

**DECISION OF THE CERTIFICATION OFFICER ON APPLICATIONS
MADE UNDER SECTION 108A(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

- (1) MR M BAKER,
- (2) MR J BESWICK,
- (3) MR G JACKSON,
- (4) MR M ROGER

v

THE NATIONAL FEDERATION OF SUBPOSTMASTERS

Date of Decision:

12 July 2006

DECISION

Upon application by the Claimants under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992Act”):

- (i) I declare that the National Federation of SubPostmasters (the “NFSP” or the “Federation”) breached Rule III(b) of the Rules of the Federation in the period March to September 2005 by applying its funds in support of libel proceedings on behalf of its General Secretary without having first satisfied the requirements of Rule III(b).
- (ii) I do not make an enforcement order.

REASONS

1. By applications dated respectively 28 September, 13, 21 and 23 November 2005 Mr M Roger, Mr G Jackson, Mr M Baker and Mr J Beswick made complaints to me that their union, the NFSP, had acted in breach of its rules. Following correspondence with my office, the complaint of each of the Claimants was identified in the following terms:-

“In breach of Rule III(b) of the Rules of the Federation, on or about 20 March, 27 June and 6 September 2005 the Federation used Federation’s funds in support of a libel action brought by the General Secretary of the Federation against an ex branch official of the Federation without the Executive Council first setting out the proposal for the expenditure in a memorandum to be published in the Federation journal “The Subpostmaster” for written comment by the members.”

2. I investigated the alleged breach in correspondence. As required by section 108B(2)(b) of the 1992 Act the parties were offered the opportunity to be heard and a formal hearing took place on the 15 June 2006. The Federation was represented by Mr L Christy a barrister in the employment of Pinsent

Masons, solicitors. Evidence for the Federation was given by its current President, Ms S Reeves. Mr Roger acted on behalf of all the Claimants. Evidence for the Claimants was given by Mr M Baker. A bundle containing over 350 pages was prepared for the hearing by my office. At the hearing, the bundle was supplemented by a memorandum to the Executive Council of the Federation from its solicitors dated 7 October 2005. Both witnesses produced written statements to which additional documents were exhibited. Skeleton arguments were produced by the parties. The rules of the Federation were also in evidence.

Findings of Fact

3. Having considered the oral and documentary evidence and the representations that were made to me, I found the facts to be as follows:-
4. On 21 December 2004 and 17 February 2005 Mr Maynard, a recently retired member of the Federation, sent two different emails which were subsequently considered to be defamatory of the General Secretary, Mr Colin Baker. Copies of the emails were not in the bundle. They in effect accused the General Secretary of corruption and concealing corruption.
5. The General Purposes Committee (“the GPC”) of the Executive Council (“the EC”) caused these allegations to be investigated and by early March 2005 had concluded that they were unfounded. The GPC obtained legal advice and reported to the EC at its quarterly meeting in March 2005. There was an unresolved dispute as to whether this meeting took place on 12 or 20 March, but nothing turns upon this point. The Claimant, Mr M Baker, was present at the meeting as a member of the EC. The other Claimants were not members of the EC. The EC resolved to provide the General Secretary with funding of up to £20,000 to enable him, if necessary, to pursue defamation proceedings against Mr Maynard. The current President of the Federation, Ms Reeves, gave evidence that the EC put a cap on the agreed funding in order to require the matter to be brought back to the EC if additional funding was needed. It was a condition of the funding that the General Secretary would repay all funds advanced by the Federation from any sums received in the legal action. Legal proceedings were commenced on 26 April 2005.
6. The EC’s next quarterly meeting was on 27 June 2005. It was reported that the Federation’s own legal costs in relation to this matter (as distinct to the legal costs incurred by the General Secretary) were then in the region of £16,500. The Claimant, Mr M Baker, gave evidence that at this meeting the EC authorised a further £20,000 to be made available to support the General Secretary’s legal action. Ms Reeves maintained that no additional funding for the General Secretary was agreed at this meeting, although she commented that there could have been a reference to a payment of £15,709 which was about to be made to the General Secretary’s solicitors in respect of their interim bill to him. Messrs Pinsent Masons were acting as solicitors for both the Federation and the General Secretary. On a balance of probabilities, I find that Ms Reeves recollection on this particular issue is to be preferred. It is unfortunate, however, that the Federation did not see fit to put in evidence the

