

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

MR J HORTON

v

UNISON – The Public Service Union

Date of Decision:

11 February 2005

DECISION

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

I refuse to make the declaration sought by the Claimant that UNISON acted in breach of rule G 3.4.3 of the rules of the union at the annual meeting of its Imperial College branch on 1 March 2004, by the branch having failed at that meeting to elect or confirm the election of its branch representative to the union’s National Delegate Conference 2004.

REASONS

1. By an application received at the Certification Office on 21 June 2004 the Claimant made a complaint against UNISON (“the Union”). The application alleged a breach of union rule relating to the selection/election of the Imperial College branch representative to the Union’s National Delegate Conference in 2004. This is a matter potentially within the jurisdiction of the Certification Officer by virtue of section 108A(2)(a) and/or (d) of the 1992 Act. The alleged breach was put to the Union in the following terms:

“that in breach of rule G3.4.3 of the rules of the union at the branch annual meeting, held 1 March 2004, of the Imperial College Branch of the union, the branch failed to elect or confirm the election of the branch representative to the union’s National Delegates Conference 2004 but Ms Debono nevertheless proceeded to attend this Conference as the branch’s said representative.”

2. I investigated this alleged breach of rule in correspondence. As required by section 108B(2)(b) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 16 December 2004. The Union was represented by Mr Laddie of Counsel instructed by Mr J O’Hara of Thompsons Solicitors. Evidence for the Union was given by Ms Debono and

Ms Lewis, respectively the branch secretary and a branch committee member of the Imperial College branch of the Union. Ms Debono and Ms Lewis submitted written witness statements. The Claimant acted in person and gave evidence on his own behalf. A bundle of documents was prepared for the hearing by my office which contained relevant exchanges of correspondence. The rules of the Union were also in evidence. Both parties submitted skeleton arguments. Shortly before the hearing the Union contended that the Certification Officer lacked jurisdiction to consider this matter on the basis that the Claimant was not, and had never been, a member of the Union. At the conclusion of the hearing I directed that both parties should make their closing submissions on this point in writing, the submissions to have been made, exchanged and, if appropriate, commented upon by the other side by 25 January 2005.

Findings of Fact

3. Having considered the oral and documentary evidence together with the representations of the parties, I make the following findings of fact:-
4. Mr Horton entered the employment of Imperial College London in January 2002. He works as a librarian at the School of Medicine in Charing Cross Hospital, Hammersmith. He applied to join UNISON as soon as he started work. He had previous experience as a trade union member and activist, having earlier been a member of UNISON and held lay positions in other unions. His application was dealt with by Ms. T Debono, the Secretary of the Imperial College branch. At all relevant times this branch had approximately 500 members. Mr Horton completed a “deductions of contributions at source” form, which Ms Debono submitted to the payroll department of Imperial College. On the basis of this authority, Imperial College was to have deducted Mr Horton’s union subscriptions from his salary every month and forward an equivalent amount to the Union. The deduction would be noted on Mr Horton’s payslip. Mr Horton received his Union membership card in April 2002.
5. At all relevant times the Union treated Mr Horton as a member. He received a membership card and number. He was allowed to attend Union meetings and to vote in Union elections. He was invited to be a visitor at the Union’s National Delegate Conference. He was given Union representation on employment matters. He received the branch email newsletter and the Union magazine. He was elected to the Branch Committee for 2003/04 and served as editor of the branch newsletter.
6. In early November 2004 the Union discovered that Mr Horton had not in fact paid any subscriptions to the Union. His employer had not deducted his subscriptions from his salary and forwarded them to the Union. I find that this was an administrative error on the part of one or more of Ms Debono, Imperial College or the Union, for which Mr Horton was not responsible. By a letter dated 12 November 2004 the Union informed Mr Horton of its discovery and gave him 21 days to pay the amount then outstanding of £329.80. Mr Horton did not do so. On 24 November Mr Horton wrote to the Union resigning with

immediate effect. By a hand-delivered letter dated 15 December 2004, the day before this hearing, the Union wrote to the Claimant informing him that it was to argue that I lacked the jurisdiction to hear his complaint as he had never been a member of the Union.

