

Opinion on The Birmingham Labour Party Selection Process for Local Government Candidates

The Birmingham Labour Party has recently issued its policy on the upcoming local government elections and has set membership criteria, namely a 'freeze date' for taking part in the selection of candidates as requiring membership of the Labour Party prior to June 2015.

I have offered to provide an opinion on this decision and its wider legality. As I am not engaged professionally by any party to the matter at issue and am not a member of the Bar of England and Wales but only of the Northern Ireland Bar this advice should not be relied upon as professional legal advice.

A Summary of the General Legal Position Applying to Unincorporated Associations.

The Labour Party is an unincorporated association. As such, it has no separate legal personality from that of its individual members and as a matter of law is not a legal entity distinct from them. It is, however, subject to rules, currently those in the 2016 Rule Book and any associated local rules of The Birmingham Labour Party. The nature of the relationship between an unincorporated association and its individual members is governed by the law of contract: -

- a. The contract is found in the rules to which each member adheres when he or she joins the association.¹
- b. A person who joins an unincorporated association thus does so on the basis that he or she will be bound by its constitution and rules, if accessible, whether or not he or she has seen them and irrespective of whether he or she is actually aware of particular provisions.²
- c. The constitution and rules of an unincorporated association can only be altered in accordance with the constitution and rules themselves.³
- d. BOTH parties to the contract MUST have a "meeting of minds" they have to have the same knowledge about the terms of the contract and be availed of the conditions of it. So if one party acts outside of any of the elements that make up the contract then it follows, that the other party does not have to abide by that particular term.

Because the nature of the relationship between an unincorporated association and its individual members is governed by the law of contract the proper approach to the interpretation of the constitution and rules is governed by the legal principles as to the interpretation of contracts, and is a matter of law. The approach is thus that set out in cases such as *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14], *Arnold v Britton* [2015] UKSC 36, [2015] AC 169 at [15] and [18], and *Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843. The intentions of the parties to a contract will be ascertained by reference to what a reasonable person having all the background which would have been available

¹ *Choudhry v Tresiman* [2003] EWHC 1203 (Comm) at [38] per Stanley Burnton J.

² *John v Rees* [1970] 1 Ch 345 at 388D – E; *Raggett v Musgrave* (1827) 2 C & P 556 at 557.

³ *Dawkins v Antrobus* (1881) 17 Ch D 615 at 621, *Harington v Sendall* [1903] 1 Ch 921 at 926 and *Re Tobacco Trade Benevolent Society (Sinclair v Finlay)* [1958] 3 All ER 353 at 355B – C.

to the parties would have understood the language in the contract to mean, and it does so by focusing on the meaning of the words in the contract in their documentary and factual context.

The meaning has to be assessed in the light of the natural and ordinary meaning of the words, any other relevant provisions of the contract, the overall purpose of the clause in the contract and the facts and circumstances known or assumed by the parties. In this context, this means the members of the unincorporated association, the Labour Party. In *Foster v McNicol* [2016] Foskett J, relying on *Jacques v AUEW* [1986] ICR 683 at 692, stated that the court can take into account “the readership to which” the rules of an unincorporated association are addressed when interpreting them.

The effect of the cases, in particular *Arnold v Britton*, is that the clearer the natural meaning of the centrally relevant words, the more difficult it is to justify departing from it. In *Arnold v Britton* the majority of the Supreme Court adjusted the balance between the words of the contract and its context and background by giving greater weight to the words used. The court will more readily and properly depart from the words of a contract where their meaning is unclear or ambiguous, or where giving them their natural and ordinary meaning would lead to a very unreasonable result. As to the latter, while it is illegitimate for a court to force on the words of a contract a meaning which they cannot fairly bear, in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 Lord Diplock stated (at 251) that:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more necessary it is that they shall make that intention abundantly clear”.

In both categories of case the court will consider the relevant context, being concerned to identify the intention of the parties by reference to “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”. This approach was affirmed by the Court of Appeal in *Evangelou and ors v McNicol* [2016] EWCA Civ 817.

The Birmingham Labour Party

It might be suggested that the Birmingham Labour Party is a separate unincorporated association with its own rules that is affiliated to the Labour Party but the case law in *Lewis v Heffer* [1978]⁴ would suggest that is not correct. In the application of Labour Party rules to Birmingham - It is clear that the rules apply to "all units of the party" and Birmingham can only adopt modifications to those rules in the limited circumstances in which the NEC has the discretion to approve such modifications to the national rules.

