

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

MR W SCOBIE

v

**THE TRANSPORT AND GENERAL WORKERS UNION
(No.2)**

Date of Decision:

25 April 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) I declare that on or about 7 June 2004 the TGWU acted in breach of rule 6(13) and Schedule 1 of its rules by its appointment of Ms Foyer to the post of ACTS National Secretary.
- (ii) I order that Ms Foyer shall forthwith cease to hold the office, or carry out the functions, of National Secretary of ACTS, unless or until she is appointed in accordance with the rules of the Union.

REASONS

1. By application dated 19 October 2004 the Claimant alleged that the Transport and General Workers Union (“TGWU”, “the Union”) had appointed a National Officer in breach of its rules. This matter is potentially within the jurisdiction of the Certification Officer by virtue of section 108A(2)(a) of the 1992 Act. The alleged breach is:

“that on or about 8 June 2004 by its appointment of Ms R Foyer to the post of ACTS National Secretary the union breached rule 6.13 and schedule 1 of the rules of the union in that Ms Foyer was not a financial member of the union for at least two years immediately preceding the date of her application or nomination”

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 of a formal hearing and such a hearing took place on 15 March 2005. The Union was represented by Mr Auerbach of Pattinson & Brewer Solicitors. Mr

Collins, TGWU, Assistant General Secretary, attended and gave evidence, Ms Dykes, TGWU, Assistant to Mr Collins, was in attendance. Ms McCartney TGWU, Finance Officer Scotland, also attended and gave evidence. The Claimant acted in person. Messrs Aitkin, Baird, and Wilson were in attendance and gave evidence in support of the Claimant. Mr Green submitted a witness statement in support of the Claimant. Three bundles of documents were before me at the hearing. They contained relevant exchanges of correspondence, case law and legal authorities. The rules of the Union were also in evidence. The Union submitted a skeleton argument.

Findings of Fact

3. Having considered the representations made to me by the parties and the relevant documents I make the following findings of fact:-
4. In the autumn of 2003 Ms Foyer, who was working for the Scottish TUC, decided to change the union to which she belonged. She had been a member of the GMB and wished to join the Transport and General Workers Union (TGWU). There is conflicting evidence on why she wanted this move and the way the change was effected. The fact though remains that from 1 May 1998 until February 2004 she paid subscriptions to the GMB. She began paying subscriptions to the TGWU in December 2003. Union records show her full membership of the TGWU as starting in January 1998 on account of her transfer from the GMB.
5. In March 2004 the TGWU General Executive Council (GEC) decided to fill the vacant post of National Secretary for one of its components, (the Administrative, Clerical, Technical and Supervisory (ACTS) Group). The Union issued a circular to all Officers and members of staff and to all branches inviting applications for this post. The circular misnumbered the relevant sub-rule but spelled out that an applicant had to “... *be a financial member of the union for at least two years immediately preceding the date of application*”. In fact the relevant rule uses the phrase “*financial member of this union*” (emphasis added).
6. Ms Foyer was one of half a dozen applicants short listed and considered by the appointments panel elected by the GEC. Ms Foyer was the successful candidate. On 7 June 2004 the GEC confirmed her appointment with effect from 12 July 2004.
7. The Claimant wrote to the General Secretary on 7 September 2004 stating that it was his understanding that Ms Foyer had joined the TGWU only on 28 November 2003 and that, if that were the case, she should not even have been considered for the post, let alone been appointed.
8. On 17 September 2004 the General Secretary stated that the Regional Finance Officer had confirmed that Ms Foyer met the conditions associated with the post. He confirmed that as also being his view. The Claimant was not satisfied with this response and raised the matter with the Certification Office.

The Relevant Statutory Provisions

9. 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)-(e) -

S.108B Declarations and orders

(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.

(2) ...

(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 Union Rules

10. Rule 6 GENERAL EXECUTIVE COUNCIL

13 “ The General Executive Council shall appoint all permanent and full-time officers of the Union (who shall have been financial members of this Union for at least two years immediately preceding the date of application or nomination) other than the General Secretary, deputy General Secretary and such other executive officers as from time to time prescribed by the General Executive Council under rule 15 Clause 3 and trustees, but including all permanent or full-time secretaries, delegates or other officers of branches. No additional officers shall be appointed by the General Executive Council until after consultation with the National Industrial Sector and/or either Regional Committee or Regional Industrial Sector committee concerned. The General Executive Council shall fix the salaries attached to each official position. It shall have power to suspend and/or dismiss any officer.”

- Rule 20 MEMBERSHIP

12 “A financial member is a member with not less than 26 weeks’ membership, having made 26 weekly payments, and who is less than six weeks in arrears.”

- Schedule 1 ELIGIBILITY AND REQUIREMENTS OF DELEGATES, OFFICERS, ETC.

