

DECISION OF THE CERTIFICATION OFFICER FOR NORTHERN IRELAND
IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 90A OF THE TRADE
UNION AND LABOUR RELATIONS (NORTHERN IRELAND) ORDER 1995 (as
amended)

Mr Paul Dale

Applicant

V

Northern Ireland Public Service Alliance (NIPSA)

Respondent

Date of Decision:

16 December 2021

DECISION

Upon Application by Mr Dale (the applicant) under Article 90A (2) (a), (b) and (d) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) a total of two complaints were raised:

The applicant is claiming breach of Regulation 35(d) in respect of the General Council election of 18 February 2021. The rule which it is claimed to have been breached is as follows:

Rule 6.31 - The General Secretary shall draw up regulations for the conduct of the elections following consultations with the Returning Officer. The regulations shall be subject to the approval of the General Council. The regulations shall be published to members and shall be binding on all members as if part of these rules.

35. Any candidate or their supporters **shall not:**

- (a) use any centrally funded service e.g. text messaging paid out of NIPSA's funds. This also includes NIPSA supplied mobile phones and laptops;
- (b) interfere or intercept ballot papers for the election. Post for the election must arrive with the member without interference. It is a breach of the Election Regulations for anyone to attach or append any additional material to the official post/envelope;

- (c) use the NIPSA Headquarters or Regional Office address in any campaigning material;
- (d) use the NIPSA official logo in campaigning material which could be construed as being a NIPSA officially sanctioned document. Photographs of protests etc which include the NIPSA logo are acceptable.**
- (e) claim travel expenses from NIPSA for campaigning in the election;
- (f) seek information or assistance from any NIPSA staff member regarding any element of the election;
- (g) NIPSA staff [or representatives] shall not supply any data or membership information to any member which may be in breach of the General Data Protection Regulation (GDPR). Any and all activity is subject to NIPSA's Data Protection Policy (available on the NIPSA website).

Right to Apply to Certification Officer

The applicant brings the complaint pursuant to Article 90(A) (1) (a): **the appointment or election of a person to, or the removal of a person from, any office**

Further, it is contended that the Union, via its official Returning Officer, has admitted and declared that there was in fact a breach of this rule in the course of the election when the Returning Officer/Scrutineer received complaints from five members, including that of the applicant, which was sent on behalf of 24 candidates.

According to Mr Dale, it has been officially stated:

'It is the view of the Returning Officer that, in each reported instance referred to the Returning Officer, the inclusion of the logo did amount to a breach of regulation 35d... Whilst it is regrettable that the regulations were breached by the use of the logo as averred it is our opinion that it is highly unlikely that any member would arrive at the view that the communications complained of could be interpreted as official NIPSA communications.'

The applicant relies upon Article 90A of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) to bring these complaints to the Certification Officer of Northern Ireland:

Right to apply to Certification Officer

90A.—(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 paragraph (2) may apply to the Certification Officer for a declaration to that effect, subject to paragraphs (3) to (7).

(2) The matters are—

1. Mr Paul Dale, a civil servant and member of NIPSA branch 15, registered his complaints with my office on 31st March 2021.
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 Dale confirmed his complaint with my office as follows:

The applicant is claiming breach of Union rule 35 in respect of the General Council election of 18 February 2021. The rule which it is claimed to have been breached is as follows:

35. Any candidate or their supporters **shall not:**

- (a) use any centrally funded service e.g. text messaging paid out of NIPSA's funds. This also includes NIPSA supplied mobile phones and laptops;
- (b) interfere or intercept ballot papers for the election. Post for the election must arrive with the member without interference. It is a breach of the Election Regulations for anyone to attach or append any additional material to the official post/envelope;
- (c) use the NIPSA Headquarters or Regional Office address in any campaigning material;
- (d) use the NIPSA official logo in campaigning material which could be construed as being a NIPSA officially sanctioned document. Photographs of protests etc which include the NIPSA logo are acceptable.**
- (e) claim travel expenses from NIPSA for campaigning in the election;
- (f) seek information or assistance from any NIPSA staff member regarding any element of the election;
- (g) NIPSA staff [or representatives] shall not supply any data or membership information to any member which may be in breach of the General Data Protection Regulation (GDPR). Any and all activity is subject to NIPSA's Data Protection Policy (available on the NIPSA website).

