

**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 HIGNEY

v

THE EDUCATIONAL INSTITUTE OF SCOTLAND

Date of Decision:

21 May 2004

DECISION

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

1. I refuse to make the declaration sought by the Applicant that the Educational Institute of Scotland (“the Union”) acted in breach of rule XX of its rules on or about 12 September 2003 by its alleged dissolution of the College Lecturers’ Association, a Self-Governing Association of the Union.
2. I refuse to make the declaration sought by the Applicant that the Educational Institute of Scotland acted in breach of paragraph 12.2 of the rules of the College Lecturers’ Association on or about 12 September 2003 by its alleged dissolution of the College Lecturers’ Association.

REASONS

1. By an application dated 23 October 2003, the Applicant made allegations against his union, the Educational Institute of Scotland (“the EIS” or “the Union”) claiming breaches of the rules of the Union in respect of the dissolution of the College Lecturers’ Association (“the EIS-CLA”), a Self-Governing Association of the Union. Following correspondence with my Office, the complaints were identified as being potentially within my jurisdiction under section 108A of the 1992 Act. The complaints were:

1.1 *“that on or about 12 September 2003 the dissolution of the College Lecturers’ Association of the Educational Institute of Scotland was effected in breach of rule XX of the rules of the Educational Institute of Scotland in that the dissolution of the College Lecturers’ Association was a rule change that had not been approved by the majority of delegates listed to attend the Annual General Meeting.”*

1.2 *“that on or about 12 September 2003 the dissolution of the College Lecturers’ Association of the Educational Institute of Scotland was effected in breach of paragraph 12.2 of the Constitution Rules and Standing Orders of the College Lecturers’ Association of the Educational Institute of Scotland in that the dissolution of the College Lecturers’ Association had not been duly approved by both the Association and by the Institute.”*

2. I investigated these matters in correspondence. As required by section 108B(2) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 29 April 2004 in Edinburgh. The Union was represented by Mr Graham Bell QC, instructed by Mr Andrew Gibb of Balfour and Manson, solicitors. Mr Kenneth Wimbor, Assistant Secretary of the Union was also present at the hearing. Mr Bell called no evidence. Mr Higney acted in person and he also called no evidence. Mr Higney tendered witness statements made by himself and Messrs. Eyre, O’Donovan and Wollman, who were also present at the hearing. A bundle of documents was prepared for the hearing by my Office which consisted of relevant exchanges of correspondence with the parties, together with their enclosures. The statements of the Applicant and his above three witnesses were added to the bundle at the hearing. The July 2002 and the November 2003 rules of the EIS, the September 2001 rules of the College Lecturers’ Association and the Instrument of Transfer of Engagements of the Scottish Further and Higher Education Association to the EIS were also in evidence. Both the Applicant and Mr Bell presented skeleton arguments.

Findings of Fact

3. Having considered the representations of the parties and the documentation before me, I find the facts to be as follows.
4. The EIS was established by Royal Charter in 1851 and is a Special Registered Body within the meaning of section 117 of the 1992 Act. Before 1976 the Union had no separate mechanism for the representation of its members employed in further education. This had led to some members breaking away in the early 1970’s to establish the Scottish Further Education Association. In 1976 the EIS formed the Further Education Lecturers’ National Section (“FELNS”). In 1985 the Association of Lecturers’ in Scottish Central Institutions (“the ALSCI”) transferred its engagements to the EIS. The ALSCI wished to secure guarantees about its place in the EIS constitution and, in order to secure the merger, the Union agreed to amend its rules to introduce the concept of a Self-Governing Association, of which the ALSCI became the first. In 1988 the Association of Lecturers’ in Colleges of Education in Scotland (“the ALCES”) also transferred its engagements to the EIS and became a Self-Governing Association. In 1989 the FELNS was dissolved and reconstituted as the College Lecturers’ Association, a further Self-Governing Association. There were further changes which resulted in there being two Self-Governing Associations immediately prior to the transfer of engagements in question. These were the College Lecturers’ Association and the University Lecturers’ Association