7. I now turn to the substance of Mr Horton's complaint. The Union holds an annual National Delegate Conference ("NDC"), usually in June each year. Branches are entitled to send representatives or delegates. By rule G 3.2, all branches are to hold an annual meeting in the January-March quarter and by rule G 3.4, certain business "*shall be transacted*" at this meeting. This business is to include "*the election or confirmation of election of branch representatives to other levels of the Union and to external bodies*".
8. In 2003 the branch did not hold its annual meeting until 4 June, a matter about which Mr Horton was critical. He also queried whether any delegate to the NDC had been elected at the branch annual meeting ("branch AGM") in 2003 but he received no reply to this query.
9. The rules of the Union provide for there to be a branch committee. At the branch AGM in 2003, Mr Horton and seven others were elected to the branch committee but, surprisingly, this committee never met. The business of the branch was effectively conducted by a branch executive committee ("the BEC"), consisting of Ms Debono, Ms Lewis and Ms Gill. The BEC was not an elected sub-committee of the branch committee. It existed de facto but without any criticism from those members who knew of its existence. Mr Horton asserted that he was unaware of its existence but he did not allege any dishonourable motives to those on the BEC. Mr Horton's grievance was that the branch was not being run in accordance with the rules, not that there was any conspiracy by persons with sinister motives.
10. In January 2004 Ms Debono invited Mr Horton to attend the NDC in June that year as an observer or visitor. Mr Horton indicated that he was interested in doing so but took the point that he could not accept the invitation unless he was "ok'd to go by an AGM". Notice of the date of the branch AGM was given by email on 9 February. On 10 February a regional officer of the Union, Mr Robbins, received a written complaint from Mr Horton that the branch had failed to set a date for its AGM and that there had been no attempt to invite members to stand for the post of NDC delegate. Mr Robbins caused a copy of that letter to be sent to Ms Debono.
11. On 11 February 2004 the BEC met and decided that Ms Debono should be the branch delegate to the NDC. In 2002 the branch had failed to send any delegate to the NDC and had been financially penalised for that failure. Ms Debono had been the delegate in 2003 and the BEC understood that no one else with suitable experience was interested in being the delegate in 2004. The branch's form recording the "appointment of delegates" to the NDC was received at the Union's Head Office on 12 February, although the final date for its submission was not until 26 March.

12. The branch AGM took place on 1 March 2004. It lasted about 2 hours and between 20 and 50 members attended, according to the evidence. No contemporaneous minutes of the meeting were taken and no other minute of it is yet available. Mr Horton did not submit himself for re-election to the branch committee. It is common ground that there was no mention of who was to be the delegate to the NDC until the item of “any other business” was reached. It is also common ground that there was no nomination process for this position or formal vote. Mr Horton maintained that he raised the matter by asking if it was still possible for him to attend the NDC as an observer, making clear that he considered his selection as such required the consent of the meeting. He stated that he was told that it was then too late for him to be approved as an observer and he pursued the matter no further. On the other hand, Ms Debono and Ms Lewis gave evidence that by the time of the branch AGM they were aware of Mr Horton’s complaint to Mr Robbins and that, for this reason in particular, Ms Debono made a point of stating that she had been selected as the delegate and asking if there were any objections from those present at the meeting. There were no objections. Ms Debono said that she responded to Mr Horton’s question about whether it was then too late for him to apply to be a visitor to the NDC by saying that she did not know and by asking him to check the position as he then had the appropriate forms.
13. On the balance of probability, I prefer the evidence of Ms Debono and Ms Lewis as to how this matter was dealt with at the branch AGM. I found them credible witnesses who had a clear reason to remember what was said on this point. I also note the email from Mr Riki Clarke to Mr Horton of 21 July 2004 in which he sets out his recollection that the meeting was told that the Branch Secretary would go to the NDC to ensure that the branch was represented. This version of events is also consistent with Mr Horton having written to Mr Robbins again on 16 March stating that his Branch Secretary appeared to have appointed herself as the NDC representative without an election being held at the branch AGM, something he would only have been able to assert if he had been told expressly. There is no evidence of Mr Horton being given this information by any other source between the branch AGM on 1 March and his letter of 16 March.
14. Mr Horton subsequently made a number of internal Union complaints about the appointment of Ms Debono. The responses to these complaints caused him yet further concern. He was told that Ms Debono had been selected as the delegate by the Branch Committee. He knew this to be untrue, as he was a member of the Branch Committee and it had never met. He was told that the decision was made at a meeting on 18 February, which was a date after the form recording Ms Debono’s appointment had been received at the Union Head Office. He was told that he had been invited to be either the branch delegate or observer at the branch AGM, but that he had declined. This was an assertion he vigorously denied. He was told that the election of Ms Debono by the Branch Committee was valid and effective in itself and did not need ratification by the branch AGM. He regarded this as being contrary to the express terms of rule G 3.4.3 of the Union rules.

