

# Membership Termination, Implied Terms and Natural Justice

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## The *Dymoke v. Association for Dance Movement Psychotherapy* decision

1. How to deal effectively with membership termination is a problem which applies universally to companies; corporations; associations; societies and other bodies. Frequently the express contract terms that govern the relationship between a member and its organisation do not make provision for the circumstances in which the individual's membership can be terminated.
2. In the recent decision of *Dymoke v. Association for Dance Movement Psychotherapy* [2019] EWHC 94 (QB) (25th January 2019), involving the membership of a company limited by guarantee, Popplewell J. confirmed there is an implied duty to act fairly in the decision to terminate membership where the contract terms do not provide for such a scenario. Although, what procedural fairness requires in practice may vary from body to body.

## 3PB's Analysis

3. **The facts.** The Defendant was a company limited by guarantee whose purpose was to promote dance music therapy (“DMP”).
4. The Claimant, successfully represented by Mr Leviseur of 3PB, was a teacher who had a background in theatre and dance. She became a registered member of the Defendant in 2002; a member of its Council in 2009; and its Chair in 2012.
5. In summary, between 2004 and 2006, the Claimant undertook a teacher training course with Ms Cohen who is the licensed holder of Body Mind Centering (“BMC”). This training allowed the Claimant to hold a licence in BMC and she played an important role in setting up

an association called ‘Embody Move Association’ (“EMA”).

6. The Defendant accredited an MA University Course which ran at a University. EMA licensed the BMC part of the MA course and the Claimant was employed as a part time senior lecturer to coordinate and teach the BMC elements of the course.
7. The Claimant's membership of the Defendant was terminated on the basis that there were two conflicts of interest in respect of her conduct of the MA University course. However, the claim was not focused on whether said conflicts justified termination, instead the focus was on the procedure adopted. The Claimant brought a claim in contract and contended that the Defendant breached the following terms in relation to the decision to terminate the Claimant's membership:
  - 7.1. the implied term that it would comply with the rules of natural justice in relation to the decision; and
  - 7.2. the express terms of the procedural codes generated by the Defendant.
8. In the alternative, the Claimant brought a claim based on the principle set out in *Nagle v. Fielden* [1966] 2 QB 633 which provides that the rules of natural justice be observed, irrespective of contract, where the decision maker has a degree of power or control over the person's ability to work in a chosen field.
9. It was accepted by both parties that the articles of association; a code of ethics and complaints procedure, formed the express terms of a contract between the Claimant and Defendant.
10. **The Decision.** The rules of ‘natural justice’ are flexible and fact specific: they “*will often, but not always, require a person adversely affected to have an opportunity to be heard, depending on*



*the circumstances*" (at [57]). This accords with the duty being regarded as 'a duty act fairly'. Further, it was established that the exercise of a discretion conferred by one party to another should be exercised in "good faith and not arbitrarily, capriciously or unreasonably in the public law sense of *Wednesbury unreasonableness*" (at [59]; see Socimer International Bank (in liquidation) v. Standard Bank London Ltd [2008] EWCA Civ 116, [200]). Whilst the decision maker's duty depends on the relevant terms and the context, "there are signs that the contractual implied term is drawing closer and closer to principles in judicial review" (at [59]; see Braganza v BP Shipping Ltd [2015] 1 WLR 1661, SC).

11. The implied duty to act fairly was not inconsistent with the articles of association considered here and with the fiduciary duties of the directors (including section 172 Companies Act 2006):

*"What fairness to a member requires in any particular case is informed by the interests of the company as a whole as well as the interests of the individual member concerned. But that does not mean that the directors should be free to reach sanctioning decisions in a way which is disadvantageous to a member concerned where there is no sufficient interest in doing so for the company as a whole; indeed s172(1)(f) would require the directors to act fairly towards a member insofar as behaving in that way did not impinge on any of the other considerations: it is not generally in the interests of a company as a whole to treat any individual members unfairly when deciding whether to sanction them"* (at [62]).

12. Notably, it was emphasised in relation to what procedural fairness demands, that this may vary from body to body: "A small voluntary organisation may not be expected to employ the more formal and elaborate procedures which are required of larger and better resourced organisations" (at [63]).
13. It was concluded that it was an implied term of the contract that the Claimant would be treated fairly in relation to her termination. Specifically, that the Claimant would be informed of the complaints in sufficient detail to enable her to

respond to them and that she would be given a reasonable opportunity to respond. This duty also applied to the relevant part of the process which evaluated whether the sanction of termination was justified (at [65]; see Marks & Spencer Plc v BNP Paribas Securities Services Trust Co [2015] UKSC 72).

14. The Defendant breached the express and implied terms identified in the judgment in a number of ways (at [67]):
- 14.1. the criticisms made against the Claimant had never been articulated to her;
- 14.2. the Claimant was not given a fair opportunity to respond to the concerns raised, before receiving the termination letter;
- 14.3. the Claimant was not given the opportunity to deal with whether her conduct warranted the sanction of termination of membership;
- 14.4. the decision was made by the three members of the Council without notice of consultation with other Council members;
- 14.5. during the process the Claimant was not kept appropriately informed; and
- 14.6. the decision imposing the sanction here was irrational and contrary to the express terms.
15. In Gaiman v National Association for Mental Health [1971] Ch 317, a company limited by guarantee passed a resolution which terminated the membership of members known or reasonably suspected of being Scientologists. Megarry J. held that there was no implied term that the rules of natural justice would be observed in that case. That case was distinguished on the basis that, if it held that the principles of natural justice cannot be implied into a contract between a company limited by guarantee and its members, that was inconsistent with subsequent case law. Further, the facts of Gaiman were distinguishable (see at [64]).



16. Given the above, Nagle v Fielden was not considered in detail. Although, it was considered unlikely such a principle applied to the Defendant because the Defendant did not decide whether a dance movement psychotherapist was eligible to practice.

### Impact of the Decision

17. This decision provides helpful guidance for bodies where the express contract terms fail to make provision for the circumstances in which membership can be terminated. Although the requirements of procedural fairness in practice may differ from body to body, the starting point is that there is a duty to act fairly.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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