REF: D/03/2019

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

Mrs Susan Parlour

Complainant

and

NASUWT

Respondent

Date of Decision: 30th November 2019

DECISION

Upon Application by Mrs Susan Parlour (the complainant) under Article 90A of the Trade Union and Labour Relations (Northern Ireland) Order 1995, two complaints were raised. My decision on these complaints is as follows:

Complaint 1

I refuse to make the declaration sought by the claimant that certain named individuals should not be permitted to hold office because they do not qualify for full membership of the Union

Complaint 2

This complaint was struck out at the request of the applicant at hearing.

REASONS

The Complaint

1. Mrs Parlour, a working classroom teacher, Union member and Union Official of her Local Association at the time of the alleged breach, brought this application as a member of NASUWT (the Union). She did so by registration of numerous and varied complaints which were received at my office between 31 January 2019 and 18 June 2019.

2. Following my initial assessment as to which complaints would be accepted as coming into the jurisdiction of the Certification Officer of Northern Ireland, Mrs Parlour confirmed two complaints with my office on the following terms:

   Complaint 1

   I believe that the following individuals do not qualify for full membership of the Union but have nonetheless been permitted to hold office:

   The National Senior Vice President, National Ex-President, National Junior Vice-President, National President and National Treasurer

   I believe that the Union breached Rule 4(1)(a) in the appointment or election of such persons. I bring this complaint under Article 90A (1)(a) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (the appointment or election of a person to, or the removal of a person from, any office)

   Complaint 2

   All resolutions of the National Officers to prosecute a Rule 27 complaint against me are invalid on the grounds of ineligibility to hold office on the part of the National Officers identified above in Complaint 1. The decision taken at the meeting of the National Executive was in breach of Rule 7(a)(i). I bring this complaint under Article 90A (1)(a) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 under paragraph (d) (the constitution or proceedings of any executive committee of any decision making meeting)

3. The Complainant sought an order compelling the Union to remove the individuals from office.

4. At the hearing Mrs Parlour was represented by Mr Richard Harris. A written statement of argument was submitted in advance of the hearing. Mrs Parlour gave oral evidence and Mr Harris made verbal submission at the hearing.

5. The Union was represented by Mr Stewart Brittenden BL, instructed by Edward Cooper, Solicitor of Slater & Gordon Solicitors. A skeleton Argument was submitted by counsel in advance of the Hearing and oral submissions were made by Mr Brittenden at the Hearing, as well as oral evidence given on behalf of the Union being provided by Ms Chris Keates, Acting General Secretary. Documentary evidence bundles were submitted by both parties.

6. **Complaint 2 was withdrawn by the Complainant at the hearing at the request of her representative Mr Harris. Complaint 2 was therefore struck out and not considered.**

7. **Further, having considered the evidence submitted by the Union Mrs Parlour partially withdrew her complaints under Complaint 1 because the evidence in respect of two of the challenged individuals has satisfied her in terms of her complaint, namely the National Ex-President and Junior Vice-President. Complaint 1 therefore proceeded only in respect of a challenge to The National Senior Vice President, the National President and the National Treasurer.**

The Issues

8. The parties had two differing positions in terms of the construction and interpretation of NASUWT Rule 4(1)(a) which is worded as follows:

(1) Full Membership

(a) All persons who are employed as qualified teachers and such other persons whose contract of employment requires them to teach, lecture or instruct whether on a full or part time basis are eligible for Full Membership of the Union provided they support the Objects of the Union

And further, it is the applicant's case that the significance of the interpretation for eligibility for full membership takes on more prominence due to Rule 20(2)(c) which dictates that the eligibility criterion for candidates standing for election to National Office as National Treasurer and the National Presidency is to meet the requirements of Rule 4(1)(a)

(2) National Officers

(c) Only persons who are in Full Membership of the Union in compliance with Rule 4(1)(a) shall be eligible for election as National Treasurer or to the National Presidency

