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High Court rules new Labour Party members can vote in forthcoming leadership election

*Evangelou, Leir, Fordham, Granger & FM v. Ian
McNicol [2016] EWHC 2058 (QB)*

Article by David Bowden

The High Court has ruled that 5 members who recently joined the Labour Party are indeed eligible to vote in the forthcoming leadership election. In construing the Labour Party rules as a matter of contract law, Mr Justice Hickinbottom ruled that the actions of the National Executive Committee which attempted to set a cut-off date were invalid. Further as a matter of contractual interpretation a party member under the age of 18 years could not be excluded from voting in the leadership election either. The Labour Party has said it intends to appeal this ruling to the Court of Appeal which will be expedited and may be heard on 11 August 2016.

Evangelou, Leir, Fordham, Granger & FM v. Ian McNicol
[2016] EWHC 2058 (QB) 8 August 2016
High Court of Justice, Queen's Bench Division (Mr Justice Hickinbottom)

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. The minor member also makes an age discrimination challenge.

What does the Labour Party rule book say?

The constitution of the Labour Party is set out in its 2016 Rule Book. The Labour Party is an unincorporated association. The relevant conditions in its rule book are:

- **Clause VI (1)** – the work of the Labour Party 'shall be under the direction and control of Party conference....'
- **Clause II (1)** – the NEC 'shall, subject to the control and directions of the Party conference, be the administrative authority of the Party'.
- **Clause X(5)** - '... any dispute as to the meaning, interpretation or general application of the constitution, standing orders and rules 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 2** - 'There shall be individual members of the Labour Party who shall pay a subscription in accordance with these rules, subject to a minimum....'
- **Chapter 4 Clause I** - 'Internal Party elections for officer posts... shall be conducted in a fair, open and transparent manner, in accordance with the constitutional rules of the Party and any appropriate NEC guidelines.'
- **Chapter 4 Clause II (iv)**- 'The timetable for the election, including any freeze date, and the procedures for agreeing the list of those eligible to vote must be approved by the Independent Scrutineer.'
- **Appendix 1** - 'Members enjoy the formal democratic rights of Party membership as stated within the rules. Party members have the right to participate in the formal process of the Party, vote at Party meetings, stand for Party office....'

What did the website of the Labour Party say?

All 5 claimants joined the Labour Party via its website. The 'terms and conditions' section stated the following:

- *By applying to become a member of the Labour Party you agree to accept and conform to the constitution, programme, principles and policy of the Party....*
- *Your provisional membership rights commence from the date your membership is recorded on the national membership list.*
- *Your provisional membership lasts 8 weeks and during that time you can attend your Labour Party meetings in a non-voting capacity and your membership can be rejected – you would be advised in writing and depending on the reason you could have a right of appeal.*
- *Full membership rules and procedures are available in the Labour Party rule book.'*

In the 'Membership explained' section it said:

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'Where could my membership take me?

As a member, you'll be a key part of our election winning team. You'll be eligible to vote in leadership elections....'

From 13 July 2016 the words 'You'll be eligible to vote in leadership elections' were removed.

What is the relevance 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 were the issues the High Court was asked to address?

There were these 3 issues for the judge:

- Did the rule book of the Labour Party allow it to exclude from voting for leader those individuals who had been a member for less than 6 months?
- Was there an implied term and/or a misrepresentation made to new members that they could vote in leadership elections?
- Did the Labour Party discriminate on the grounds of age by not allowing members under the age of 18 to vote in its leadership election?

What do the Labour Party members say?

They say 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.

What does the Labour Party say?

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.

Are there any prior authorities of any relevance?

These authorities are highly relevant:

Dawkins v. Antrobus (1881) 17 Ch 615 (Court of Appeal – Jessel MR)

The constitution and rules of an unincorporated association are generally regarded as intended to be comprehensive, and further terms will not readily be implied. These can only be altered in accordance with the constitution and rules themselves.