3. The complaint in its entirety as set out at paragraph 2 is **conceded** by the Union without qualification.
4. The hearing proceeded in order to allow me to consider the appropriateness of the issuing of an enforcement order. The hearing was limited to submissions on this issue.
5. At the hearing Mr Dale appeared in person and was supported by Ms Helena McSherry. A written statement of argument was submitted by Mr Dale in advance of the hearing and he made submissions at the hearing.
6. The Union was represented by Mr Neil Richards BL, instructed by Mr John McShane, Solicitor of McCartan Turkington Breen Solicitors. Oral submissions

were made by Mr Richards at the Hearing. A statement of evidence given on behalf of the Union was provided by Ms Carmel Gates, General Secretary of NIPSA. This statement clarified that all complaints made by Mr Dale were fully conceded by the Union. Documentary evidence bundles were submitted by both parties and a booklet of legal authorities was submitted on behalf of the Union.

The Issues

7. The focus of the unresolved grievance arising from the complaints brought before me was that Mr Dale had brought a complaint about rule breaches by individuals who were standing for election in the NIPSA General Council Elections 2021/2022. The actions of the individuals concerned had been recognised as a breach of NIPSA election regulations by NIPSA. However, in Mr Dale's view, this had resulted in unduly lenient response on the part of NIPSA.

8. Mr Dale believes that the conduct of the candidates who breached union rules in the use of NIPSA logo in their election materials was not fairly or adequately assessed by the Independent Election Scrutineer, Civica Election Services (CES). CES was appointed by NIPSA as Independent Scrutineer for the General Council Election 2021/2022 pursuant to the Trade Union and Labour Relations (Northern Ireland) Order 1995. Moreover, he stated that NIPSA's response to the breaches to date has been inadequate.

9. Mr Dale made the submission that the Independent Scrutineer in its Returning Officer's Report had failed to recognize the potential for serious consequences flowing from the breach. It was the conclusion of the Returning Officer that the breach was merely a minor breach, it was not material and it did not have any impact on the election outcome. Accordingly, The Returning Officer reached the judgement that he did not believe that the election had been compromised.

10. NIPSA are bound under the terms of its own rules and procedures to treat the findings and recommendations of the Independent Scrutineer as binding and as a consequence there was no further action taken during the time of the election, such as disqualification of the candidates in breach of rule or a decision to re-run the election. The election went ahead and many of the candidates who had been in breach of NIPSA election regulations were elected to the General Council.

11. Mr Dale's view was that the use of the NIPSA logo was in fact very misleading to the wider membership to whom the materials were circulated. In Mr Dale's submission, the appearance of the logo was likely to cause confusion the minds of members or lead them to believe that certain candidates had been officially 'endorsed' by NIPSA. In his view this was a material issue and it had the potential to mislead those who were

voting. It is Mr Dale's view that the breaches would therefore have a significant impact on voting choices and election outcomes.

12. In light of the binding nature of the returning officer's report, it is difficult to be critical of NIPSA in its action to follow the Returning Officer's findings as to the issue of the integrity of the election. However, the remaining question is the question that Mr Dale has posed: is NIPSA going to take any formal action to address the breach with the individuals concerned and to ensure future compliance?

13. I recognise the candour in the response from NIPSA to Mr Dale. In a letter to my office from former General Secretary Alison Millar dated 17 June 2021, it was openly confirmed that the rule breach was conceded and should never have happened. However, I can see how the Union's hands were tied by the view on materiality of the breach as set out in the Returning Officer's report.

14. Mr Dale stated at the hearing that he understood that, like his Union, he had no option other than to accept the assessment of the Independent Scrutineer, despite having significant reservations about the conclusions set out in the Returning Officer's report. He also submitted that 19 of the candidates who had used the logo in their promotional materials were ultimately elected to office.