9. The Complainant made the case that as a working teacher she felt very strongly that active classroom teachers should represent teachers because only those who are 'rooted in classroom practice' can fully and fairly represent the interests of teachers. As the requirement to hold the office of the Presidency and National Treasurer of the Union is that a candidate for election should hold full membership of NASUWT in compliance with Rule 4(1)(a), Mrs Parlour believes that the spirit and meaning of the rule regarding eligibility for full membership requires those individuals to be <u>actively</u> teaching. The Complainant argued on the first part of the eligibility rule, that all persons who are '*employed as qualified teachers'* means those who are actively teaching in a classroom and not merely demonstrating the status of being employed but not actively teaching. Further the second and alternative part of the eligibility rule states that a person must hold a contract which '*requires them to teach lecture or instruct'.* Again, Mrs Parlour argued that this requires the Union to look for active classroom teaching and not merely the possession of a contract which may be inactive or a sham arrangement. Mrs Parlour believes that the spirit of the rule requires a closer examination of the activity behind the contract, not a mere 'tick box' approach to accepting the existence of a contract as sufficient evidence of eligibility under Rule 4(1)(a).

10. Conversely the Union argued that applying the plain natural meaning to the rule requires a two limbed test. To be eligible within limb (1) the only precondition is that the member can establish that s/he is employed as a qualified teacher. Under limb (2) the individual must only establish that s/he holds a contract which requires them to teach lecture or instruct. Essentially, the argument of the Union is that the Rule imposes no requirement to look behind the contract of employment of a qualified teacher or a contract to teach lecture or instruct in order to test for the amount or quality of active teaching. It was argued by Mr Brittenden that this concept of 'active teaching' being an implied part of the eligibility test under Rule 4(1)(a) is the way that Mrs Parlour thinks the rule *should* be, rather than what the rule requires under its present construction. Thus, the Union contends, she cannot establish any actual rule breach, but is merely making an assertion that the present terms of the rule itself does not satisfy her personal expectations.

11. Mrs Parlour alleged that the three challenged individuals are working under either sham arrangements or 'ghost contracts' which merely enable the

individuals to work in their capacity as Union officials full time. In reality, Mrs Parlour argues, these individuals have not been involved in any teaching whatsoever for a significant amount of time. Mrs Parlour takes exception to this practice of 100% facility time as she believes it is an abuse of taxpayers' money to the financial benefit of the Union and it is also detrimental to the Union's professional membership as they are being represented at the highest level by individuals who have become completely removed from classroom practice.

12. The Union argued in terms of construction of Union Rules, that the Rules must be constructed as they would be understood by the members as per ***Heatons Transport (St Helens) Ltd v Transport and General Workers Union*** [1972] ICR 308 HL and further as per ***Jaques v AEEU*** [1986] ICR 683 that the rules of a Union were to be given a reasonable interpretation which accorded with their intended meaning. The Union maintains that its construction of Rule 4(1)(a) is fortified in that it accords with long-standing convention and how the rule has previously been understood by members. By way of evidence it was submitted by Ms Keates that every President since 1986 (with the exception of Fred Brown) has had full time facility release in their Presidential Year. A further four named National Presidents and three named National Treasurers had full time facility release for all four years of their term of office. It was the evidence of Ms Keates that she is not aware that '*anyone has ever raised a challenge since 1986 that a President was not eligible to hold office. Indeed it appears to have been a long-standing convention or practice that they would have full time release for at least part of their four year term of office'*

13. The representative for the Complainant rejected the approach of the Union to interpreting the requirements of Rule 4(1)(a) and referred to the case of ***Autoclenz Ltd v Belcher & Ors*** [2011] UKSC 41, where the key issue for the Supreme Court to determine was, where there is dispute over whether a written employment contract reflects the true nature of the relationship between the parties, the extent to which the written terms may be disregarded in favour of what was actually agreed between the parties when assessing the true nature of the relationship between them. Thus, it was argued that the Union must therefore look behind the evidence of an employment contract or contract to teach lecture or instruct in order to understand the true relationship between the individual and the employer. It was further argued by the applicant that the contractual appearance of 'teaching' or claiming to be a 'teacher' is not enough. The Union must test and determine the veracity of the employment arrangements and nature of the relationship between individual and employer to satisfy itself that the person is in fact engaged in the practice of teaching in order to fully satisfy the requirements of Rule 4(1)(a).