The Relevant Statutory Provisions

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

S.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) the appointment or election of a person to, or the removal of a person from, any office;
- (b) -;
- (c) the balloting of members on any issue other than industrial action;
- (d) the constitution or proceedings of any executive committee or any decision-making meeting;
- (e) ...

(3) The applicant must be a member of the union, or have been one at the time of the alleged breach or threatened breach.

The Union Rules

16. The Rules of the Union most relevant to this application are

Rule C Membership

5 *Becoming a member*

5.1 “Every person wishing to become a member shall complete and sign a prescribed form of application....”

5.2 “Providing that (a) the applicant is eligible for membership within these Rules and has not previously been expelled or barred from membership of the Union or has not previously ceased to be a member whilst a disciplinary charge against her/him was outstanding and (b) the branch or branch committee at its next meeting does not decide to refuse the applicant membership, she/he shall become a member of the appropriate branch following receipt of her/his properly completed application form having due regard for the Disability Discrimination Act where appropriate by the branch or Head Office and from the date on which the first contribution is made.”

6 *Obligations of membership*

6.1 “Every member shall observe all the Rules of the Union.”

6.4 “It is the obligation of the member to ensure that her/his subscription is paid to the Union on the date on which it is due. Payment may be made in cash or by cheque (to the member’s Branch Secretary or to a Union Office as directed); by standing order; by direct debit; by check off arrangements made through the member’s employer; or by any other method acceptable to the National Executive Council.”

7.2 *Arrears of subscriptions*

7.2.1 “Any person owing more than three months’ subscriptions shall cease to be a member of the Union (unless the National Executive Council decides otherwise) and shall forfeit all that she or he has paid to the Union.

- 7.2.2 “Such a person may rejoin the Union. The National Executive Council shall require such a person to pay outstanding subscriptions or such other amount that it may determine.”

Rule G3: Branches

2 The Branch Committee

- 2.1 “Each branch shall establish a Branch Committee.....”
- 2.2 “The Branch Committee shall administer branch business in accordance with the branch rules and any guidelines issued by the National Executive Council, and in particular:
- 2.2.1 shall co-ordinate local negotiations conducted by stewards in the branch;
 - 2.2.2 shall establish effective representation of members’ interests by stewards in each work group;
 - 2.2.3 shall maintain a record of membership showing the work group in which each member is employed;
 - 2.2.4 shall ensure that the branch officers are properly exercising their functions.”
- 2.3 “The Branch Committee shall meet as necessary.”
- 2.4 “Meetings of the Branch Committee shall be convened by the Branch Secretary or in her/his absence by the Branch Chairperson.”

3 Branch Meetings

- 3.1 “All members of the branch shall be entitled to attend branch meetings.”
- 3.2 “Branches will hold an annual meeting in the January – March quarter. Additional meetings shall be held in line with the agreed branch rules or when summoned by the Branch Committee to discuss any matter affecting the branch.”
- 3.3 “The purpose of the branch meeting shall be to:
- 3.3.1 provide a means of communication between the Branch Officers and the membership
 - 3.3.2 enable the membership to take decisions on matters of branch policy
 - 3.3.3 ensure that the Branch Officers are accountable to the membership for conducting the affairs of the branch.
- 3.4 “At the annual meeting of the branch, the following business shall be transacted:
- 3.4.2 the election or confirmation of election of Branch Officers for the coming year.
 - 3.4.3 the election or confirmation of election of branch representatives to other levels of the Union and to external bodies.
 - 3.4.4 such other business as may be required by the branch rules.
- 3.5 Meetings of the branch shall be convened by the Branch Secretary or in her/his absence by the Branch Chairperson.”

A Brief Summary of the Submissions

17. Mr Horton maintained that he had been treated at all times as if he was a member of the Union and that he believed he was a member. He stated that he had completed the form authorising the deduction of subscriptions from his salary and considered that he had done everything he needed to do to become and remain a member. He argued that for the Union to raise this argument at such a late stage was in effect an ambush to prevent him raising his substantive complaint. On the substance of his case, Mr Horton submitted that Rule G 3.4.3 required the branch delegate to the Union’s NDC to be elected at the branch AGM or for the branch AGM to confirm the election of that

delegate. He argued that Ms Debono had effectively ignored this provision and had attended the NDC in 2004 in breach of Rule G 3.4.3.