5. In late 2002 the EIS entered into merger negotiations with the Scottish Further and Higher Education Association (“the SFHEA”). By June 2003 the SFHEA had agreed in principle to transfer its engagements to the EIS on the basis of a draft instrument of transfer which provided for specific amendments to be made to the rules of the EIS. Of these amendments, the most significant for present purposes was the amendment to rule XIV, dealing with Self-Governing Associations. All references to the College Lecturers’ Association were to be removed and effectively replaced by references to a new Self-Governing Association, the Further Education Lecturers’ Association (“FELA”), which would be made up of the former members of the EIS-CLA and the SFHEA. The Constitution of the EIS-CLA was to be replaced by a Constitution of the FELA. The University Lecturers’ Association would continue as the only other Self-Governing Association.
6. On 20 June 2003 a special meeting of the Executive Council (the “EC”) of the EIS was convened to approve and agree the documentation to be used to effect the SFHEA transfer of engagements. This meeting noted certain objections of the EIS-CLA representatives but formally approved the following five documents: the instrument of transfer of engagements, the new EIS-ULA constitution, the new EIS-FELA constitution, the new EIS rules, incorporating amendments as a consequence of a transfer of the engagements, and interim measures following the transfer of engagements.
7. The Applicant alleged that on 12 September 2003 a meeting of the National Executive Committee (“the NEC”) of the EIS-CLA was advised by a memo from the General Secretary of the Union that the EIS-CLA had been dissolved and that neither its NEC nor any of its sub-committees would meet from that day onward. The Applicant submitted that the effect of this memo was that all elected members of the EIS-CLA executive had then been removed from office. The Union denied that anything of such constitutional significance occurred on 12 September. On the sparse evidence before me, and on the balance of probabilities, I find that the EIS did not impose the constitutional changes alleged by the Applicant on 12 September, although it may well have indicated its intention to do so in the future. In reaching this finding, I observe that the Applicant has not supplied a copy of the memo from the General Secretary to which he referred. I also note that on 12 September the result of the ballot on the transfer of engagements had not been declared. Further, in a letter to the Applicant on 14 October, the General Secretary of the EIS stated that the constitutional changes would become apparent “once the transfer is complete”. It is common ground, however, that when the instrument of transfer was registered on 3 November 2003 the EIS-CLA was effectively dissolved and the members of its NEC were thereby effectively removed from the offices they held.
8. The result of the ballot of the SFHEA members was declared on 15 September 2003. There were 409 votes for the transfer of engagements and 28 votes against.

9. On 30 September and 9 October 2003 the Applicant wrote to the EIS complaining that the constitutional changes had not been approved in accordance with either rule XX of the EIS rules or paragraph 12.2 of the EIS-CLA rules. On 23 October the Applicant completed a registration of complaint form which was received at the Certification Office on 27 October.
10. The instrument of transfer of engagements was registered by the Assistant Certification Officer for Scotland under delegated powers on 3 November 2003.

The Relevant Statutory Provisions

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

S.98.(1) The instrument of amalgamation or transfer must be approved by the Certification Officer and shall be submitted to him for approval before a ballot of the members of any amalgamating union or (as the case may be) of the transferor union, is held on the resolution to approve the instrument.

(2) The instrument must comply with the requirements of any regulations in force under this Chapter and the Certification Officer shall approve it if he is satisfied that it does so.

S.102.(1) Where a trade union proposes to transfer its engagements to another trade union and an alteration of the rules of the transferee union is necessary to give effect to provisions in the instrument of transfer, the committee of management or other governing body of that union may by memorandum in writing alter the rules of that union so far as is necessary to give effect to those provisions.

This subsection does not apply if the rules of the trade union expressly provide that this section is not to apply to that union.

(2) An alteration of the rules of a trade union under subsection (1) shall not take effect unless or until the instrument of transfer takes effect.

(3) The provisions of subsection (1) have effect, where they apply, notwithstanding anything in the rules of the union.

S.103.(1) A member of a trade union who claims that the union –

- (a) has failed to comply with any of the requirements of sections 99 to 100E, or
- (b) has, in connection with a resolution approving an instrument of amalgamation or transfer, failed to comply with any rule of the union relating to the passing of the resolution,

may complain to the Certification Officer.