The correct interpretation of these facts are that The Birmingham Labour Party is therefore a contiguous part of the Labour Party and its rules must conform to the terms of the national rule book and any additional local rules which are subject to approval by the NEC of the Labour Party. Any local modifications must be made subject to the stated process of amendment, alteration or addition as detailed in the rules.

⁴ *Lewis v Heffer* [1978] 1 WLR 1061 (CA).

Lewis v Heffer [1978] per Lord Denning, Master of the Rolls:

*“Each of the parties – the national and the local constituency party – was in law an unincorporated association and each a separate entity as Sir Robert Megarry, Vice-Chancellor, said in **John v Rees ([1970] 1 Ch 345, 389)**; but they were inextricably tied together. The legal bonds between the two associations were as tight as rules could make them. When a person joined a local constituency party he became at the same time a member of the national party. In the eye of the law he entered into two contracts, one with other members of the local party, one with the other members of the national party. He was taken to agree to both and to be bound by the rules of both. So, there were two sets of rules – the national rules (yellow book) and the local constituency rules (white book) and they must be read together.*

It then became apparent that the local constituency party was in no sense an independent organisation. It did not make its own rules or change them. Its rules were prescribed for it by the national party conference. They could not be changed except by the conference or by the NEC. If any question arose on them it could be referred to the NEC and their decision was final.

The NEC had direct power to discipline any member of a constituency party. They had also the duty and power to enforce party rules.

A constituency party could not be regarded as independent of the national party nor could its members. It was like a regiment. Each individual was a member of his unit but was also a member of the whole. His unit was subject to the directions of the High Command; and so was he. And that High Command in the NEC was subject of course to the party conference.”

Whilst Lewis v Heffer related directly to a CLP in applying the case law to the facts of the operation of The Birmingham Labour Party it is clear that whilst it is not a Constituency Labour Party (CLP) it is clearly not a separate unincorporated association or affiliated organisation but rather a contiguous undefined ‘party unit’ of the wider unincorporated association the Labour Party. The appropriate rules that would apply to The Birmingham Labour Party and would therefore amount to the material contractual terms between members would be the appropriate Labour Party Rules for a ‘Party unit’ with such local modifications, if any, that it would be within the contractual authority of the NEC to sanction.

The remaining contractual provisions between members would be those rules that The Birmingham Labour Party members agreed between themselves that dealt with those areas on which the Labour Party Rules were silent and thus these Birmingham rules would constitute additional contractual obligations applying only to Birmingham members of the Labour Party by way of their mutual consent to them. These rules are therefore also part of the contractual relationship between members and all the same legal obligations and rules of interpretation would apply to them as to the rules of the Labour Party rules at large.

The Birmingham Labour Party Rules.

The relevant additional rules that apply to The Birmingham Labour Party appear to be contained in the document Rules- May 2008 which is to be found on the Party Website.

In relation to the matter at issue the relevant clause is Clause VIII.

Clause VIII – Candidates

- VIII. 1. Candidates for the City Council elections shall be selected in accordance with **the rules for the selection of local government candidates laid down in chapter 5 of the national rules of the party** and in the selection guidelines appended thereto along with any other regulations approved by the NEC.
- VIII. 2. In the event of a by-election arising The Board shall consult with the Executive Committees of the CLP and branches/wards concerned to ensure that a candidate is selected as far as possible following the procedure referred to above. Under normal circumstances candidates will be selected by ward members from a short list drawn up by 3 members of this party, 3 members of the CLP EC and 3 members of the Branch/ward EC. In the case of an emergency, this party shall take whatever action that may be necessary to meet the situation and to ensure that the vacancy is contested by the party.

As stated above for reasons of the legal position of a party unit like The Birmingham Labour Party the general provisions of the national Labour Party Rules would have direct effect but this is specifically dealt with in The Birmingham Labour Party Rules:

Clause X – Miscellaneous

- X.I The general provisions of the constitution and rules of the party shall apply to this party.