18. For the Union, Mr Laddie submitted, by way of a preliminary point, that section 108A(3) of the 1992 Act requires a person making a complaint under section 108A(1) to be either a member of the relevant union or to have been a member at the time of the alleged breach. He maintained that Mr Horton was not and never had been a member of UNISON during the relevant period and that accordingly I lacked jurisdiction to determine this matter. Mr Laddie submitted that Mr Horton had not paid a “first contribution” in accordance with rule C 5.2 and that he had therefore never become a member. Further or in the alternative, he argued that, if Mr Horton had become a member, his membership had been automatically forfeited by the operation of Rule C 7.2.1, when his subscriptions had fallen more than 3 months in arrears. He went on to argue that whilst Mr Horton may not have been at fault in failing to pay his initial subscriptions, he was at fault by failing to ensure that his later subscriptions were paid on time as required by Rule C 6.4. On the substance of the complaint, Mr Laddie submitted that the dispute was essentially one of fact as to what occurred at the branch AGM on 1 March 2004 and that I should prefer the evidence of Ms Debono and Ms Lewis on these events. He accepted that Rule G 3.4 requires that a branch’s delegate to the NDC be elected at the branch AGM or that the AGM confirms a prior election. However, he noted that the rules do not prescribe the method of election of the branch NDC delegate, as they do in the case of other positions, and that the election of Ms Debono by the BEC was sufficient for this purpose.

Conclusions

Preliminary Point

19. At the hearing, Mr Horton stated that he had only been notified that the Union was going to take the point about his membership by its letter of 15 December 2004 and that he had not been able to check his payslips to find out if any deductions had been made from his salary. Accordingly, I invited Mr Horton to submit copies of his payslips with the further written submissions that I had directed to be completed by 25 January. In his subsequent written submissions, Mr Horton has not submitted copies of his payslips or sought to argue that money was deducted from his salary by his employers but not paid over to the Union. I therefore find that Mr Horton did not pay any subscriptions to the Union pursuant to his application to join in January 2002. I further find that rule C 5.2 of the rules of the Union requires as a condition of membership that an initial or first contribution is made. It is only from the date of such a payment that a person becomes a member of the Union. As Mr Horton did not make any payment of contributions to the Union, he did not become a member in accordance with the rules.
20. As noted above, at the conclusion of the hearing I invited the parties to make further written submissions. One of the matters upon which I invited further submission was the validity of rule C 7.2.1 of the rules of the Union which provides for automatic forfeiture of membership upon non-payment of

subscriptions for a prescribed period. I specifically invited comment on the effect of the decision of the Court of Appeal in *Edwards v. SOGAT* (1971) Ch 354, in which case it was observed that such a rule was void at common law. In his written submission, Mr Laddie pointed out that the comments of the Court of Appeal on this matter were obiter (non-binding), on the basis that the union had admitted liability and the only live issue to be determined was one of damages. Mr Laddie also pointed out that the *Edwards* case was decided against the background of a closed shop and the probability that loss of union membership would result in loss of livelihood. He observed that as such, the comments of the Court of Appeal were based on the principle of public policy against agreements which are in restraint of trade. However, since the effective abolition of the closed shop, Mr Laddie contended that the reasoning underpinning this part of the Court of Appeal's comments is no longer sustainable. With regard to Lord Justice Sachs observation that the forfeiture rule was also void on grounds of natural justice, Mr Laddie argued that this was also an obiter (non-binding) observation, that it was not adopted by the majority of the Court, that it is not based on an established principle of public policy, not being related to an issue of discipline, and that it should not be followed. Mr Laddie concluded that the *Edwards* case is of no application at all to rules of forfeiture of union membership in the 21st Century. As I have found that Mr Horton did not become a member of the Union, it is unnecessary for me to determine the validity of the automatic forfeiture rule in this case although, on the arguments before me, I find much force in the submissions of Mr Laddie.

21. I also invited written submissions on whether, in the event of a finding that Mr Horton had not become a member of the Union, the Union should be estopped from advancing such an argument on the basis that by its words and conduct it had made a representation of fact to Mr Horton that he was a member, which representation he had relied upon to his detriment. The Union accepted that it had treated Mr Horton as a member from early 2002 until November 2004 and that Mr Horton had served the Union as a lay official. Mr Laddie's submission referred to the cases of *Martin v. Scottish Transport and General Workers Union* (1952) 1 All ER 691 and *Faramus v Film Artistes' Association* (1964) AC 925, in which cases the House of Lords found the respective claimants had never been members of the relevant unions despite having each been treated as members for 8 years. However, neither case is authority for the proposition that a union cannot be estopped from denying membership in the appropriate circumstances. In the *Martin* case the Claimant had wrongly been admitted to a category of temporary membership that had never existed. In the *Faramus* case, the Claimant had failed to declare his criminal convictions in circumstances in which there was an express rule that persons should not be eligible for membership if they had been convicted of any criminal offence. The facts of this case are different. Mr Horton submitted that he had not misled the Union in any way, that he had been admitted to an extant category of membership, that he had completed a deduction at source form and had relied upon the issuing of his membership card as a representation that he was a bona fide member. He also gave evidence that he had performed gratuitous services for the Union on the basis that he was a member. In my judgment, many of the ingredients necessary to establish an