(2) Any complaint must be made before the end of the period of six weeks beginning with the date on which an application for registration of the instrument of amalgamation or transfer is sent to the Certification Officer.

Where a complaint is made, the Certification Officer shall not register the instrument before the complaint is finally determined or is withdrawn.

(2A) On a complaint being made to him the Certification Officer shall make such enquiries as he thinks fit.

(5) The validity of a resolution approving an instrument of amalgamation or transfer shall not be questioned in any legal proceedings whatsoever (except proceedings before the Certification Officer under this section or proceedings arising out of such proceedings) on any ground on which a complaint could be, or could have been, made to the Certification Officer under this section.

S.108A.(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) -
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
- (e) -

The Union Rules

12. Prior to the amendments made at the time of the transfer of engagements, the rules of the EIS most relevant to the Applicant's complaints were:-

Rule XIV SELF GOVERNING ASSOCIATIONS

1. The following self governing associations shall be established:

(a) The College Lecturers' Association, to deal with matters concerning further and adult education in Scotland. Its powers are defined by the Constitution of the College Lecturers' Association approved by the Annual General Meeting of 1989. Membership of the College Lecturers' Association of the Institute may be conferred on any lecturer or other member of educational personnel in colleges or other institutions of further education consistent with the terms of Rules & Regulations and according to a scheme approved by the Executive Council of the Institute.

(b) The University Lecturers' Association.....

2. The self governing associations shall have constitutional autonomy in respect of the distinctive interests of their members

Rule XX CHANGES IN RULES AND REGULATIONS

The Annual General Meeting shall enact such Rules and Regulations as it deems necessary. The Rules and Regulations shall be binding on all concerned and may only be revised in accordance with the following procedure:

The Finance and General Purposes Committee may propose changes in the Rules and Regulations for consideration by the Executive Council at its January meeting. In addition, members of the Executive Council may propose changes in the Rules and Regulations for consideration by the Executive Council at its January meeting.

Local associations and self-governing associations may also propose changes in the Rules and Regulations. All proposed changes to the Rules and Regulations must be received by the General Secretary no later than the first working day following the end of January.

All proposed changes in the Rules and Regulations shall be submitted to the Standing Orders Committee, which shall determine the competence of the proposals submitted. Where there are two or more proposals having similar content, the Standing Orders Committee shall decide on the wording of a composite amendment. Proposals considered incompetent by the Standing

Orders Committee shall not be entered on the Agenda of the Annual General Meeting. Intimation of such ruling shall be sent to the body which has submitted the proposal along with a full and clear explanation as to why the proposal has been considered incompetent.

No change in Rules and Regulations shall be effective until it has been approved by the majority of delegates listed to attend the Annual General Meeting.

13. Prior to the transfer of engagements in question the rules of the EIS-CLA most relevant to the Applicant's complaints were:-

EIS-CLA CONSTITUTION

1 Name and Status

The Association shall be a self-governing association within The Educational Institute of Scotland and shall be constitutionally autonomous in all matters concerning the further and adult education services. It shall be known as "The Educational Institute of Scotland College Lecturers' Association" (EIS-CLA).

7 National Executive Committee

7.1 The business of the Association shall be conducted by an Executive Committee, which shall have full powers to regulate and transact the affairs of the Association within the Constitution. The Executive Committee shall take office at the close of the Annual Conference and shall hold office until the close of the succeeding Annual Conference.

12 Changes to the Constitution

12.2 No change shall be made to this Constitution or the Rules and Bye-laws of the Institute which would have the effect of dissolving this Association or otherwise altering the relationship between the Association and the Institute as set out in this Constitution, unless such changes shall have been duly approved by both the Association and by the Institute.

12.3 Subject to the above provision, changes to this Constitution shall be made only by the Annual Conference of the Association in accordance with the following procedures.

(a)-(d).....

(e) A motion for change shall be approved and implemented only where two-thirds of those voting vote in its favour.