The relevance of the ***Autoclenz*** case is limited in this context. I am examining the application interpretation of rules in a Trade Union whereas the **Autoclenz** case involved the examination of a disputed employment relationship where the dispute was between two parties in a bi-lateral relationship. The focus of that case was on employment rights and it is not a case which established legal principles for the construction and interpretation of Union Rules

Conclusions

The Interpretation of Rule 4(1)(a)

14. I cannot accept the argument of the Complainant that her preferred approach to interpretation of Rule 4(1)(a) is implicit within the rule as it is presently constructed. It is my assessment that the approach of the Union to accepting evidence of the existence of a current and qualifying contract is a reasonable and adequate interpretation of Rule 4(1(a).
In terms of the first part of the rule, if the Union can satisfy itself that the individual is a qualified teacher and is employed as a qualified teacher then, in my view that is a reasonable and sufficient test in order for the Union to satisfy itself that the requirements of the Rule have been met. I do not find any direct or implied duty on the Union to test the performance or the perceived quality of a contract of employment. Indeed, I find that such an approach would be a much more risky approach to testing eligibility because it would likely exclude many categories of members or potential members. For example, a qualified teacher might be employed by an educational or quasi-educational establishment but not actively teaching, s/he might be employed exclusively to carry out a special project or retained in an exclusively managerial position or liaison role which does not ever require them to teach in a classroom. I would not expect such a person to be excluded from Union membership if such a person can produce evidence that they are employed as a qualified teacher.
Indeed, Mrs Parlour herself agreed under questioning by Mr Brittenden that some individuals who are employed but not teaching should be eligible for membership such as Supply Teachers or some School Principals who are specifically contracted to manage and not teach. In my assessment, evidence of actively teaching is irrelevant if a person can establish that they are employed as a qualified teacher. The test is not the action of teaching; the test is the existence of an employment contract held by a qualified teacher who holds that contract because they are a qualified teacher.

I could see a case where a Union could refuse membership to a qualified teacher where the teacher proves s/he is a qualified teacher but s/he has not been employed because of his or her professional status. For example, if a qualified teacher produces evidence of being a qualified teacher but his/her contract of employment is as a retail assistant. The Union would likely make the distinction that the person is not employed as a qualified teacher but is a qualified teacher employed as a retail assistant. This is distinctly different from a qualified teacher who is employed or engaged in non-teaching roles but has been employed because he or she is a qualified teacher, such as a non-teaching Principal or a teacher working for the Department of Education.

Similarly, as is the case for the individuals challenged by Mrs Parlour, if a qualified teacher is working on 100% Facility time for NASUWT as agreed with their employer, and that qualified teacher continues to hold his/her contract of employment with their employer, then that person can produce sufficient evidence of a qualifying contract to meet the requirement of Rule 4(1)(a). Contrary to the view of the Complainant, the daily activity of the person does not undermine the qualifying nature of the contract. The teacher does not switch to being 'employed' by the Union or switch to being employed by their employer in a different capacity and no longer employed as a qualified teacher. The contract between employer and employee is not undermined by a facility time agreement. The law would fully expect such an employer to observe its duties to such employees at the conclusion of the facility time and that teacher retains the protected right to return to his or her substantive post. The person therefore remains employed by the employer as a qualified teacher.

Further, in terms of the second part of the Rule, a person may not be a qualified teacher or in actual employment but alternatively can satisfy eligibility requirements if they hold a contract to teach, lecture or instruct. Again, it is my assessment that it is reasonable that a person might hold a qualifying contract without actually having engaged in teaching. For example a teacher may hold a 'zero hours' contract which requires them to teach as the demand dictates. Such contracts are common in Further Education teaching and may result in the allocation of little or no teaching time according to demand. Thus the Union's approach to accepting the contract as the evidence and not probing the amount of regular teaching would seem to be a fair and reasonable approach to ensure that such individuals are not unreasonably excluded from membership.