estoppel are in place. However, a person cannot claim the benefit of an estoppel if he or she had actual or constructive knowledge of the falsity of the representation. In this case, Mr Horton knew or should have known that the deductions of his subscriptions were not being made from his salary by an examination of his payslips. He therefore knew or should have known that he was not a member of the Union. He has not submitted those payslips in evidence, despite being invited to do so. Accordingly, Mr Horton's reliance on the Union's representation was at least in part a product of his negligent failure to examine his payslips. This failure is made more significant however by a consideration of Rule C 6.4, which imposes an obligation on each member to ensure that her/his subscriptions are paid to the Union on the date on which they are due. This is a type of rule which appears in many union rule books and implicitly acknowledges the administrative errors that can occur in any mass membership organisation, by imposing on the members of those organisations the responsibility for ensuring that subscriptions are paid. Mr Horton's failure to do so in this case was therefore not merely negligent but was also in breach of the very rules upon which he seeks to rely. For the above reasons, in my judgment, this is not a case in which the Union is estopped from denying that Mr Horton was a member at the relevant time. The situation may have been different if Mr Horton's payslips had recorded deductions having been made and if the error had occurred in the transmission of the subscriptions between the employer and the Union. However, these are not the facts of the present case.

22. In my judgment therefore, Mr Horton was not a member of the Union at the relevant time and he is unable to raise an estoppel argument preventing the Union from relying upon its strict legal position. It follows that Mr Horton did not have the locus or standing under section 108A(3) of the 1992 Act to bring this complaint which, accordingly, I dismiss.

The Substantive Issue

23. Should I be wrong on the question of Mr Horton's membership of the Union, I have considered the merits of his substantive claim. This turns on the interpretation of Rule G 3.4.3 of the rules of the Union and my findings of fact on what occurred at the branch AGM on the 1 March 2004.
24. Rule G 3.4.3 provides that:

"At the annual meeting of the branch, the following business shall be transacted: ... the election or confirmation of election of branch representatives to other levels of the Union and to external bodies."

Ms Lewis gave evidence that in her opinion this rule did not require branch delegates to the NDC to be confirmed by the branch AGM, but merely allowed for this to be done. The Union's solicitors had made a similar assertion in correspondence. Quite properly, Mr Laddie did not seek to uphold such an interpretation. In my judgment, rule G 3.4.3 does require the branch delegate(s) to the NDC to be elected at the branch AGM or for the result of a prior election to be confirmed at the branch AGM.

25. I have already made findings of fact as to the events at the branch AGM on 1 March 2004. I have found that the AGM was informed of the prior election of Ms Debono to be the branch delegate to the NDC and that the meeting was asked if there were any objections to her attendance. There were none. These are not findings which I reached easily, having regard to a number of factors. There are no minutes of the meeting of the BEC which took the decision to put Ms Debono's name forward. There is no evidence that members of the branch were aware that they could put their names forward for consideration as branch delegate to the NDC. The Union's Head Office was notified of Ms Debono's appointment before the branch AGM was held. The process of confirming Ms Debono's election was extremely informal and there are no minutes of the branch AGM. On the other hand, I note that the rules of the Union do not provide for any specific method of electing a branch delegate to the NDC, unlike elections to the National Executive Council, and I find on a balance of probabilities that the BEC did decide upon Ms Debono's appointment by way of an election. I also find that the process of seeking objections from the branch AGM to Ms Debono's name going forward amounted to a confirmation of her election, despite its informality. In his evidence Mr Horton stated that he had anticipated that the process would involve a proposer, a seconder, a vote and a properly recorded minute. This would of course be best practice but it is not what is required by the rules. The formality required of branches in the conduct of their meetings is a matter for each union to determine and prescribe in its rules, having regard to the nature of such meetings and the importance of the particular business being transacted. It is a matter of regret that the very informal approach of the Imperial College branch to its rule G 3 responsibilities has resulted in the present case against the Union. In my judgment, however, the actions of the branch did not breach the precise terms of rule G 3.4.3.
26. Accordingly, should I be wrong on the question of Mr Horton's membership of the Union, I would dismiss this complaint on its merits.

David Cockburn
The Certification Officer