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**Court of Appeal rules
new Labour Party
members cannot vote in
'crowd funded' leadership
election challenge**

*Ian McNicol v. Christine Evangelou, Leir, Fordham,
Granger and FM - [2016] EWCA Civ 817*

Article by David Bowden

In a shock ruling the Court of Appeal has unanimously over-ruled the judgement given by Mr Justice Hickinbottom in the High Court. He had ruled that 5 members who recently joined the Labour Party were eligible to vote in the forthcoming leadership election. The judge below had ruled that Labour Party rules had to be construed purely as a matter of contract law and he ruled that the actions of the National Executive Committee ('NEC') which attempted to set a cut-off date were invalid. In allowing the Labour Party's appeal however Lord Justice Beatson in the Court of Appeal said the judge below had erred. He said a clause in the Labour Party's rule book gave the NEC's wide powers including to overrule rule book provisions. Permission for a final appeal to the Supreme Court of the United Kingdom was refused.

Ian McNicol v. Christine Evangelou, Leir, Fordham, Granger and FM
[2016] EWCA Civ 817 12 August 2016
Court of Appeal, Civil Division (Lord Justice Beatson, Lady Justice Macur and Lord Justice Sale)

What are the facts?

The 5 representative claimants all became members of the Labour Party between 12 January and 12 July 2016. 1 of them is a minor aged under 18 years of age. On 12 July 2016 the National Executive Committee ('NEC') met to agree rules for the election of leader of the Labour Party. The NEC resolved that only 3 categories of its supporters could vote:

- those who had held 6 months' continuous membership of the party,
- affiliated supporters, or
- registered supporters aged over 18 years who had paid the £25 fee.

The claimants say that the constitution of the Labour Party does not permit the imposition of these conditions by the NEC on its members. FM made an age discrimination challenge.

What did the judge below rule?

Mr Justice Hickinbottom said that *'the courts must be careful not to interfere in political matters but that the claim before him concerns the proper interpretation of the contract between members of the Labour Party. He said that was an apolitical question. He ruled that the Labour Party rule book 'indicates that all members are able to vote in a leadership election, unless excluded by some other provision in the Rule Book'. He rejected the Labour Party's submission that its NEC has the power 'to set any criteria for whom may vote' as simply being a 'bold contention' by its counsel.*

Whilst the judge ruled that the prospective freeze date was *'within the powers of the NEC'* and that the NEC had a *'power generally to define voting eligibility criteria'*, he said that he *'did not consider that...on a true construction of the rules, a freeze date can be retrospectively imposed'*.

He also ruled that *'there is no other provision within the Rule Book which could found a power in the NEC to impose a requirement on members in the context of a leadership election, that they must have been members for a six month period'*. He ruled that at *'the time each of the Claimants joined the Party, it was the common understanding as reflected in the Rule Book that, if they joined the Party prior to the election process commencing, as new members they would be entitled to vote in any leadership contest. That was the basis upon which each Claimant joined the party'*.

What were the grounds of appeal?

There were only these 2 grounds of appeal:

- Whether the judge erred in law in concluding that the NEC had no power under the Labour Party rule book to restrict members who are able to vote in the leadership election to those who had continuous memberships since 12 January 2016, and
- Whether the judge erred in law in concluding that the NEC's power to impose a 'freeze date' in any leadership election was limited to a power to impose a prospective freeze date on the basis that a freeze date could not be retrospective.

What is the significance of the Collins review?

Lord Collins of Highbury was asked by former leader Ed Miliband in July 2013 to conduct a review so that *'it becomes a genuinely mass membership party reaching all parts of the nation'*. His report was published in February 2014. It proposed the abolition of the electoral college and to implement *'one member, one vote'* for party leadership elections. It also recommended establishing a system of *'affiliated supporters'* who would be allowed to vote in leadership elections too. The Report set out

the necessary changes it recommended to the Labour Party Rule Book to implement its proposals. In particular it said: *'Votes shall be cast in a single section, by Labour Party members, affiliated supporters and registered supporters.'*

What was the NEC's case on this appeal?

The NEC submitted that it was the 'custodian' of the Labour Party's rule book and constitution. The NEC submitted it had much power reserved to it and was subject to endorsement at the annual party conference. The NEC said that construing the Party's rule book as a whole does give it a power to impose a freeze date and exclude a cohort from voting. The rule book gives the party's NEC wide powers. It said a 'freeze date' has been applied in every leadership election since 1994. The NEC met on 12 July 2016 to agree the procedure and timetable for the leadership election. Registered supporters were given until 5pm on Thursday 14 July 2016 to apply and pay the £25 fee to enable them to vote. The NEC imposed a 6 month freeze date.

What submissions did the new Labour party members make?