minutes of this or any other relevant meeting of the EC. On 30 June, the Federation paid £15,709 to, or for the benefit of, the General Secretary in respect of the legal costs he had incurred hitherto.

7. Between March and August 2005, Mr M Baker and others sent a number of letters and emails to the Federation querying the financial support that was being given to the General Secretary. However, in none of this correspondence did they complain of a breach of Rule III(b). Rule III(b) provides for certain procedural requirements to be met before the funds of the Federation can be applied for the benefit of non-members, such as the General Secretary. It requires the EC to put any proposal for such expenditure in a memorandum which must contain full details of all the material terms. The memorandum shall be published in the Federation's journal, 'The Subpostmaster', together with a statement inviting any member to submit written comments on the proposed expenditure to the EC within 30 days. At the expiration of 30 days, the EC shall consider whether to implement the proposal or to refer the proposal to annual conference for decision. If the proposal is considered by the annual conference, a majority vote of two thirds is required. Mr M Baker accepted that he did not allege a breach of Rule III(b) until September 2005. He explained that he had not done so because he had understood from the EC meeting in March 2005 that the Federation had received legal advice that it was under a legal obligation to fund the General Secretary's action. He further understood that this legal obligation prevailed over the Rules of the Federation.
8. On 6 September 2005, there was a special meeting of the EC called on the issue of pay. Mr M Baker was not present at this meeting, being abroad on holiday. A partner of Pinsent Masons presented a report and answered questions on the defamation action. It emerged that the Federation's legal advice was to the effect that the General Secretary had a strong case and that the Federation was entitled to and should fully support his litigation. It was not suggested that the Federation had a legal obligation to support him. Ms Reeves gave evidence that, at this meeting, the EC agreed to extend the funding of the General Secretary's action by a further £20,000. Mr M Baker's initial evidence was that a further £27,000 of funding had been agreed at this meeting but he subsequently accepted that he may have confused this meeting with the one that took place in January 2006. I again prefer Ms Reeves' evidence on this point.
9. By a letter dated 14 September 2005, Mr M Baker complained to the then President of the Federation, Ms Jenkins, that there had been a breach of Rule III(b) in the manner in which the General Secretary's legal action had been funded. The President responded by a letter dated 30 September. She explained that the nature of the defamation claim had made it impossible to give meaningful notice of the proposal. She also stated that, as far as Mr Maynard's first email was concerned, the legal proceedings were drawing to a successful conclusion with an out of court settlement. By 21 October, Mr Maynard had agreed to issue a retraction and an apology and to pay the General Secretary damages and costs.

