

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

Mr S Bostock

v

POA

Date of Decision

11 April 2014

DECISION

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

Pursuant to section 256ZA(1) of the 1992 Act, I strike out the claimant’s application that the POA breached its rules on or around 17 May 2013 by having failed to advertise and hold interviews for the position of Finance Officer on the grounds that the application was brought out of time and/or has no reasonable prospect of success.

REASONS

1. Mr Bostock has been a member of the POA (“the Union”) for over 20 years. He has served as a local official, as a national official for ten years and as national vice-chairman for three years. By rule 10 of the rules of the Union the national vice-chairman sits on the National Executive Committee (“the NEC”).
2. Mr Bostock commenced this complaint by a Registration of Complaint Form dated 14 December 2013, which was received at my office on 16 December. On this form, Mr Bostock summarised his complaint as follows, *“That on the 16th May 2013 the POA breached its own rules and Constitution namely Annex A by the employment of Mr Peter Chapple as Finance Officer to the Union without using the adopted process for selection of Assistant Secretaries (full time officers) whereby not advertising the post, holding exams or interviews. Therefore breaching the equal opportunities of its members being able to be considered for the employed position of Finance Officer”*. Following correspondence with my office, Mr Bostock agreed the precise terms of his complaint in an email dated 11 February 2014 as follows, *“On or around 17 May 2013 the Union breached Annex A of the rules of the Union because the position of the Finance Officer was not advertised and interviews were not held as required by the POA Circular*

87/208 dated 24 July 2008". Finally, by a letter dated 4 March 2014 Mr Bostock wished his complaint to be in the following terms:

"On around the 17 May 2013 the Union breached rule 2.1(k) supported by Annex A of the rules of the Union because the position of Finance Officer was not advertised and interviews were not held as required by the POA Circular 87/2008 dated 24 July 2008".

3. By a letter dated 24 February 2014, my office required Mr Bostock to show cause why his complaint should not be struck out on the grounds that it had been brought out of time and/or had no reasonable prospect of success. That letter was sent pursuant to section 256ZA(4) of the 1992 Act. Mr Bostock responded to that letter on 4 March 2014.

Background

4. The Union had been considering a restructuring of its organisation since at least its Annual Conference in 2011. In January and February 2013, the Union obtained legal advice from its solicitors, Thompsons, regarding a proposed restructuring which would have the effect of reducing the size of its NEC. At a subsequent Special Conference it was explained that this would both save money and allow for there to be an increase of facility time at local level. The legal advice explained various options which were open to the Union.
5. The NEC considered the options and a Special Delegate Conference was called on 16 and 17 May 2013 in Southport. Various conference papers were before the delegates on which a number of motions were based. Conference paper 3 set out an amended NEC structure and relevant rule changes. The relevant motion, motion 12, approved this conference paper by the necessary two thirds majority. Conference paper 5 set out three options relating to the position of the Finance Officer. The minutes reveal a lengthy debate of the relevant motion, motion 16, and a decision to adopt option three. Conference voted to *"accept and retain and employ a Finance Officer"* and instructed the NEC to appoint the incumbent, Mr Chapple. He had previously been the elected Finance Officer. It would appear that conference resolutions take effect upon the closure of that particular conference.
6. Under the rules as amended in 2013, rule 9.5 provides that *"the NEC will appoint a Finance Officer as may be determined from time to time by conference"*. Mr Chapple was appointed as the employed Finance Officer pursuant to the instruction of conference.
7. On 8 August 2013 Mr Bostock wrote to the General Secretary, Mr Gillan, stating that he wished to raise a complaint under rule 25.7. Rule 25 is the rule which relates to disciplinary action that may be taken against members. Rule 25.7 provides that, *"any member who wishes to complain about any matter relating to another Union member should do so in writing to the general Secretary setting out the basis of the complaint"*. Mr Bostock's complaint was that the appointment of Mr Chapple as Finance Officer had breached rule 2.1(k). Rule 2 is the rule which sets out the "Objects and Powers" of the Union. Rule 2.1(k) provides that an object of the Union is *"to secure full Trade Union rights and equality of opportunity for its members"*. Mr Bostock maintained that, along with every other

member of the Union, he was not given the opportunity to apply for the post of Finance Officer as the normal selection process had not been used.