The excluded members reiterated their case made below before Hickinbottom J. They submitted that the rules of the Labour Party are clear and that when they joined it was made clear to them on the website that they could vote in a leadership election. When they joined there was no mention of any freeze period or qualifying period to vote in a leadership election. The Labour Party's rule book should be interpreted in the same way as any other contract. Properly so construed the Labour Party cannot exclude this cohort of its members from voting for its party leader. The imposition of the 6 month freeze period is inconsistent with the recommendations of the Collins review. They said there was a clear distinction here to what happened in the *Jeffers* case.

What was the ruling in the *Jeffers* case?

In *Jeffers v. The Labour Party* [2011] EWHC 529 (QB), Wyn Williams J ruled that the imposition of a 'freeze date' prevents additional individuals seeking to become members after the election process has begun. He ruled that this is standard practice in the case of selection of Parliamentary and local government candidates and by custom and practice in respect of election of officers of Party

What is the *Foster* case and what is its relevance here?

In *Foster v. McNicol* [2016] EWHC 1966 (QB) Foskett J also had to construe the Labour Party rule book. He determined that the NEC had correctly interpreted the provisions in the party's rule book relating to elections for national officers, and had been right to conclude that the party's current elected leader was entitled to take part in a forthcoming leadership ballot automatically and without the need to obtain nominations. **Clause 1.X.5** stated that any dispute as to the meaning, interpretation or general application of the party's rules should be referred to the NEC determination, and that the NEC's decision would be final and conclusive for all purposes.

Foskett J ruled that the NEC had reached the correct legal conclusion in respect of **clause II.B.2 (i)** and **(ii)** of the Labour Party's rule book. The clause was unambiguous and required neither clarification nor re-writing. Its natural and ordinary meaning was that where there was a vacancy for leader, anyone who wished to be considered for the position would require nominations from 15% of the combined Commons members of the Parliamentary Labour Party and the European Parliamentary Labour Party. Where there was no vacancy, anyone wishing to challenge the leader's right to continue would need nominations from 20% of the said members. In the latter situation, the leader would not be a '*challenger*' for the leadership and would therefore require no nominations in order to compete in the ballot to retain their position.

What does the Labour Party rule book say about the NEC's powers?

The relevant parts of the rule book have the following to say about its constitutional rules.

'Clause VIII

The National Executive Committee

...

2. *The primary purpose of the NEC shall be to provide a strategic direction for the Party as a whole ...*

...

3. *In furtherance of its primary purpose and key functions, the duties and powers of the NEC shall include:*

A. *to uphold and enforce the constitution, rules and standing orders of the Party and to take any action it deems necessary for such purpose ...*

...

M. *to issue guidance, give rulings and bring forward rule changes to Party conference to ensure continued compliance with the Party's legal and financial responsibilities ...*

...
4. ... Where the rules do not meet the particular circumstances, the NEC may have regard to national or local custom and practice as the case may require. The NEC's decisions shall be final and binding on all organisations, units and individuals concerned.

Clause X
Scope of rules

...
5. For the avoidance of any doubt, any dispute as to the meaning, interpretation or general application of the constitution, standing orders and rules of the Party or any unit of the Party shall be referred to the NEC for determination, and the decision of the NEC thereupon shall be final and conclusive for all purposes.'

Chapter 4 of the rule book ('the Chapter 4 Power') has this to say about elections for its party leader.

Clause II
Procedural rules for elections for national officers of the Party

...
2. Election of leader and deputy leader.
A. The leader and deputy leader shall be elected separately in accordance with rule C below...
C. Voting...
vii. The precise eligibility criteria shall be defined by the National Executive Committee and set out in procedural guidelines and in each annual report to conference.'

What did the court rule on the NEC's powers?

The court said the language of the Chapter 4 Power was 'clear' and that these words had to be its starting point. It said it was not necessary to depart from the words and to 'consider the background in any deeper way'. It said that it was 'not at all obvious that ordinary members of the public joining the Labour Party would have been aware of' the Collins review. It said there were 'a number of powerful indicators that the powers given to the NEC in respect of elections...were intended to be construed more broadly'.

The court said the rules also dealt with 'concerns about the improper manipulation of the Party's democratic procedures' and that these too were 'also important pointers to construing the powers given to the NEC'. Beatson LJ went on to say that: 'The Appendices show concern with entryism and the packing of the party at membership level. They indicate a rationale which makes it reasonable to interpret the Chapter 4 Power 'in line with the natural sense of the language used in it, so as to provide NEC with the power to define precise eligibility criteria for participation in a leadership election.'

The Court of Appeal expressly rejected the member's submission that the Chapter 4 Power was only there for 'gap filling' to deal with lapsed members and the like. Beatson LJ said it was 'not a tenable reading...to read it down so as to limit' the Chapter 4 Power in this way.