1 “ Every candidate for any office in the Union, i.e., officers, whether paid or not, or delegates to a Delegate Conference, the Rules Conference, or for membership of the General Executive Council, or of a national trade group, or section, or a Regional Trade Group, or district, or a Regional Committee or other constitutional committee,

shall have been a financial member of this Union for at least two years immediately preceding the date of application or nomination, subject to the provisions of Rule 16, Clause 1 in the case of the General Secretary, and the Executive Finance Director, respectively. A candidate must be employed in or in connection with the trade they desire to represent provided always that for the purpose of suitable and efficient discharge of the duties of a paid officer of the General Executive Council may, at its discretion, invite applications from other or all sections of the membership. A member who becomes unemployed is eligible to stand for office in the Union after they lose their employment, provided that they still retain their full membership as required by rule and continue to seek employment. Members not seeking employment are not eligible. Notwithstanding this Clause, the General Executive Council shall have the power to allow members who are beyond the age of retirement to continue in post as Branch officials.”

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5 “Every member holding an official position in the Union, or members of the General Executive Council, or any other constitutional committee, not being in compliance as a financial member of the Union as per Rule 20, Clause 12, shall forthwith cease to hold office in the Union for the term for which they were elected.”

6 “Any permanent officer not being in compliance as a financial member of the Union as per Rule 20, Clause 12, shall forthwith cease to hold office in the Union.”

A Brief Summary of the Submissions

The Claimant’s Case

11. The Claimant produced evidence from Mr Baird, who had been Regional Secretary for Region 7 (Scotland) for about five years until he was suspended in January 2004, Mr Aitkin who had been a GEC member for 8 years until 2003, and Mr Wilson who was a member of the GEC until September 2004. They were unanimous in their view that they were aware of no arrangement whereby service in another union could be classed as service in the TGWU for the purpose of satisfying rules about qualification for posts in the Union. It was their view that had the fact of Ms Foyer’s membership history been known to any selection panel, she would have been ruled out at the short-listing stage, as she did not meet the mandatory requirements even to apply for the post. Mr Green, a member of the selection panel for the ACTS post, said in a witness statement that no applicant was rejected because they lacked the two years membership of the TGWU. It was always assumed that Central Administration would have done a full check to ensure that the two year rule had been satisfied. In his 11 years on the GEC he was unaware of any authority having been given for an applicant for an Officer’s post in the TGWU to have less than two years membership. The witnesses felt the two year rule was there to prevent head-hunting or carpet-bagging and also to promote the development of TGWU staff and members.
12. The Claimant recognised that there may have been special arrangements with GMB in the Scotch Whisky industry for transferring the membership of groups of workers but he was aware of no cases where individuals had transferred in a similar way. He pointed out that the Union’s case had changed over time and that no one seemed to have questioned the decision of the Regional Finance Officer to calculate Ms Foyer’s membership as starting in

January 1998. In the first correspondence and when the matter was raised in the Regional Finance and General Purposes Committee no mention was made of transferred rights. The Union referred to Ms Foyer transferring her membership, or having it transferred by agreement, but Ms Foyer herself had written that she had resigned from the GMB. At one stage the Union claimed the transfer took place when Ms Foyer moved from the TUC to the Scottish TUC (“STUC”) but later said it was a change of duties in the STUC that prompted her transfer of membership.

The Union’s Case

13. In the Union’s view, the Claimant hinged his case on an isolated, narrow and very literal interpretation of rule 6(13) with particular emphasis on the words “*membership of this union*”. However, this was the wrong approach to the Union’s rule book, it being well recognised by the Courts and the Certification Officer that Union rules are not to be subjected to the rules of grammatical construction. In *Heatons Transport (St Helens) Ltd v Transport and General Workers’ Union* [1972] 3 All ER 101 the Courts confirmed that union rules had to be interpreted in the light of custom and practice. In that case Lord Wilberforce (quoting, with approval, a section of a TUC handbook on the 1971 Industrial Relations Act) said:

“Trade Union government does not however rely solely on what is written down in the rule book. It also depends on custom and practice, by procedures which are developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union’s rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore the procedures which custom and practice lay down very often vary from workplace to workplace within the same industry and even within different branches of the same union.”

14. In the current case the TGWU claimed long established arrangements with another union, the GMB, under which it is recognised that employees of certain employers are more appropriately recruited by one union rather than the other. These arrangements were thought to date from 1932. Pursuant to these long established arrangements, a member who changes jobs from one employer to another may also be treated as transferring their membership from one union to another. Where this occurs both unions agree that the transferring member will be treated by the transferee union as having continuous membership. Accordingly in relation to a transferring member, all relevant rules of the TGWU including rule 6(13) and Schedule 1 are interpreted and applied in accordance with that longstanding custom and practice. Ms Foyer had been treated by the TGWU as having continuity of membership calculated from January 1998, the date she was thought to have joined the GMB. On this basis her period of continuous membership of the TGWU complied with Union rules when she applied for the ACTS post. Transfer arrangements operated in the Scottish Region particularly in relation to transfers within the whisky industry. In other Regions, including London and the Midlands, similar arrangements were reported covering the GMB but also the Communication Workers Union, the Iron and Steel Trades Confederation and the National Union of Rail Maritime and Transport Workers. Rule 6(13) and

Schedule 1 were not breached by Ms Foyer's appointment when the rules are interpreted in the light of this longstanding custom and practice.