8. In subsequent correspondence with my office, Mr Bostock supported his objection to the appointment of Mr Chapple by reference to Annex A of the rules. This Annex is headed "Equal Opportunities Policy". He stated in a letter dated 4 March 2014 that he relied upon paragraphs 1 and 2 of the Annex. These paragraphs provide:-

"1. The POA is absolutely committed to equal opportunities and opposes any display or act of discrimination or harassment and will challenge any discrimination on grounds of gender, race, disability, sexual orientation, religion or age, to ensure that employees and Union members are fully protected.

2. The POA will ensure that it is regarded as an exemplary employer and Trade Union and aims to take a strategic lead in combating discrimination, promoting equality and opportunity."

9. The General Secretary replied to Mr Bostock on 13 August 2013. He stated that he considered that Mr Bostock's complaint fell outside the ambit of the Conduct and Standards process and that he was therefore referring the complaint back to him under rule 25.8(a). The General Secretary noted that rule 9.1 vests the management of the Union ultimately in conference and that conference came to a decision after having considered the relevant conference paper and after a full debate.
10. Mr Bostock raised his complaint again in a letter of 15 October 2013 to the Deputy General Secretary, Mr Darken, to which the General Secretary replied on 25 October. The General Secretary informed Mr Bostock that the Deputy General Secretary would only deal with such correspondence in the absence of the General Secretary. The General Secretary was not absent and saw no reason to change the view that he had previously expressed.
11. Mr Bostock commenced this complaint by a Registration of Complaint Form dated 14 December 2013, received at my office on 16 December.
12. In January 2014 the General Secretary was in the USA for an extended period and on 22 January Mr Bostock wrote again to the Deputy General Secretary asking him to address his complaint. Mr Darken responded on 28 January informing Mr Bostock that he was content with the earlier decision of the General Secretary.
13. In a letter to my office dated 21 January 2014, Mr Bostock provided a copy of POA Circular 87/2008 which was signed by the then General Secretary and National Chairman. It is headed "*Secondment to POA Positions*" and states that from the date of the Circular, 24 July 2008, "*any secondment ... will only be made following the post being fully advertised across the membership, interviews being held and any appointment will be made under the POA's equal opportunities policies, and will be ratified by the National Executive Committee*". Mr Bostock argued that this circular was evidence that the Union had breached its own policy.

14. On 24 February 2014, my office wrote to Mr Bostock in accordance with section 256ZA(4) of the 1992 Act, requiring him to show cause why his complaint should not be struck out on the grounds that it had been made out of time and/or had no reasonable prospect of success. On the same date, my office notified the Union of the complaint and of the show cause letter that had been sent to Mr Bostock.
15. On 4 March 2014, Mr Bostock responded to the show cause letter. He reformulated his complaint as set out in paragraph 2 above. In this letter, Mr Bostock states that he had complained to the General Secretary under rule 25.7 “as there was no other avenue to complain about the actions of the Union” and asked that I accept that he had over a period of months attempted to activate his complaint within the Union. He further maintained that Annex A was an integral part of the rules, noting that rule 25.1(b) refers to it expressly. Mr Bostock also relied upon POA Circular 87/2008 as being an instruction from the NEC and as being still extant as a policy.

The Relevant Statutory Provisions

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

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) disciplinary proceedings by the union (including expulsion);*
- (c) the balloting of members on any issue other than industrial action;*
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;*
- (e) such other matters as may be specified in an order made by the Secretary of State.*

(6) An application must be made -

- (a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or*
- (b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).*

(7) Those days are -

- (a) the day on which the procedure is concluded, and*
- (b) the last day of the period of one year beginning with the day on which the procedure is invoked.*

256ZA. Striking out

(1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may-

(a) order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived,
(b)-(c).....

(4) Before making an order under this section, the Certification Officer shall send notice to the party against whom it is proposed that the order should be made giving him an opportunity to show cause why the order should not be made.

(7) An appeal lies to the Employment Appeal Tribunal on any question of law arising from a decision of the Certification Officer under this section.

The Relevant Rules of the Union

17. The rules of the Union which are relevant for the purposes of this application are:

RULE 2

OBJECTS AND POWERS

Rule 2.1 Objects

The objects of the Union are to:

(k) secure full trade union rights and equality of opportunity for its members.

RULE 9

ORGANISATION AND MANAGEMENT

Rule 9.1 Authority

The management of the Union is vested in

(a) Conference;

(b) the National Executive Committee;

(c) the Officers; and

(d) the National Chairman and General Secretary acting together;

In that order of priority (except where the Rules provide differently)

Rule 9.5 Other Officials

The National Executive Committee will appoint such Assistant Secretaries and/or a Finance Officer as may be determined from time to time by Conference.