What did the court rule on the 'freeze date' point?

Beatson LJ started by saying that 'it is not strictly necessary to consider the arguments based on the express reference to "freeze date"...'. Reading the various clauses in the Party rule book, Beatson LJ said that 'it is clear that the NEC has power to impose freeze dates' and that the question the court had to resolve was whether 'it is only empowered to impose a freeze date that is the date of the commencement of the election process or a later date, or whether it is empowered to impose a freeze date that is earlier, as was done in this case if one takes the freeze date to be in substance a composite of the date of 12 July 2016 and the earlier cut-off date of 12 January 2016.'

On this the court said a 'freeze date' was 'simply the date by which a particular state of affairs must exist in order for a person to be eligible to vote. The imposition of a freeze date has the same effect as the definition of precise eligibility criteria.' As to whether 'freeze dates' can only be prospective or whether they could be retrospective too, again Beatson was trenchant in his judgement. He ruled that:

'We do not consider that there is anything in the ordinary meaning of the term which suggests that it can only be prospective. Nor does the purpose to be served by a freeze date indicate that it must in every case be stated prospectively.'

Again Beatson LJ said the 'freeze date' powers demonstrated 'a concern for entryism and packing of the Party'.

Finally the judge below had partly relied on a letter from the Labour Party's solicitors written in the course of the *Jeffers* case. That letter had said that the purpose of 'freeze date' powers was to 'prevent individuals seeking to become members after an election process had begun'. Beatson LJ ruled that reference to this letter was 'misplaced' as an aid to construction of the Labour Party rule book.

What was the court's view on the Labour Party's rule book?

Whilst a number of criticisms were levelled at the rule book by all counsel and judges at the Court of Appeal hearing, in the end Beatson LJ was more measured about his assessment of it. In his judgement he said this:

'10. The Rule Book is a detailed document containing 15 chapters and 8 appendices. As stated by Foskett J in Foster v McNicol ... it is not the product of a single drafting exercise. The result is ... that it contains examples of "untidy draftsmanship".'

Are there any surprises in the judgment?

The biggest surprise is the legal analysis of Beatson LJ in paragraphs 47 and 48 of the judgment of the Court of Appeal. This contains an analysis of the NEC's powers and a detailed consideration of contractual discretionary powers with a comparison of these with corresponding ones in the public law field. In total Beatson LJ relies on 10 prior court authorities. With the exception of *Braganza [2015] UKSC 17* none of these were in the parties' skeleton arguments, referred to at the hearing or were in the authorities bundle. Beatson LJ was a professor of contract law before he became a judge. The analysis especially in paragraph 48 would seem to represent Beatson LJ's own views on an area that he maintains a special interest in.

Did the court make any ruling about the website?

The extracts of the website produced to Hickinbottom J made it clear that there was no such restriction on new members voting for party leader until the text was changed on 13 July 2016. Hickinbottom was clearly influenced by this in coming to his ruling. There was no reference to the website in either side's skeleton argument for the appeal and Beatson LJ does not refer to it either in his judgement. In another Court of Appeal case (*Alexander v West Bromwich [2016] EWCA Civ 496*) it was also not assisted in his enquiry by a reference to screen dumps from a website.

Nevertheless this case is a salutary reminder of the need to ensure that website text – be it displayed on PCs or tablets or smartphones – is kept up to date and accurately reflects an organization's offering.

Will there be a final appeal to the Supreme Court?

At the handing down hearing, Mr David Goldstone QC made an application on behalf of the members for permission to appeal to the Supreme Court. He said that his instructing solicitors had established that the Supreme Court could hear this appeal as an urgent matter and that provisional arrangements had been made for a hearing on Tuesday 16 August 2016. After rising, permission for a final appeal was refused. However in order for an application for permission to appeal to be made to the Supreme Court it is necessary to have made an application first to the Court of Appeal.

How was this case funded?

Harrison Grant are the solicitors who acted for the members. On their website they say that the 'claimants funded their case through public donations' and that 'so far over 2000 supporters have helped.'

There is a dedicated portal for the crowd funding effort in this case. The link to this is here: www.crowdjustice.co.uk/case/labour-party-membership/. This says 'Labour Party members take action against their Party for denying their democratic right to vote in the forthcoming Leadership election'. At the date of writing this piece, the crowd funding portal was stating that it now had '£95,750 pledged by 5934 people towards £100,000 stretch target'.

What order for costs was made?

The Court of Appeal ordered the party members to pay the NEC's costs. These costs will have to go to a detailed assessment if they are not agreed. After retiring, Beatson LJ ordered the party members to make a payment on account of costs to the NEC of £30,000 within the next 28 days.

15th August 2016