10. The EC met again on or about 4 October 2005. At this meeting Mr M Baker was suspended from all meetings of the EC until the present complaint to me was resolved. He was suspended for having sent an email which breached the “*Cabinet Responsibility*” required of members of the EC. For present purposes, this suspension is only relevant to explain Mr M Baker’s absence from all subsequent meetings of the EC.
11. Ms Reeves gave evidence that the Federation’s failure to meet the procedural requirements of Rule III(b) in relation to the funding of the General Secretary’s libel action was inadvertent. She stated that the EC had simply not considered the requirements of Rule III(b) prior to Mr M Baker’s letter of 14 September 2005 and that, upon becoming aware of this issue, had sought legal advice. The Chair of the GPC had subsequently instructed Pinsent Masons to draft a Rule III(b) memorandum for publication in ‘The Subpostmaster’. The then President and the other members of the GPC approved the draft memorandum for publication at the same time as a report of the settlement of the first part of the libel action against Mr Maynard.
12. The memorandum was published in the edition of ‘The Subpostmaster’ of 7 November 2005. It invited members to comment on the EC proposal to continue to provide legal aid to the General Secretary until the claim against Mr Maynard could be resolved or the EC determine that it was no longer in the best interests of the Federation to do so. It referred to resolutions of the EC in June, September and October to provide financial aid to the General Secretary and stated that these were subject to conditions “*including the appointment of our solicitors, Pinsent Masons, to conduct his case and subject to his agreement to repay all funds advanced by the Federation from any sums recovered in the libel action*”. Members wishing to submit written comments were to send them to the General Secretary by no later than 9 December. Fourteen responses were received. Nine responses (including two from Regional Councils) opposed the proposals and five supported them. The Federation has about 11,000 members.
13. At the next quarterly meeting of the EC, on 12 January 2006, the responses to the memorandum were considered. The EC resolved to continue with the funding of the litigation, authorised the expenditure of a further £27,000 and ratified the funding decisions that had been made at the EC meetings in March and September 2005. The reference in the memorandum to an EC resolution at its October meeting to provide further funding had been made in error.
14. The next annual conference of the Federation was held in May 2006. A motion was received from the South West Regional Council in April which called upon conference to instruct the EC to discontinue funding the General Secretary’s litigation. The motion was circulated to all members in the April edition of ‘The Subpostmaster’, as a part of the Conference Agenda. The motion was debated at annual conference and overwhelmingly rejected.
15. On 8 June 2006 Mr Maynard notified the General Secretary that he was in effect conceding the action against him based on the second email, his defence

having been recently struck out. This left damages and costs to be assessed, if not agreed.

The Relevant Statutory Provisions

16. The provisions of the 1992 Act which are relevant for the purpose of this application are as follows:-

Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

- (a) ...
- (b) ...
- (c) ...
- (d) the constitution or proceedings of any executive committee or of any decision - making meeting
- (e) ...

Section 108B Declarations and orders

(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

- (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;
- (b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

The Relevant Federation Rules

17. The Rules of the Federation relevant to this application are as follows:-

Rule III (a) FUNDS AND PROPERTY OF THE FEDERATION

The Funds of the Federation shall be applied in furtherance of the objects herein-before set out and the following additional objects and for any matters (such as the provisions of office premises and payments to staff) which may be reasonably ancillary or incidental thereto...

Rule III (b)

- (i) *If the Executive Council shall at any time consider it necessary or desirable (whether for commercial reasons, good industrial relations or for any other reason whatsoever) to make any disposal of property (whether real or personal) of the Federation or to apply the Funds in any manner (including by disposal or payment) not otherwise expressly authorised by the Rules to any member of or employee of the Federation, other than any of the Trustees or Members of the Executive Council, the Executive Council shall set forth any proposals concerning the same in a memorandum (“the Memorandum”)*

containing full details of all material terms of such proposals, including (in any event) details of :

- (1) the property or Funds concerned;*
 - (2) the persons to whom such disposal is proposed to be made, or the proposed application of such Funds; and*
 - (3) the reasons for such proposals.*
- (ii) The Memorandum shall be published in an issue of The Subpostmaster. Such issue shall contain a statement that any member of the Federation may submit written comments to the Executive Council provided that such comments are received within the period specified, which shall be of not less than 30 days commencing on the date of such issue. Following the expiry of such period, the Executive Council shall, after giving consideration to any written comments received from members of the Federation, decide whether or not to implement the proposals set out in the Memorandum or whether to refer any decision concerning the same to the next Annual Conference and shall cause a record of its decisions to be published in The Subpostmaster.*
- (iii) If the Executive Council decides to implement the said proposals it shall have the authority to do all such acts and things as shall be necessary or desirable to implement the same.*
- (iv) The Executive Council may refer any decision concerning the said proposals to the Annual Conference if in its final and absolute discretion it considers that there is significant opposition to the said proposals or that it is desirable for any reason whatsoever so to refer the matter and in any such event the provisions of Rule X applicable to Resolutions to be considered at the Annual Conference shall apply to the said proposals. For the avoidance of doubt the said proposals shall be deemed to have been sufficiently described if reference is made to the relevant Notice of Motion to the publication of the Memorandum in a specified issue of The Subpostmaster.*
- (v) Where the said proposals are considered by the Annual Conference a two-thirds majority vote shall be required.*