John v. Rees; Martin v. Davis [1970] 1 Ch 345 (High Court, Chancery division, Megarry J)

A person who joins an unincorporated association does so on the basis that he will be bound by its constitution and rules, if accessible, whether or not he has seen them and irrespective of whether he is actually aware of particular provision

Choudhry v. Treisman [2003] EWHC 1203 (Comm) (Stanley Burnton J)

The Labour Party is an unincorporated association with rules which constitute a contract to which each member adheres when he joins the Party.

Chartbrook Ltd v. Persimmon Homes Ltd [2009] UKHL 38 (House of Lords – Lords Hope, Hoffman, Rodger, Walker & Lady Hale)

The proper interpretation of a contract is a matter of law for the court. It court focuses on the wording of the contract. If the words are clear and unambiguous, then there is no need to look outside them. However, if the natural and ordinary meaning of the words is unclear or ambiguous, then the court will consider the relevant context, being concerned to identify the intention of the parties by reference to

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'what a reasonable person having all background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'.

Jeffers v. The Labour Party [2011] EWHC 529 (QB) (High Court, QBD, Wyn Williams J)
The imposition of the freeze date prevents additional individuals seeking to become members after the election process has begun. 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 units.

Nattrass v. UK Independence Party [2013] EWHC 3017 (Ch) (HHJ Purle QC)
A court should approach with great caution any claim which seeks relief in the form of interference in the processes of a political party.

What did the court decide on the main claim?

The judge said that

'Whilst I accept and fully endorse the proposition that the courts must be careful not to interfere in political matters, the claim before me concerns the proper interpretation of the contract between members of the Labour Party inter se.... the question with which I have to grapple is apolitical. It is a question of pure law. The question is this: under the contract between members of the Party that is set out in the Rule Book, was there an agreement that the NEC should have the power to restrict the members who are able to vote in the leadership election to those who have continuous membership since 12 January 2016?'

He ruled that Chapter 4 Clause II(2)(C)(vi) read with Chapter 2 Clause I(2) *'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'*. The judge noted that:

- the phrase *'freeze date'* first appeared in the Labour Party's Rule Book in 2016 (and not in any earlier version),
- it *'suggests a crystallization of matters from a current or future time, not a reversion to a past state of affairs'*, and
- applying *Jeffers* freeze dates could not be imposed *'after the election process has begun'*.

Further 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'*. To conclude on this issue the judge said:

'87. 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 did the court decide on misrepresentation and implied terms?

As the claimants succeeded on the main issue, the judge said *'I need say no more about them'* but he indicated at the hearing that he saw a *'difficulty in implying terms into a contract such as this'*.

What did the court decide on the age discrimination issue?

Section 4 of the Equality Act 2010 provides:

'4 The protected characteristics
The following characteristics are protected characteristics —
age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity;
race; religion or belief; sex; sexual orientation.'

The judge ruled that FM would be able to vote because of his determination on the main issue: FM had been a Labour Party member and when he joined there was no restriction on voting in leadership elections on the Labour Party website. If the judge had had to consider age discrimination he said that he was *'unpersuaded'*. Not only was there a procedural difficulty in that discrimination claims under the 2010 Act have to be brought in a County Court (rather than the High Court) but that exercising his discretion the age discrimination claim had now become *'hypothetical'*.

Will there be an appeal?

The order that judge made says that '*There shall be liberty to apply in relation to relief on 48 hours' notice*'. The Labour Party says it wants to appeal. An appeal will lie with permission to the Court of Appeal. It is currently on summer vacation. There is a possibility that the appeal will be heard on 11 August 2016.

What are the practical implications of this decision for the Labour Party?

Unless this decision is over turned on appeal, it will have to allow everyone who joined the Party before 13 July 2016 to vote in its leadership election. Although not disputed, those who paid the £25 fee and met the eligibility criteria as registered supporters will also be able to vote as well. Whether this benefits the incumbent leader or his challenger remains to be seen.

What wider lessons can be learned from this case about websites and contracts?

The extracts of the website produced to the court made it clear that there was no such restriction there until the text was changed on 13 July 2016. This 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. The contract was construed against party seeking to rely on it here. It was helpful that there was the Collins report which made the judge's task of interpreting the contract between the Party and its members considerably easier and shone a light on what had been done when the rules had been changed.

8th August 2016

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