15. Mr Dale further submitted that, in the interests of the good governance of the Union, he was not seeking an enforcement order which would quash the election of the General Council of 2021/2022. As set out in the submissions of Mr Richards BL, the individuals have been in office for half the year and have already acted under the authority of holding office in General Council and taken senior level decisions on significant issues. Mr Dale generously conceded that potentially invalidating those decisions 'would not be in the best interest of my union'. Instead Mr Dale is seeking assurance from the Union that decisive action will be taken as a result of the occurrence of a clear breach of NIPSA election regulations by multiple individuals, both to bring accountability to those in breach of rule and to prevent future reoccurrence. Moreover, he wants that action to be cognisant of the potential for conflict of interest as those elected to office of the General Council should not be in a position of 'policing themselves'.

16. It is positive to see that in response to Mr Dale's position, the Union has also exercised reciprocal generosity. I note the witness statement of Ms Carmel Gates, General Secretary, in addressing her approach to the election cycle for 2022-2023:

'I view the substance of Mr Dale's complaint very seriously and I plan to take steps to prevent such breaches from occurring in the future....I will be sending a circular to all NIPSA Branches...and warn all candidates and branches that they comply....on pain of possible disqualification and discipline'

And in terms of the breaches identified in the 2021-2022 election:

Apart from the Returning Officer's acknowledgement of the breach of Regulation 35(d) it is true to say that there is yet to be any censure of individuals in relation to the 2021-2022 election. I would, however, point out that at NIPSA's Annual Delegate Conference (held online from 2nd to 4th June 2021) a motion was submitted by Branch 730 asking Conference to condemn the breaches of the Election Regulations, and calling on the General Council to investigate those breaches and consider what action was required...The motion was adopted by Conference. Therefore it is incumbent on the General Council to follow the motion up...My intention is to advise the General Council to expedite the matter as soon as possible...I understand Mr Dale's sense of grievance...I agree with him that the use of NIPSA's logo in the campaigning material of some candidates was unacceptable.

17. The issuing of an Enforcement Order by the Certification Officer is not always automatic. In the event of issuing a declaration, I am required to make an enforcement order unless I consider it is inappropriate to do so. Mr Richards for the union submitted that it was held by the Employment Appeal Tribunal in *GMB v Corrigan* [2008] ICR para 39 '**there is no obligation to make an order; it is discretionary**'.

18. It is important to note Harvey on Industrial Relations at 4012.01

An enforcement order is an order requiring the union to take specified steps or refrain from specified acts within a specified time in order to 'remedy the breach' or 'withdraw the threat of the breach' or to secure that a similar breach or threat 'does not occur in the future'

Accordingly, an enforcement order is not merely a rebuke but must be a specified and measurable requirement to act or desist in order to bring the Union into compliance with rule.

19. Further, as submitted by the Union, it is not open to the Certification Officer to merely issue an enforcement order which is purely a direction to comply with existing stated rules or reinforce rules that are already clear and well understood. As stated in the *Corrigan* case at paragraph 39 '*The purpose of an order is to secure compliance by the wrongdoing union*'.

20. Accordingly, in balancing all of the factors in this case, I believe that the issuing of an enforcement order is appropriate in this case. The Union has not yet acted to address the rule breach with those who were found to be in breach and, given the extent of the rule breach by so many candidates, it is fair to say that there is significant problem with awareness of the election regulations. There is therefore a distinct risk of future non-compliance. I agree with the submissions of Mr Richards BL in that the enforcement should not be an order to quash the General Council election of 2021/2022. Indeed, both parties are in agreement that such an order would be

extremely damaging to the good governance of the Union. I commend Mr Dale for the compromise he has made on this matter.

21. The enforcement order issued by me under this decision is intended to benefit both the applicant and the Union in bringing a focus to the commitment for reparation as already expressed by the Union. I order the Union to take action as per the terms I have set out in my Enforcement Order above. The Union must instigate immediate implementation of an efficient and effective internal investigation and arrive at a decision as to next steps in terms of addressing the breaches which occurred. The process must appropriately recognise and manage any conflicts of interest at General Council level. I would anticipate that this should be done as quickly as possible so as to be complete by the time the next election cycle begins, but in any event should be complete within 3 months from the date of this decision.

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