A Brief Summary of the Submissions

18. Mr Roger, on behalf of the Claimants, noted that the Federation had in effect conceded that it had acted in breach of Rule III(b) by making a payment to the General Secretary in respect of his legal costs of £15,709 on 30 June 2005. In these circumstances Mr Roger argued that I should make an enforcement order. The Claimants had each made written submissions as to the enforcement order they sought. In essence they sought an order which would put the Federation back in the position that it would have been in had the EC not determined to support the litigation. Specifically, Mr Roger requested an order prohibiting any further funding of the litigation until the Federation had properly complied with Rule III(b). He also sought an order that the EC should obtain repatriation of all funds expended on this matter to date that proved irrecoverable and that the EC should publish in the next edition of 'The Subpostmaster' an account of the funds expended or legally committed in this matter together with any sums repaid by the General Secretary and the true extent of any deficit to the Federation.

19. Mr Christy, for the Federation, conceded that there had been a breach of Rule III(b) in respect of the actual payment of £15,709 to the General Secretary in respect of his legal costs on 30 June 2005, but he denied that there had been any further breach of that Rule by reason of the EC having resolved to authorise payments up to a stated maximum in support of the General Secretary's litigation. Mr Christy submitted that I should not make an enforcement order having regard to the inadvertent nature of the admitted breach, the Federation's compliance, albeit belatedly, with Rule III(b) by the publication of its proposals in 'The Subpostmaster' of 7 November 2005 and the EC's further consideration of this matter on 12 January 2006. He also argued that I should have regard to the fact that this matter had been debated at the annual conference in May 2006 at which the EC's decisions were in effect endorsed. He further submitted that I should have regard to the successful conclusion of the defamation proceedings.

Conclusion

20. The Federation accepted that it had acted in breach of Rule III(b) by making a payment of £15,709 to the General Secretary on 30 June 2005 in respect of his legal costs in the defamation proceedings. However, Mr Christy did not accept that the Federation had acted in breach of Rule III(b) by the mere authorisation of such expenditure by the EC.
21. It is not disputed that, on the facts of this case, Rule III(b) was engaged. Rule III(b)(i) imposes a requirement on the EC to take certain procedural steps if it "*... shall at any time consider it necessary or desirable...to apply the Funds in any manner...not otherwise expressly authorised by the Rules to any...employee of the Federation...*". The General Secretary is an employee of the Federation and the expenditure of funds to support his defamation action was "*not otherwise expressly authorised by the Rules...*". In these circumstances, the procedural steps required by Rule III(b) had to be taken. The issue raised by Mr Christy's argument relates to when they had to be taken. In his submission, the funds would only be "*applied*" when they were expended. In my judgment, this argument misses the point. Rule III(b)(i) is engaged at the time the EC consider it "*necessary or desirable*" to fund the General Secretary's litigation. This stage must logically predate the authorisation of the expenditure and, indeed, its actual expenditure. I therefore find that the Federation breached Rule III(b) not only by making a payment to the General Secretary in support of his defamation action without having gone through the relevant procedures but also by resolving to make such payment without having done so.
22. For the above reasons, I declare that the National Federation of SubPostmasters breached Rule III(b) of the Rules of the Federation in the period March to September 2005 by applying its funds in support of libel proceedings on behalf of its General Secretary without having first satisfied the requirements of Rule III(b).
23. When I make a declaration I am required by section 108B(3) of the 1992 Act to make an enforcement order unless I consider that to do so would be