RULE 25

DISCIPLINE

Rule 25.1 Matters which may give rise to Disciplinary action

Subject to any statutory restrictions in force at the time, any member may be disciplined who:

(a) Acts against the interests of the Union's membership

(b) Acts contrary to or fails to carry out or comply with the policies of the union, its rules or the annexes to the rules.

(c)-(i).....

Rule 25.7 Report by General Secretary

Any member who wishes to complain about any matter relating to another union member should do so by writing to the General Secretary setting out the basis of the complaint.

Rule 25.8

If the General Secretary (or, in his absence, his Deputy) becomes aware, either because of a complaint made to him under Rule 25.7 or by any other means, of circumstance which may mean that a member has been guilty of breach of Rule 25.1 he will deal with the matter in the following manner:

- (a) Following consideration of the information refer it back to the complainant if he considers it not to be an issue falling within the ambit of the Conduct and Standards process;
- (b)-(e)

ANNEX A

EQUAL OPPORTUNITIES POLICY

1 The POA is absolutely committed to equal opportunities and opposes any display or act of discrimination or harassment and will challenge any discrimination on grounds of gender, race, disability, sexual orientation, religion or age, to ensure that employees and union members are fully protected.

2. The POA will ensure that it is regarded as an exemplary employer and Trade Union and aims to take a strategic lead in combating discrimination, promoting equality and opportunity

3. The POA will recognise the contribution of all its staff, union members and will work positively to protect them from any form of discrimination or harassment whilst promoting zero tolerance.

4. The POA is absolutely committed to the law and accepts its responsibilities set out in the following,

*Equal Pay Act 1970

*Sex Discrimination Act 1975

*Race Relations Act 1976

*Disability Discrimination Act 1995

*Employment Equality (Sexual Orientation) Regulations 2003

*Employment Equality (Religion or Belief) Regulations 2003
Employment

Equality (Age) Regulations 2006

*Together with all relevant amending legislation

and will not tolerate discriminatory behaviour by or against its employees or membership.

5. The POAs national and branch officials must deal promptly with complaints made by any member or employee regarding unlawful discrimination or harassment, including sexual harassment and ensure that all parties are supported, valued and advised appropriately. 6. The National Executive Committee must deal promptly with any complaint made by an employer or member against any member or employee regarding unlawful discrimination or harassment, including sexual harassment.

7. In accordance with its Rules and Constitution the POA shall have the power to discipline, dismiss, remove from office or expel any member or employee who following an enquiry has been found to have behaved in a manner which can be construed as harassment victimisation or discrimination. Any member who registers a complaint against another member will be supported throughout the process by a local member of their local branch committee

8. The POA insists that diversity and equality training be available to all its members and be made mandatory by the Prison Service Agency, or any other management body responsible for the security, care and custody of any individual removed from society by the Crown.

9. The POA will establish processes to achieve change and monitor that progress to ensure we prevent discrimination, act when discrimination occurs and promote equality.

10. The POA is committed to all minority or disadvantaged groups and will actively work to promote, support and recognise their needs.

Consideration and Conclusions

18. The show cause letter sent to Mr Bostock on 24 February 2014 required him to comment on whether his complaint had been brought in time and to establish that his complaint had a reasonable prospect of success. I shall deal separately with these two issues.

The Time Point

19. The standard limitation period in applications of breach of the rules of a union is provided for in section 108A(6)(a) of the 1992 Act. This requires that any such application is to be made within six months of the date of the alleged breach. Sections 108A(6)(b) and 108A(7) provide for an extended limitation period, which I describe below.

20. Mr Bostock's application to me is dated 14 December 2013 and was received at my office on 16 December. In that application he complained that on 16 May 2013 the Union had breached Annex A of its rules by the employment of Mr Chapple as Finance Officer without using the established procedures, thereby breaching the Union's equal opportunities policy. Latterly, Mr Bostock asserted that the breach occurred on 17 May. I take no point on this slight discrepancy.

21. As noted above, the standard limitation period for a case alleging a breach of rule is six months from the date of the alleged breach. On the facts of this case, Mr Bostock's complaint should have been received at my office by 16 November 2013. It was in fact received on 16 December. Accordingly, I find that the alleged breach was brought out of time in accordance with the standard limitation period in section 108A(6)(a) of the 1992 Act.