Clearly no excepted local power exists in the Birmingham Rules for The Birmingham Labour Party to vary its local government candidate selection criteria in a manner that does not accord with the Labour Party National Rules at Chapter 5.

It is therefore necessary to consider the provisions of Chapter 5 of the Labour Party Rules 2016.

This chapter states at Chapter 5, Clause I.

Clause I.

General rules for selections for public office

1. The following rules shall be observed in the selections of all prospective elected representatives:
 - A. Rights of members participating in the selection process
 - i. All individual eligible members of the Party with continuous membership of at least six months (who reside in the electoral area concerned) are entitled to participate in selections. Any exceptions to this must be approved by the NEC.

Further it continues in Clause III.

Clause III.

Selection of local government candidates

1. The NEC shall issue procedural rules and guidelines for the selection of local government candidates. Local Campaign Forums, established in accordance with Chapter 12 of these rules, shall be responsible for implementing these guidelines in line with the rules detailed in Clause I.1 above and following. Local Campaign Forums shall agree their procedures with the appropriate RD(GS) or other designated officer approved by the NEC.
5. Individual paid-up members of the Party, resident in the electoral area where the selection is taking place and a member for at least six months at a date determined by the Local Campaign Forum, will be invited to participate in the process of shortlisting and selection of their local government candidate(s).
6. The shortlisting and selection of candidates shall consist of a vote, by eliminating ballot, of all eligible individual members of the electoral ward/ division on the basis of one member one vote.
8. Any exceptions to rules 1-7 above can only be made with the approval of the NEC or an officer exercising the powers given to them by the NEC.

Assuming it is correct that no power is separately vested within The Birmingham Labour Party under its own rules to limit voting at selection meetings to only members who joined after June 2015 then authority for such a policy would need to be found in the national rules. Chapter 5 Clause I. A.(i) clearly states that members with at least six months continuous membership are entitled to participate. Only the NEC (or such delegated authority) can approve an exception to this. Clearly the default requirement for taking part in selection meetings and voting to select candidates is intended to be six months continuous membership. However as reference is made to an NEC approved exception some provision must be expected to exist to allow for the application of such an exception.

This could arguably be detailed in Clause III at section 5. The section states “...a member for at least six months at *a date determined by the Local Campaign Forum*”. This might be interpreted as providing authority for a Local Campaign Forum to set a date from which the backdated six month period is to be calculated. As this section is nonspecific it might be arguable that an LCF could set any date that it wishes and thus has authority to set December 2015 as the beginning of the period from which to backdate an individual’s membership, thus requiring membership from June 2015.

However I would suggest that this interpretation has serious flaws. Whilst Chapter 5, Clause III. section 5 is nonspecific about the date to be determined it is clearly to be read in conjunction with the rule at Chapter 5, Clause I, this requirement is in fact reiterated at Clause III section 1. The rule in Clause I. A.(i) clearly states that members who have continuous membership for a period of six months are entitled to take part in selection. It is suggested the proper meaning of the Clause III section 5 date is therefore the date on which the LCF is to determine that the selection meetings are

to take place not any arbitrary date the LCF wishes. In this sense the discretionary authority of the LCF (or similar body) is contractually limited to the parameters of the broader rule on a six month period of membership prior to taking part in a selection meeting.

It is clear that the broader parameters of Chapter 5, Clause I. A.(i) can be varied by the exercise of discretion by the NEC. The authority to exercise this discretion can be delegated by the NEC under Labour Party Rules Chapter 1 Clause VIII. 5. This raises some questions:

1. Prior to the Board making its purported decision did The Birmingham Labour Party receive from the NEC procedural rules and guidelines for the selection of local government candidates? Did these include prior approval in writing from the NEC (or a delegated officer) to vary the six month period in Chapter 5 Clause I A(i)?
2. Has The Birmingham Labour Party applied for retrospective approval of this discretionary decision and has it been granted in writing by the NEC (or a delegated officer)?

Whilst it is reasonably clear that the NEC has a broad discretion to approve variations on the six month rule at Chapter 5 Clause I A (i) it is not untrammelled. It remains subject to the overriding principles of contract law and the proper interpretation of that contract and the lawful exercise of contractual discretion. This was affirmed by the Court of Appeal in *Evangelou and ors v McNicol* [2016] EWCA Civ 817.

