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**Court of Appeal reserves
judgment on whether new
Labour Party members
can vote in forthcoming
leadership election**

*Ian McNicol v. Christine Evangelou, Leir, Fordham,
Granger and FM - A2/2016/3148*

Article by David Bowden

The Court of Appeal has reserved judgement in this case. The High Court had ruled that 5 members who recently joined the Labour Party were eligible to vote in the forthcoming leadership election. The judge below (Mr Justice Hickinbottom) 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. The Labour Party appealed this ruling to the Court of Appeal which was expedited and heard on 11 August 2016. Judgement was reserved to be handed down on 3pm on Friday 12 August 2016.

Ian McNicol v. Christine Evangelou, Leir, Fordham, Granger and FM
A2/2016/3148 11 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.

Who was in Court?

The proceedings were filmed and made available on the BBC website. There were 7 reporters in court from various national newspapers including the Daily Mirror. At the start of the hearing there were 20 people in the public gallery whose numbers swelled during the course of the hearing. The hearing was in the Master of the Rolls court which is the largest court and additional seating was made available. Lord Falconer of Thoroton QC was present for the entire hearing and provided instructions before and during the hearing. Mr McNicol was also there with the General Secretary of the NEC.

Who acted in this case in the Court of Appeal?

The Labour Party's NEC was represented by Peter Oldham QC before Hickinbottom J. For the appeal, a new team of counsel was instructed. The leader was Clive Sheldon QC (who acted for Sharon Shoosmith in her claim for wrongful dismissal by Haringey Council) and Julian Milford (both of 11 Kings Bench Walk).

The Labour Party members were represented by Stephen Cragg QC before Hickinbottom J. Surprisingly, considering they won below, for the appeal, a new team of counsel was instructed. The leader was David Goldstone QC of Quadrant Chambers who led Imogen Proud of Monckton Chambers (other members of which appeared below).

How did the Labour Party rulebook stand up to scrutiny?

Very badly indeed.

All members of the court were perplexed by its complex numbering which utilised a confusing mixture of Arabic numerals, Roman numerals, lower and upper case alphabet letters and lower case Roman numerals. It was not clear who had drafted the rule book originally. At the hearing, the NEC's counsel said recent policy work was put into Appendices including some work from the Collins review. In the morning, the NEC's counsel was unable to answer a straight question as to whether these appendices to the Rule Book formed part of it or not. In the afternoon he said that on instructions they did.

This will likely rebound badly on the Labour Party and its NEC who seek to rely on the rule book. As it is so complex, unwieldy and difficult to navigate, the clauses the NEC seek to rely on will be construed against it. It was clear during exchanges that little thought had been given to structural issues of the rule book and which parts were to have precedence. This would appear to be a surprising state of affairs for a party which recently was led by a lawyer. Whether the NEC put the rule book on a diet after this case remains to be seen.

What was the mood of those who came to court?

There was real anger from those Labour Party members who came to court, some of whom had also been to the hearing below. The anger split out as follows:

- The attempt to exclude new members from voting,
- The NEC decision to exclude,
- The NEC refusing to accept that new members did not have any freeze date imposed on them when they signed up,
- NEC bringing the court case,
- NEC refusing to accept the outcome of the judge below, and
- The large amount that has been spent and continues to be spent by the NEC of ordinary Labour Party members' money on legal fees which could have been better spent elsewhere.

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'*.

Finally the judge 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 submissions did the appellants representing the NEC make?

Rather grandly, Mr Sheldon submitted that the NEC was the *'custodian'* of the Labour Party's rule book and constitution. The NEC had much power reserved to it and was subject to endorsement at the annual party conference. On a challenge by Beatson LJ as to where the word *'custodian'* could be found in the Labour Party rule book, Mr Sheldon was forced to admit it did not appear and this was his descriptor.

It says 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 and this 'chimes' with the Labour Party rule book.

The NEC also relied heavily on *Foster* to make good its submissions.

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.

Foskett 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.

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. The true effect of that clause was better left until a case raising the issue arose. The court accepted unreservedly that where a decision required consideration of background material beyond the precise wording of a rule, the NEC might be better placed than a court to consider the implications in their political context. However, it could not be said that a fundamental interpretation issue would be outside the province of the court. The court's power was not simply to determine whether a decision of the committee was honest and reasonable, but whether it was right or wrong.

