

**Decision of The Certification Officer of Northern Ireland
In The Matter of an Application Pursuant to Article 90A of The Trade Union and
Labour Relations (Northern Ireland) Order 1995**

Mr Sean Garland

Complainant

And

Northern Ireland Public Services Alliance (NIPSA)

Respondent

Date of Decision: 10th June 2021

DECISION

Upon Application by Mr Sean Garland (the complainant) under Article 90A of the Trade Union and Labour Relations (Northern Ireland) Order 1995, two complaints were raised.

Complaint 1

On Wednesday 29 May 2019 the Acting President of NIPSA breached the stated process under Annex E of the NIPSA Constitution in her failure to permit the conference to deal with a correctly carried motion for a reference back to the Financial Statements for the year ended 31 December 2018

Complaint 2

On Wednesday 29 May 2019 the Acting President of NIPSA wrongfully facilitated a second vote to undermine the correctly carried motion for a reference back to the Financial Statements for the year ended 2018, in breach of Rule 36 of the NIPSA Constitution.

A Hearing of the Complaints was held on 20 May 2021 at The Certification Office, Gordon Street Belfast.

My decision on the complaints is as follows:

Complaint 1

I cannot make any declaration on the basis that the Complaint is out of time

Complaint 2

I cannot make any declaration on the basis that the Complaint is out of time

REASONS

The Complaint

1. Mr Garland, a civil servant and member of NIPSA registered his complaints with my office on 23 March 2020.
2. Following my initial assessment as to which complaints would be accepted as coming into the jurisdiction of the Certification Officer of Northern Ireland, Mr Garland confirmed two complaints with my office on the following terms:

Complaint 1

On Wednesday 29 May 2019 the Acting President of NIPSA breached the stated process under Annex E of the NIPSA Constitution in her failure to permit the conference to deal with a correctly carried motion for a reference back to the Financial Statements for the year ended 31 December 2018

Complaint 2

On Wednesday 29 May 2019 the Acting President of NIPSA wrongfully facilitated a second vote to undermine the correctly carried motion for a reference back to the Financial Statements for the year ended 2018, in breach of Rule 36 of the NIPSA Constitution.

3. At the hearing Mr Garland was self-represented. A written statement of argument was submitted by Mr Garland in advance of the hearing. Mr Garland gave oral evidence and submissions at the hearing.
4. The Union was represented by Mr Richards BL, instructed by John McShane, Solicitor of McCartan Turkington Breen Solicitors. A written statement of argument was submitted by counsel in advance of the Hearing and oral submissions were made by Mr Richards at the Hearing, as well as statement evidence given on behalf of the Union provided by Ms Alison Millar, General Secretary of NIPSA. Documentary evidence bundles were submitted by both parties and a booklet of legal authorities was submitted on behalf of the Union.

The Issues

5. The focus of the complaint was the procedures applied to a motion proposed by Mr Garland at the 2019 NIPSA Conference. The parties ultimately had very little difference in position by the time the complaint came to a Hearing. Prior to the Hearing a Witness Statement by Alison Millar was submitted on behalf of the Union. In this statement Ms Millar made significant concessions in respect of the two complaints. In particular, a critical admission was made in this statement:

'I accept that NIPSA's rules were not properly adhered to at the Conference in connection with the 'second vote'

6. This admission by Ms Millar had the broad impact of entirely validating Mr Garland's original complaint.

7. It is noted as a matter of record that Mr Garland had made several unsuccessful attempts to raise his complaints internally after the NIPSA Conference on 29 May 2019 in that correspondence was raised by him between August 2019 and March 2020. Mr Garland, at the time of raising his concerns internally, was not aware of the strict time limits which apply to the bringing of complaints to the Certification Officer under Article 90A of the 1995 Order

8. At the internal correspondence stage, there was an extraordinary and, in my view, entirely unacceptable delay on the part of the Union in responding to and dealing with Mr Garland's concerns. Mr Garland raised his concerns by way of direct correspondence with Ms Millar and there was a prolonged period during which Mr Garland's questions were either avoided or ignored.

9. It is true to say that the Union made a full and honest concession which was eventually made in the statement made by Ms Millar in preparation for the Hearing. However, this was almost 2 years after the event. In my assessment, had this approach been adopted at any point between August 2019 and March 2020, then this matter would never have been pursued by Mr Garland at all.

10. The entire situation of escalation to the Certification Officer was therefore unnecessary and avoidable. To be fair to Mr Garland, I can see why he was left with little choice as he eventually concluded that he was not going to receive the basic courtesy of a formal explanation, and he had no other escalation options unless he reported the matter to the Certification Officer. This was something that Mr Garland said he felt forced to do and he stated that he did so with great reluctance. In my assessment, there are not many people who would have shown his level of patience and tolerance of the length of time taken by the Union to acknowledge and address his concerns. Indeed, Mr Garland's indulgence of the Union's delay is the direct reason why he did not lodge his complaint with me within six months of the date of the Conference, because he was holding out for the Union to act in good faith. Ultimately, and somewhat ironically, this indulgence of the Union on the part of Mr Garland has now been the point argued against him on behalf of the Union in order to strike out this complaint.

11. The legal argument submitted on behalf of the Union sought to strike out Mr Garland's complaint on the grounds that the complaint had not been brought to the Certification Officer within the statutory time limit as imposed under Article 90A (6) and (7):

(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 paragraph 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.