22. I now turn to consider whether Mr Bostock's complaint was brought in time in accordance with the extended limitation period in sections 108A(6)(b) and 108A(7) of the 1992 Act. This requires an examination of whether Mr Bostock invoked any internal complaints procedure of the Union to resolve the complaint within six months of the date of the alleged breach and, if so, whether his complaint was brought within a further period of six months beginning with either (a) the date upon which that complaint was concluded or (b) the last day of the period of one year beginning with the day on which the procedure was invoked.

23. Mr Bostock wrote to the General Secretary of the Union on 8 August 2013 stating that he wished to raise a complaint and requesting that it be investigated under rule 25.7. His stated complaint was that the appointment of Mr Chapple as Finance Officer was a breach of rule 2.1(k) of the rules of the Union. The General Secretary responded by a letter dated 13 August refusing to progress the complaint. Mr Bostock tried again to raise the same issue by letters to the

Deputy General Secretary of 15 October 2013 and 22 January 2014 but again without success.

24. In order to take advantage of the extended limitation period Mr Bostock needed to establish that his above letters that to the General Secretary and/or Deputy General Secretary constituted the invocation by him of *“any internal complaints procedure of the Union to resolve the complaint”* in accordance with section 108A(6)(b) of the 1992 Act. In the case of *Bakhsh v. Unison* (EAT/0375/08) the EAT commented upon this provision. It stated, at paragraph 14, that whilst these words can be given a fairly wide meaning *“it is essential that some recognisable formal procedure should be being followed”*.
25. The procedure that Mr Bostock expressly invoked was the procedure in rule 25, which is the procedure by which individual members of the Union may be disciplined. Mr Bostock explained his use of the disciplinary procedure on the basis that he had no other avenue to complain about the actions of the Union. In my judgment, a procedure that provides a means of disciplining individual members of the Union is not a procedure by which an internal complaint against a decision made by the Union itself may be invoked to resolve that complaint. I find that these are qualitatively distinct matters and that the extended limitation period in section 108A(6)(b) of the 1992 Act is not available to Mr Bostock on the facts of this case. In the absence of an internal complaints procedure capable of being invoked by Mr Bostock, he was not left without a remedy. He could and should have brought his complaint to me within six months of the date of the alleged breach. He failed to do so and, accordingly, his claim made on 16 December 2013 was made out of time.
26. For the above reasons I find that Mr Bostock’s application was brought out of time and therefore has no reasonable prospect of success.

The Prospects of Success/Jurisdiction Point

27. Further and/or in the alternative, I turn to the substance of the case that Mr Bostock sought to advance. In his response of 4 March 2014 to the show cause letter, Mr Bostock alleged a breach of rule 2.1(k) of the rules of the Union supported by Annex A and the failure to follow POA Circular 87/2008.
28. I deal separately with each of these provisions. Rule 2.1(k) is part of a rule which sets the ‘Objects and Powers’ of the Union. It provides that one of the objects of the Union is to *“secure full Trade Union rights and equality of opportunity for its members”*. I have asked myself if this is a rule which falls within my jurisdiction under section 108A(1) and (2) of the 1992 Act. I find that it is not. The Objects of a union set the limits of its lawful activity and, whilst they may form the basis of an action of ultra vires in the courts, they would not normally be capable of being breached in a manner within my jurisdiction under section 108A(1) and (2). In my judgment, rule 2.1(k) does not do so on the facts of this case.
29. As to Annex A of the rules, I note that Mr Bostock relies upon paragraphs 1 and 2 of that Annex. I accept that the Annex forms part of the rules of the Union but whether any particular provision in the rules is capable of constituting a legal obligation on the Union within my jurisdiction depends on the correct construction

of that provision. In my judgment, paragraphs 1 and 2 of Annex A of the Union's rules are aspirational in nature and state the general policy of the Union. I find that they are not rules which create an obligation on the Union which is justiciable before me under section 108A(1) and (2) of the 1992 Act.

30. Finally, I deal with POA Circular 87/2008. I find that this is not a rule of the Union. It is a statement of how the Union intended to deal with secondments to POA positions in 2008. I observe that it was intended that this issue be dealt with at the Annual Conference in 2009 but that no rule change was then adopted which would have had the effect of turning this statement of intent into a rule. In any event, the decision about which Mr Bostock complains was made at a Special Conference and rule 9.1 provides that a decision of Conference prevails over the decision of any other body within the Union.
31. Having considered the rules allegedly breached, I find that none of them give rise to a case which has any reasonable prospect of success.
32. For the above reasons, I strike out Mr Bostock's complaint pursuant to section 256ZA of the 1992 Act on the grounds that it has been brought out of time and/or has no reasonable prospect of success.



David Cockburn
The Certification Officer