What was the new point the Labour Party tried to make?

The NEC at the hearing sought to amend its Grounds of Appeal to make 1 new additional point. This was to refer to the breadth of the NEC's powers given to it within the Labour Party rule book. The Labour members objected to this because it was not pleaded before the judge below.

What did the Court rule on this new point?

All 3 judges were concerned by an attempt to run a point of this nature so late. They noted that whilst Mr McNicol had given a witness statement, he had not been cross-examined on this because the case below turned only on construction of the rule book. The judges said that if the new point was raised below then the evidence would have needed to have been tested and the members would be deprived of this opportunity. In the end, Mr Sheldon withdrew his attempt to run this new point but merely asked the court to consider the NEC's powers as part of the overall 'flavour' of the NEC's case.

What submissions did the new Labour party members make?

They reiterated their case made below before Hickinbottom J. They submit 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

Was there a Respondent's Notice?

No. The Labour party members did not put in a Respondent's Notice seeking to affirm the decision of the judge below on other grounds. Lord Justice Beatson noted in one exchange with Mr Sheldon QC that there was no rationality challenge in this appeal. He observed that there was no Respondent's Notice from the members on this or indeed as to the 6 month freeze date.

What interventions did the judges make? What points seemed to be troubling them?

Lord Justice Beatson's initial comments were directed to the large number of Roman numerals in the Labour Party rule book. Beatson was a professor of contract law and his first concerns related to the materials a court could use to construe a contract. He challenged the NEC's counsel that it was trying to rely on materials such as the Collins review in a private law context as though he were defending a rationality challenge on a judicial review. Beatson challenged the 6 month freeze date and questioned what would happen if it were made 12 months or a period of years much further back. In response the NEC's counsel said its decisions were subject to ratification at the party's annual conference and if the NEC overstepped the mark and tried to set a very long freeze date, it would face a challenge from its members there. Beatson LJ correctly interrupted to say that the Supreme Court in *Arnold* set out 3 different concepts to contractual interpretation. In an exchange with the members' counsel in the afternoon, he noted that there were '*not may case where unreasonableness of the result gets you home*'.

Lady Justice Macur made the least interventions overall. Her first intervention showed she had read the Labour Party rule book quite carefully. She challenged the NEC's counsel about some of the powers and said some of the provisions were there to empower an independent scrutineer (and not the NEC) to decide. She asked if the Collins report recommendations were incorporated into the rule book or not. She also questioned whether the terms in the rule book about setting eligibility criteria for voting in elections were ones of substance or were procedural only. Macur LJ was concerned about the imposition of a retrospective date for eligibility.

Lord Justice Sales kept his powder dry early in the hearing and was the last judge to intervene. His first intervention related to the 'freeze date' which he said on his reading of the rule book was a 'composite freeze date'. He categorised it as having 2 conditions – that a member had been a member by 12 January 2016 and also continued to be a member in July noting that if subscriptions were not paid then membership could lapse. As to some specific clauses in the rule book he said he struggled to see how they applied directly and was concerned about the breadth of the powers given to the NEC. He then turned his fire to the appendices to the rule book noting that Appendix 2 were 'procedural guidelines' and Appendix 3 were NEC powers on '*freeze dates*' and questioned what the status of the appendices was. Mr Sheldon QC said he was told the appendices were part of the rule book and therefore part of the contract with Labour Party members. Sales LJ questioned how retrospective freeze dates worked, saying it seems the NEC had a power to issue guidelines and it **assumed** it could set a retrospective freeze date if it had the authority of party conference to do so. In the afternoon Sales LJ turned to the question of member's arrears and eligibility to vote. He intervened to say that the NEC regulates when people cease to be members because they are in arrears and though the power on that in the rule book was limited to just that case.

What did the Court say about judgment in this case?

The court rose for 5 minutes at the end of the hearing. On returning Beatson LJ said that judgement would be handed down 'not before 3pm on Friday 12 August 2016'. Although a draft will be provided to counsel one hour beforehand to check for errors, this is to remain confidential to counsel and is not to be released to either solicitors or the parties. Beatson LJ clearly said '*we will also try to provide written judgements before that*'. It is likely that we will see more than 1 judgement and it is not clear from this indication whether the judgement will be unanimous or not.

11th August 2016