15. The Complainant believes that it is important for NASUWT to reinforce the importance of active teaching within its membership and particularly in its leadership at Presidential level. However, Mrs Parlour's position may not

accord with the perspectives of those who hold differing types of teaching contracts. Given the changing status of 'teacher' in the gig economy, the rise of transient working patterns, portfolio careers, demand led contracts and so on, it strikes me that any decision by a Union to only accept for full membership under Rule 4(1)(a) those who are actively and regularly teaching, who are 'rooted in classroom practice' as Mrs Parlour puts it, could exclude and disadvantage those in the profession who may require representation the most.

Rule 4(1)(a) strikes me as having been purposefully constructed to be as inclusive as possible and to attract all types of education practitioners, not just traditional classroom teachers. It is my assessment that Mrs Parlour is pursuing a desire to change or update the current approach of the Union in order to better meet what she sees as the expectations of a professional membership. However, in order to establish a rule breach she would have to establish that the approach of the Union to interpreting Rule 4(1)(a) was unreasonable. This has not been established. The case which Mrs Parlour has made is one of aspiration for the framing of a different approach for testing eligibility and she has not established that it is unreasonable for the Union to simply accept the existence of either of the two types of qualifying contracts as being sufficient evidence of meeting the requirements of eligibility for full membership under Rule 4(1)(a) and, as a consequence, meeting the terms of Rule 20 (2)(c) for election to National Office.

The Eligibility of Individual Office Holders

16. Turning to the specific eligibility of the three individual National Officers under Rule 4(1)(a):

17. **Dan McCarthy, National President**. It is conceded by the Union that the contractual circumstances of Mr McCarthy fell out of compliance for full membership in September 2016, some six months after his election to office, because his contract with Basildon Upper Academy ceased at that time. The Complainant made the case that Mr McCarthy had retired, he was not a practising teacher and he left Presidential office on the false pretence of ill health. The Complainant claimed that the real reason he left office was because of Mrs Parlour's letter of challenge wherein she set out her belief that he was not eligible under Union Rules to hold office.

However, in September 2016, when Mr McCarthy's contract with Basildon Academy ended, he was already holding a four year term of office. He was first elected to the four year term of presidential office in March 2016. Thus, at the date of his election, he was employed as a qualified teacher having provided legitimate evidence to stand for election in the form of a payslip dated 26 September 2015. This satisfied the election requirements. There are no further elections once a person has been elected to the four year term which begins with a year as Junior Vice President, then Senior Vice President, a third year as President and a final year as Ex-President.

Mrs Parlour also makes the claim that Mr McCarthy was in fact a retired teacher at the point of his election. The evidence supporting this claim is limited to Mrs Parlour's statement that she personally telephoned Basildon Academy on 22nd January 2019 and spoke with the school secretary. Mrs Parlour claims that the school secretary said that '*Dan McCarthy had retired from teaching a number of years ago*'. However, this evidence does not establish that Mr McCarthy was retired at the date of his election. He may well have retired shortly after election to his four year term of office. If he retired in September 2016, which was after his election, then this would still accord with a statement made in 2019 that he 'retired a number of years ago.

Mr McCarthy's change in status seems to have alarmed Ms Keates because she stated that she advised him to secure other employment or supply teaching once she knew that his contract with Basildon Academy was ending. This might suggest some apprehension on the part of Ms Keates about Mr McCarthy falling out of compliance and potentially holding office in breach of rule. Mrs Parlour believes that this apprehension on the part of Ms Keates and the subsequent stepping down from office on the part of Mr McCarthy was due to the fact that the Union had been 'caught out' by Mrs Parlour's letter of challenge and the Union was attempting to cover its tracks. I reject this argument because I do not agree with Ms Keates that Mr McCarthy was required to do anything about his working arrangements as I can find no Union rule in the NASUWT Rule Book which would empower the Union to remove a person from office in such circumstances.