A discretion conferred on a party under a contract is subject to control which limits the discretion as a matter of necessary implication by concepts of honesty, good faith and genuineness, and need for absence of arbitrariness, capriciousness, perversity and irrationality: see *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 134 at [66] and *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304, Rix LJ reviewed the authorities concerning the control of the exercise of a discretion conferred on a party under a contract, and (at [66]) stated:

*“It is plain from these authorities that a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury unreasonableness*, not in the sense in which that expression is used when speaking of the duty to take reasonable care or otherwise deploying entirely objective criteria ... ”.*

That approach was applied in *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, in which Baroness Hale stated that the principles to be applied were the same as those applied in public law cases, i.e. not only that the decision is made rationally and in good faith, but also that it is made consistently with its contractual purpose and, we add, that all relevant matters have been taken into account and irrelevant matters not taken into account. See also the judgment of Lewison LJ in *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265.

The legal concept of unreasonableness is also relevant to the exercise of contractual discretion. It is defined in the key authority *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*

[1948] 1 KB 223 [The Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that:

1. in making the decision, the defendant took into account factors that ought not to have been taken into account, or
2. the defendant failed to take into account factors that ought to have been taken into account, or,
3. the decision was so unreasonable that no reasonable authority would ever consider imposing it.

As Lord Greene, M.R said (at 229),

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

In applying these authorities a decision by the NEC (or such delegated officer) to approve the decision to set the 'freeze date' for membership as being in June 2015 is vulnerable to legal challenge on the basis that it is arguably in breach of the legal rules regarding the exercise of a contractual discretion.

Whilst the Court would not substitute its own discretion for that of the contractual authority in question it is difficult to imagine a decision which appears on its face to be irrationally targeting a particular class of members who joined subsequent to a particular event, namely the election in 2015 of Rt Hon Jeremy Corbyn MP as leader of the Labour Party can be found to have been made honestly, in good faith and genuineness?

It would also seem vulnerable to challenge on the basis of Wednesbury unreasonableness in that it has taken into account factors it ought not to have taken into account i.e. the election of a new leader of the Labour Party. This is not a relevant factor in determining a members entitlement to select local government candidates.

Essentially the Court would look to identify if the discretion in question was being exercised in a manner that was an abuse. The factual situation here does seem prima facie to indicate a potential or actual abuse of the contractual discretion.

Conclusion

It is my opinion that The Birmingham Labour Party either through its own rules or under those rules of the Labour Party that are applied to it has no separate power, or authority to impose a rule requiring membership of the Labour Party prior to June 2015 for members taking part in selections of local government candidates.

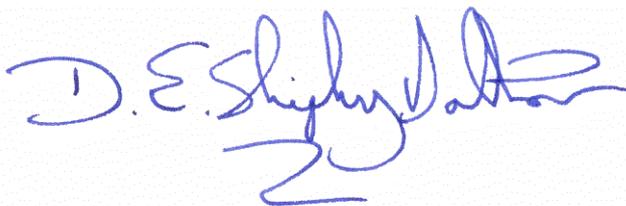
The only body that could legitimately approve such a rule would be the Labour Party National Executive Committee (NEC). The discretion in regard to this restriction on members taking part in selection meetings in Birmingham is therefore solely within the power of the NEC.

In the event that the NEC were to exercise their discretion to allow this restriction on members taking part in selection meetings then it could be subject to legal challenge on the basis of arbitrariness, and a lack of honesty, genuineness and good faith. It would also potentially be vulnerable to challenge on the basis of Wednesbury unreasonableness in the exercise of the contractual discretion.

My recommendations are:

1. That if the NEC has not done so already then the requested approval by The Birmingham Labour Party should not be granted. If the NEC has already given approval then this should be rescinded.
2. If it has not already done so then the NEC should issue the appropriate procedural rules and guidelines for the selection of local government candidates to Birmingham Labour Party specifying the normal period of six months membership at the time of the selection meeting as required in Chapter 5, Clause I. A (i) as being the appropriate period.

Signed:

A handwritten signature in blue ink, reading "D. E. Shipley Dalton". The signature is written in a cursive style with a large, stylized "D" and "S".

Duncan Shipley Dalton LL. B(Hons), LL.M, CPLS, MPA(Harvard) Barrister-at-Law(non-practicing).