inappropriate. The Claimants submitted that I should make an enforcement order, arguing that the Federation deliberately concealed the decision to fund the General Secretary's litigation from its members. Having regard to the transparency which is at the heart of Rule III(b), this is a serious allegation. On the other hand, Ms Reeves, the current President of the Federation, gave evidence that the failure to comply with Rule III(b) was inadvertent. Indeed, Mr Roger himself stated that he was unaware of any previous occasion upon which Rule III(b) had been invoked. I further observed that Mr M Baker had engaged in vigorous correspondence with the Federation on this issue between March and August 2005 without himself having raised the Rule III(b) point. It was the Federation's case that once it had been alerted to this point by Mr Baker's letter of 14 September, it took legal advice and did what it could to rectify the position. Although the intentions of the Federation during this period are not clear beyond all reasonable doubt, I accept Ms Reeves evidence, on the balance of probabilities, that the Federation's breach in this period was inadvertent.

24. I accept more readily the Federation's case that from September 2005 there was an attempt to rectify matters both prospectively and retrospectively. It was of course not possible for the Federation to cure past breaches by a process of ratification, having purported to observe the relevant procedures. It could, however, refer to its subsequent conduct in support of an argument that I should not exercise my discretion to make an enforcement order. For this limited purpose, it is not necessary that I decide whether the Federation did in fact comply with the strict requirements of Rule III(b) from November 2005, although its compliance is a relevant factor to be taken into account. In this connection I observe that the memorandum of 7 November does not make any attempt to quantify for members the amount of Federation funds that the EC had already applied and/or those that they were considering should be applied for the benefit of the General Secretary. It is my provisional view that, as the Rule III(b) procedure is to enable members to make informed comments to the EC, any Rule III(b) memorandum should give members such information about the proposed expenditure as was available to the EC at the time of making its proposal for "*an application of funds*". I further observe that there would appear to have been no record of the decision at the EC meeting of 12 January 2006 having been published in 'The Subpostmaster'. On the other hand, the Federation did instruct its solicitors to draft a memorandum in compliance with its Rule III(b) obligations and gave the memorandum, as approved by the President and GPC, considerable prominence in its journal. The memorandum provoked only nine written responses in opposition to the expenditure from a membership of about 11,000. Further, I observe that the culmination of the Rule III(b) procedure is that the matter may be debated at the next annual conference. I find that it is a relevant consideration that a motion to discontinue funding the litigation was overwhelmingly rejected at the annual conference in May 2006. I also note that the Rule III(b) procedure does not give members a veto of the proposed expenditure. It is in essence an information and consultation procedure. The final decision remains that of the EC, unless it decides in its absolute discretion to refer the proposal to annual conference for decision. Accordingly, even if I were to make an enforcement order in the terms sought by the Claimants, the EC could, if it so wished,

reinvoke the Rule III(b) procedure and then apply the funds of the Federation so as to achieve the present position.

25. In considering the appropriateness of an enforcement order, I have had regard to all the circumstances of the case. I have had particular regard to the inadvertent nature of the breach, the relatively few critical responses that were received to the memorandum published on 7 November 2005, the subsequent decision of the EC on 12 January 2006, the overwhelming rejection of the relevant motion by annual conference in May 2006 and the apparently successful conclusion of the legal action, which gives rise to at least a prospect that the Federation's legal costs will be recovered in full. In all the circumstances of the case, I find that it would be inappropriate to make an enforcement order.

Observation

26. I have found that the breach of Rule III(b) between March and September 2005 was inadvertent and that the EC acted responsibly in taking steps thereafter to comply with its obligations under the Rules. Whilst I have not made an enforcement order, I trust that the EC will continue to act consistently with the spirit of Rule III(b) and ensure that a full report is made to members at the appropriate time, informing them not only of the outcome of the litigation but also of its actual or likely net cost to the Federation.

David Cockburn
The Certification Officer