Rule 20 of NASUWT rules deal with elections and Rule 20(2)(c) states that '*only persons who are in Full Membership of the Union in compliance with Rule 4(1)(a) shall be* ***eligible for election*** *as National Treasurer or to the National Presidency'.* It is very clear to me that Mr. McCarthy was therefore only required by Rule 20(2)(c) to meet the terms of the eligibility rule at the time of his election. If the Rule instead stated, for example, '***shall be eligible to hold office',*** then Ms Keates would rightly have felt apprehensive as there

would be legitimate authority under such wording of the Rule for the Union to require Mr McCarthy to step down from his tenure or, in the absence of agreement, to take action to remove him. However, on the present construction of Rule 20(2)(c), my view is that he could arguably have legitimately held office for the whole four years regardless of his change in employment status. I can find no other rule in the NASUAWT rule book which would require a lawfully elected office holder to stand down during their tenure because s/he had subsequently retired or no longer held a contract.

Ms Keates may have been contemplating whether Mr McCarthy could rightfully retain office under his new circumstances, but I would imagine that had she moved to remove him from office, the Union would be very vulnerable to challenge by Mr McCarthy. Indeed when I asked Ms Keates at the Hearing if she would consider removing a lawfully elected National Officer because their circumstances changed during their tenure, she said that she would have to act cautiously and under legal advice in such cases. My own view is that Mr McCarthy was lawfully elected to a four year term of office and the Union would have had little or no authority under its current rules to remove him once elected simply because he no longer met requirements for full membership which, under Rule 20 (2)(c), are only required to be met at the time of election

I therefore find that Mr McCarthy met the requirements of Rule 4(1)(a) at the time of his election and therefore for the whole of his four year term of office as per Rule 20(2)(c). The fact that he chose to voluntarily stand down from office in March 2019 and why he did that is not relevant to my findings.

18. National Senior Vice President, Dave Kitchen was elected to the presidency in March 2017 and is currently National President. The evidence presented confirms that he has been employed as a qualified teacher with Lostock College since 1993 in the subject of R.E. He took phased retirement commencing in January 2014 and is now employed on a 0.4 contract with full time release. A letter of 9 June 2016 to Dave Kitchen from Schools HR Support of Trafford Borough Council confirms his change of hours and revised salary and states that '*all other terms and conditions of employment remain unchanged'.* Several other documents were submitted by way of confirming his employment. I am satisfied that Dave Kitchen is employed as a qualified teacher by Trafford Council. It is true that he does not teach but works on 100% facility time as agreed between NASUWT and his employer. I accept that Dave Kitchen is not currently a practising classroom teacher but as per paragraph 14 of this decision I consider the evidence of Mr Kitchen's employment to meet the requirements of Rule 4(1)(a) and there is no need for

the Union to look behind that contract or make any other inquiries to test eligibility for full membership under the terms of that rule. It follows that he therefore met the requirements for election to National Office under Rule 20 (2)(c).

19. National Treasurer Russ Walters was elected to office in the National Executive on 1 August 2015. He was elected unopposed to take up office as National Treasurer in 2019. Mr Walters is a qualified teacher in the subject of Art and Design Technology. His payslip from his employer Bolton Council confirms that he is part of the Teachers Pension Scheme and for nomination purposes he provided satisfactory evidence that he is employed as a teacher by Bolton Children's Services and he is engaged on school teacher's terms and conditions of employment, all of which was reproduced in the Union's bundle of documents. I am satisfied that Russ Walters is employed as a qualified teacher by Bolton Children's Services. It is true that he does not teach but instead works on 100% facility time as agreed between NASUWT and his employer. I accept that Russ Walters is not currently a practising classroom teacher but as per paragraph 14 of my decision I consider the evidence of Mr Walter's employment to meet the requirements of Rule 4(1)(a) and there is no need for the Union to look behind that contract or make any other inquiries to test eligibility for full membership under the terms of that rule. It therefore follows that he met the requirements for election to National Office under Rule 20 (2)(c).

20. I do not uphold any part of the complaint and I make no declaration or order. Having considered all of the written and oral evidence together with the representations of the parties in respect of Complaint 1 as amended, I do not consider that the complainant has established a breach of rule on the part of the Union in its application of NASUWT Rule 4(1)(a) in determining eligibility of three persons to hold full membership of NASUWT and thus to hold office as National Senior Vice President, National President and National Treasurer.

S. Havlin LLB,