Conclusion

15. There is no dispute over the fact that under rule 6(13) and paragraph 1 of Schedule 1 to the rules to be eligible to apply for the post of National Secretary ACTS Ms Foyer had to have been a financial member of the TGWU for two years immediately preceding her application. Nor is it disputed that Ms Foyer started paying subscriptions to the TGWU in November or December 2003 and that at most this was six months before she applied for the ACTS post in March or April 2004.
16. I have reached no conclusion on the Claimant's submission that no actual transfer was agreed by the two unions.
17. The question for me to determine is whether, by custom and practice, when Ms Foyer transferred from the GMB she carried with her rights entitling her to be considered a financial member of the TGWU for the purpose of satisfying the Union's rules relating to appointments. To decide this I must first consider the principles that have been established in applying the effect of custom and practice in interpreting union rule books and contracts. I shall then consider how the facts of this case match those principles.
18. The Union drew my attention to Lord Wilberforce's words on interpreting union rule books in *Heatons v TGWU*. Those words and that approach have been adopted by Courts and by Certification Officers ever since. Rule books should not be regarded as if they were Acts of Parliament. Custom and practice, which need not be written down and which can vary between locations and industry, can be held to modify rules and to fill in gaps in rule books. I accept that view entirely.
19. Case law in varying contexts and since the early twentieth century has, however, provided guidance on limits that should be recognised in applying this approach to custom and practice. This guidance has been summarised as requiring the custom and practice to be "*reasonable in the sense of fair, notorious in the sense of well-known and certain in the sense of precise*" (*Harvey on Industrial Relations and Employment Law volume 2 para M414.01*).
20. To some extent all three of these tests depend on the extent to which the claimed custom and practice was well-known in the Union. I have considered that first and note that it is not sufficient to show that the practice was well known among Union Officers, it must be shown that the practice was understood by the membership as a whole (or a relevant section of it). In this case all the Claimant's witnesses, experienced Officers of considerable standing in the Union, said that they were unaware of the practice of members transferring into the TGWU from another union bringing with them membership that counted as if it were membership of the TGWU. There was one exception to this. Mr Baird said there may have been examples in the

whisky industry where blocks of members were transferred from one union to another. He was, however, not aware of individuals transferring in this way and being granted continuity of membership.

21. Mr Collins explained that he had enquired of all Regions whether the practice of transfers granting continuity of membership operated in their territory. The outcome of his enquiries, set out in the Union's case, shows that the coverage of any such arrangement was by no means universal. Some Regions operated this practice with some unions but other Regions reported no such arrangement. Moreover, Ms Foyer was the only case Mr Collins could find where an individual transfer had been held to secure continuity of membership.
22. In my judgment the heavy preponderance of evidence negates any claim that the practice on which the Union relies in this case is notorious in the sense of well-known.
23. If I am wrong on this, I consider whether the practice is reasonable, in the sense of fair, and certain in the sense of precise. The argument that the practice does not have to be universal to be a custom and practice does not in my view have relevance in this case. This case relates to the selection of a National Officer serving all parts of the United Kingdom. If that selection is to be fair, all potential applicants should know whether membership of another union can count towards the qualifying period for job applications. Similarly, before this case no one would have had any grounds for believing that an individual transferring from one of three or four unions in one of a few Regions could bring with them - if both unions agreed to the transfer - continuity of membership relevant to qualification for appointment. In these circumstances the custom and practice on which the Union relies is neither reasonable nor certain. Potential candidates, possibly even in other unions, would not know if they were qualified to apply.
24. Without the aid of that custom and practice Ms Foyer did not have the qualifying membership of the TGWU required under rule 6(13) and Schedule 1 to make her eligible to apply for the post to which she was appointed.
25. I therefore declare that the TGWU breached rule 6(13) and Schedule 1 when on 7 June 2004 the GEC confirmed Ms Foyer's appointment as National Secretary ACTS with effect from 12 July 2004.
26. Under section 108B(3) of the 1992 Act I am obliged to make an enforcement order unless I consider that to do so would be inappropriate. In the circumstances of this case I do not consider that it is inappropriate to do so. Ms Foyer is operating in a senior national post in the Union - a post for which in my judgment she was not even eligible, to submit an application. I did not hear from her or from the Union as to how she came to apply for the post. I have formed no view on whether head-hunting or carpet-bagging played any part in her application but she should not continue in a post to which she was appointed contrary to rule.

27. I accordingly order that Ms Foyer shall forthwith cease to hold the office, or carry out the functions, of National Secretary of the Administrative, Clerical, Technical and Supervisory (ACTS) Group, unless or until she is appointed in accordance with the rules of the Union.

E G WHYBREW
Assistant Certification Officer