14. After the transfer of engagements the rules of the EIS most relevant to the Applicant's complaints were:-

Rule XIV SELF GOVERNING ASSOCIATIONS

1. The following self governing associations shall be established:

(a) The Further Education Lecturers' Association, to deal with matters concerning further and adult education in Scotland. Its powers are defined by the Constitution of the Further Education Lecturers' Association. Membership of the Further Education Lecturers' Association of the Institute may be conferred on any lecturer or other member of educational personnel in colleges or other institutions of further education consistent with the terms of these Rules & Regulations.

(b) The University Lecturers' Association.....

2. The self governing associations shall have constitutional autonomy in respect of the distinctive interests of their members.

The Submissions

15. The Applicant submitted that the EIS-CLA had been established as an autonomous body with constitutional protection against its rules being amended without specific procedures being undertaken. He argued that the actions taken by the EIS in dissolving the EIS-CLA and removing the members of its NEC from office were ultra vires and void. In the Applicant's submission, the Union had purported to amend the rules of the EIS without complying with the procedure set out in rule XX for changing its rules and had also purported to dissolve the EIS-CLA without complying with the procedure for so doing set out in paragraph 12.2 of the EIS-CLA constitution. The Applicant relied upon the sentence of rule XX of the rules of the EIS which provides "*No change in Rules and Regulations shall be effective until it has been approved by the majority of delegates listed to attend the Annual General Meeting*". He also relied on paragraph 12.2 of the rules of the EIS-CLA which provides "*No change shall be made to this Constitution or the Rules and Bye-laws of the Institute which would have the effect of dissolving this Association or otherwise altering the relationship between the Association and the Institute as set out in this Constitution, unless such changes shall have been duly approved by both the Association and by the Institute*". In response to the argument advanced by the Union based on section 102 of the 1992 Act, the Applicant submitted that the amendments made to the rules went far beyond the changes necessary to give effect to the transfer. He further argued that the EIS could not rely on section 102 as it required the committee of management of the EIS-CLA to agree by memorandum in writing to the alterations to rule. The Applicant asserted that the EIS had unsuccessfully sought to dissolve the EIS-CLA at an annual conference about 12 months previously and it was now seeking to achieve the same objective by means of this transfer without going to conference. He doubted if the SFHEA had insisted upon the reorganisation of EIS-CLA into the EIS-FELA, as the price of the transfer.
16. Mr. Bell QC, for the Union, had three main submissions. First, he accepted that the rules of the EIS and EIS-CLA had not been amended in accordance with the normal rule revision procedures of the Union but he submitted that this was not necessary as the rules had been lawfully amended in accordance with section 102 of the 1992 Act. Secondly, Mr. Bell argued that I had no jurisdiction under section 108A to hear the Applicant's complaints of breach of rule as, by reason of section 102, there was no breach of rules. Finally Mr. Bell argued that I was personally debarred from considering the complaint by reason of section 103 of the 1992 Act and the fact that the instrument of transfer had been registered by the Assistant Certification Officer for Scotland on 3 November 2003. He submitted that the proposed changes of rule had been approved by the Certification Officer when approving the instrument of transfer in accordance with sections 98 and 102 of the 1992 Act and, in the knowledge of the Applicant's complaint, the instrument of transfer had been registered. In Mr. Bell's submission, section 103(2) and (5) precluded any consideration by me of a complaint relating to a transfer of engagements after the instrument of transfer had been registered. He argued that the fact of registration established that any such complaint had been finally determined.

Conclusions

17. In considering my jurisdiction to hear a complaint under section 108A of the 1992 Act, I must assume the facts to be as alleged by the Applicant. In this case the Applicant complained that the members of the NEC of the EIS-CLA had been removed from office in breach of rules. I find that this is a complaint within section 108A(2)(a), being a complaint about “*the appointment or election of a person to, or the removal of a person from, any office*”. The Applicant further alleged that the EIS-CLA had effectively been dissolved in breach of rules. I find that this is a complaint within section 108A(2)(d) being a complaint about “*the constitution or proceedings of any executive committee or of any decision-making meeting*”. I accordingly find that I have jurisdiction under section 108A of the 1992 Act to hear the Applicant’s complaints of breach of rule and reject the Union’s argument to the contrary.
18. I also reject the Union’s argument that I am personally debarred from hearing this complaint by reason of section 103 of the 1992 Act. The “complaint” to which reference is made in section 103 is a complaint that has been made under that section. In this case the Applicant’s complaint was made under section 108A(1), not under section 103. Further, it is doubted if a member of the transferee union, such as the Applicant, can make a complaint under section 103 in respect of a transfer of engagements. I accordingly find that the Union’s argument in this regard is misconceived.
19. Mr. Bell’s prime submission, however, was based on Section 102 of the 1992 Act. Section 102(1) provides:

S.102(1) “Where a trade union proposes to transfer its engagements to another trade union and an alteration of the rules of the transferee union is necessary to give effect to provisions in the instrument of transfer, the committee of management or other governing body of that union may by memorandum in writing alter the rules of that union so far as is necessary to give effect to those provisions.

This subsection does not apply if the rules of the trade union expressly provide that this section is not to apply to that union.”

Further, Section 102(3) provides:

S.102(3) “The provisions of subsection (1) have effect, where they apply, notwithstanding anything in the rules of the union.”
20. The benefit of section 102 to unions wishing to transfer their engagements is manifest. Without this provision a transfer of engagements could not normally be made effective until the rules of the transferee or receiving union were amended at a rules revision conference or otherwise in accordance with its rules. This may be many months or even years after the ballot in respect of the transfer. On the other hand, the Applicant submitted that the effect of section 102 is that the EC of the transferee union has the power to make fundamental amendments to its rules without going through the union’s own democratic processes for doing so. He noted that the members of the transferor union have a democratic input into the process by their ability to vote upon the transfer, but that ordinary members of the transferee or receiving union are excluded

from the whole process. The Applicant argued that such a wide power is open to abuse.

21. I note the Applicant's concerns but I also note the final sentence of sub-section (1) of section 102. This provides that the sub-section can be excluded if the rules of the union expressly provide that it is not to apply. In other words, section 102 itself provides some safeguard against abuse in providing that the union's own democratic processes may prevail, should it choose to exclude section 102. I nevertheless find that the nature of section 102 is such that its construction should be approached restrictively.
22. Applying section 102(1) of the 1992 Act to the facts of this case, I note that the sub-section applies where **“an alteration of the rules of the transferee union is necessary to give effect to the provisions in the instrument of transfer”**. Contrary to the Applicant's submission, this does not require a consideration of the minimum rule changes necessary to effect a transfer. It requires an examination of what is in the instrument of transfer and whether an alteration of the rules of the transferee union is necessary to give effect to the provisions of the instrument. In this case, the instrument of transfer was premised upon and incorporated the disputed amendments to the rules of the EIS and its Self-Governing Associations. The amended rules were appended in full to the instrument. In my judgement, therefore, it was necessary for the EIS to alter its rules to give effect to the provisions of the instrument of transfer.
23. Section 102(1) goes on to provide that **“the committee of management or other governing body of that union may by memorandum in writing alter the rules of that union so far as it is necessary to give effect to those provisions”**. It was not contested that the reference to “those provisions” is a reference to the provisions of the instrument of transfer. The Applicant argued, however, that the reference to “that union” is, in the context of this case, a reference to the EIS-CLA. I reject that submission. Applying the plain meaning of the statutory words, I find that the reference to “that union” is a reference to the transferee union. On the facts of this case, it is a reference to the EIS. It is not a reference to the EIS-CLA. The Applicant has not contended that the committee of management of the EIS did not purport to alter its rules by memorandum in writing. Arguably it did so by the minute of the special meeting of the EC on 20 June 2003. Accordingly I find that the EC of the EIS did alter its rules by memorandum in writing so far as it was necessary to give effect to the provisions of the instrument of transfer.
24. In my judgement, therefore, the rules of the EIS and its Self-Governing Associations were lawfully amended in accordance with Section 102 of the 1992 Act, such amendments taking effect in accordance with the terms of the instrument of transfer on 3 November 2003, when the instrument was registered.

25. For the above reasons I dismiss the Applicant's complaints and refuse to make the declarations sought.

David Cockburn
The Certification Officer