12. Simply put, a complainant MUST submit a complaint to the Certification Officer within six months of the date of the alleged breach of rule taking place. In Mr

Garland's case this time limit expired on 29 November 2019 as the breach was non-recurring and related to a one off event on 29 May 2019.

13. The time limit is strict and I have absolutely no discretion to vary it. However, there is a caveat to the six month time limit and that is when an internal complaint procedure has been invoked. In such cases, the time limit does not start until either six months from the date of the conclusion of the internal procedure or, if it is not concluded, the time limit runs for 12 months from the date the internal procedure was invoked. In this case, Mr Garland first wrote to Ms Millar by email raising his concerns and seeking a formal response on 23 August 2019. Were this action on the part of Mr Garland accepted as being an invocation of a formal procedure, then the time limit in such circumstances would arguably begin to run on 23 August 2019 and end on 23 August 2020. However, it is a matter of interpretation as to whether his correspondence was the invocation of a NIPSA complaint procedure.

14. Mr Garland's complaint was submitted to my office on 23 March 2020. At that point my office alerted Mr Garland to the issue of time limits and set out information on the statutory time limits in correspondence from my Assistant Mrs S Hamilton acting under my direction on 12 June 2020:

The alleged breach of rule in your complaint occurred 12 months ago which would rule out your complaint under (6)(a) but you may argue that the complaint has been raised internally with NIPSA as an official internal complaint and so the time limit under (6)(b) applies. It is open to NIPSA to argue against you on this point as NIPSA may claim that a complaint process was not invoked internally

15. As it transpired the issue as set out in Mrs Hamilton's correspondence, as quoted above, was the precise and central focus of the argument advanced by the Union.

16. Accordingly, the primary question for determination is whether Mr Garland had invoked an internal process and can enjoy the benefit of an extended time limit. This is a matter for interpretation as to the wording of Article 90A at paragraphs (6) and (7). Indeed, both parties submitted strong arguments as to why the issue should be interpreted as they viewed it.

17. There were a range of other cases from the Certification Officer in Great Britain which were referred to at the hearing as being persuasive to the approach I should take in deciding the issue of which time limit applies to Mr Garland's complaints. These decisions are informative only. However, crucially I am bound in terms of my approach to this issue by a legal authority defined by The Court of Appeal, which addressed this precise point. That case is *Unison v Bakhsh* [2009] IRLR 418.

18. The most influential principle from the *Bakhsh* case was set out by Underhill J who held that for the extended time limit to apply:

It is essential that some recognisable formal procedure should be being followed...'

Thus, a distinction must be drawn between correspondence which is part of a complaint procedure and a series of communications which simply voices concerns, raises a question or poses a challenge.

19. Mr Garland was of the view that he had invoked a procedure via his correspondence as it was the only 'procedure' available within NIPSA processes he could use to raise his complaints. NIPSA also confirmed that there was no internal process within defined NIPSA procedures which provides for a complaint about a NIPSA Delegate Conference.

20. Mr Garland was critical of the fact that NIPSA did not have a procedure available for purpose of raising internal complaints about matters at a Delegate Conference and his argument was that he should not be penalised for shortcomings of both adequacy of process and of good practice on the part of the Union.

21. I have sympathy for Mr Garland's position but I am bound by the principles set out in the *Bakhsh* case. In particular I note the following:

'There was some debate before us as to whether there was in fact any 'internal complaints procedure' which could have been invoked...it is not necessary to the union's submission that there should have been a specific complaints procedure available: its essential point is the same whether the position is that there was an available procedure but it was not invoked or whether there was no procedure in the first place'

22. In other words, the lack of procedure and Mr Garland's decision to allow such a long time for the Union to respond to his concerns does not absolve him of his requirement to lodge his complaint with the Certification Officer within the time limit. Mr Garland cannot rely on the lack of clarity of process as a reason for extending his requirement to observe the time limit under the legislation. It is therefore a matter of regret that Mr Garland allowed more than six months to elapse before escalating his unresolved issues by way of a formal complaint to the Certification Officer.

23. The wording of the legislation on the triggering of the longer time limit is somewhat rigid as it requires Mr Garland to 'invoke' an internal complaints 'procedure'. Despite this, the Court of Appeal accepted:

'...that the phrase can properly be given a fairly wide meaning, so as – for example – to cover an appeal procedure. But it is essential that some recognisable formal procedure should be being followed. That seems to us to be inherent in the words themselves.'

24. The Court of Appeal stated that the proper approach to interpreting the language of the statute is that something more than '*a series of letters and emails*' is necessary to establish the invocation of a process that could be reasonably regarded as a complaints procedure. Mr Garland's challenge to the Union was raised merely through a series of letters and emails and I must therefore conclude that an internal procedure was not invoked and the six month time limit applies to Mr Garland's complaints.

25. Despite the Union's open acceptance of the validity of Mr Garland's complaints in Ms Millar's statement dated 18 May 2020, I am unable to make any Declaration upholding Mr Garland's complaints against NIPSA. I must find in favour of NIPSA on its preliminary argument that the complaint lodged with the Certification Officer on 23 March 2020 is out of time and must therefore be struck out.

A handwritten signature in black ink, appearing to read 'S. Havlin', with a long horizontal flourish extending to the left.

**S. Havlin LLB,
Certification Officer of Northern Ireland**