

D/17/22-23

Decision of the Certification Officer on an application made under Section 108A of the  
Trade Union and Labour Relations (Consolidation) Act 1992

McKay

V

UNISON: The Public Service Union

Date of Decision

01 November 2022

## Contents

Decision .....	3
Reasons .....	3
Findings of Facts .....	4
The Relevant Statutory Provisions .....	4
The Relevant Rules of the Union .....	5
Considerations and Conclusions .....	6
Enforcement Order .....	7

## Decision

1. Upon application by Mr Gordon McKay (“the applicant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

Following the Union’s acknowledgement that it had acted in breach of its Rules I grant a declaration that on, 15 March 2022, the Union breached Rule I.5.3 when the NEC did not ‘consider the result’ of the disciplinary investigation report before deciding whether a charge should be brought.

2. I consider that it would be appropriate to make an enforcement order. I order that:

The Union implements the agreement, set out in their e-mail to me of 27 October 2022 and at paragraph 13 below, by 1 April 2023.

## Reasons

3. Mr McKay submitted an application to make a complaint on 7 April 2022. Following correspondence with my office, Mr McKay, confirmed his complaint as follows:-

That on or around 15 March 2022, the union breached Rule I.5.3 when the NEC did not ‘consider the result’ of the disciplinary investigation report before deciding whether a charge should be brought. In particular, no reasons were given to why the report should be rejected, the NEC did not see the report, no questions or debate was allowed. The union also broke with the historical practice of agreeing recommendations from disciplinary investigation reports. This means no reasonable person could come to the conclusion that the union ‘considered the result of the investigation’ in its proper meaning.

## **Findings of Facts**

4. Mr McKay is a member of the Lothian Health Branch and UNISON's Health Care Service Group and has a position on UNISON's ("the Union") National Executive Committee ("NEC").
5. Following an investigation under Rule I, the Vice Chair of the Development and Organisation Committee ("D&O") made a recommendation to the NEC at its meeting on 15 March 2022, that the cases which had been investigated should proceed to disciplinary hearings. The Committee voted to reject some of the Vice Chair's recommendations without giving reasons for their decision.

## **The Relevant Statutory Provisions**

6. The provisions of the 1992 Act which are relevant for the purposes of this application are as follows:-

### **108A Right to apply to Certification Officer**

- (1) A person who claims that there has been a breach or threatened breach of the Rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).
- (2) The matters are –
  - (a) the appointment or election of a person to, or the removal of a person from, any office;
  - (b) disciplinary proceedings by the union (including expulsion);
  - (c) the balloting of members on any issue other than industrial action;
  - (d) the constitution or proceedings of any executive committee or of any decision-making meeting;

(e) such other matters as may be specified in an order made by the Secretary of State.

### **108B Declarations and orders.**

(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements—

(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

(4) The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.

## **The Relevant Rules of the Union**

7. The Rules of the Union which are relevant for the purposes of this application are:-

### **Rule I Disciplinary action**

5.3 In any case, the body on whose behalf an investigation is undertaken shall consider the result of such investigation before deciding whether or not a charge should be brought.

### **2001 NEC Protocol**

#### **Reporting the result of the Investigation to the NEC**

The result of the investigation will be reported back to the NEC for consideration of whether or not charges are brought based upon a prima facie case being established. So as not to prejudice any members' case, the recommendation will be solely based upon a prima facie case being established or not. The report is not made available to the NEC as there is a string risk of prejudice to the member potentially facing charges under Rule I. This practice has been endorsed by the High Court.

In cases where a prima facie is established, subject to the NEC's approval, charges will be brought and a disciplinary panel convened in accordance with Schedule D to test the evidence.

## **Considerations and Conclusions**

8. I have been informed by Ms Shantha David, Head of UNISON Legal Services, that the normal practice of the Union is that, upon the conclusion of an investigation under Rule I, the Chair of the D&O is provided with the investigation report and its recommendations to determine whether or not formal charges should be brought. The recommendations are then reported to the NEC.
9. Ms David in her response made the following points:
  - a. That the custom and practice of the NEC, for at least the last 21 years, is to note the recommendations made by the Chair of the D&O who has been delegated to undertake a full review of an investigation before making a recommendation. Recommendations by the Chair are (generally) for noting, and once the recommendations have been "passed" by the NEC, a disciplinary panel is convened
  - b. That the NEC has not until the events of 15 March 2022 taken a formal vote in respect of Rule I recommendations, although the process allows for the NEC to check that any disciplinary 'charge' brought would constitute a

breach of the Union's Rules and that there is no procedural bar to accepting the Rule I recommendation.

- c. That at the NEC meeting on 15 March 2022, the Vice Chair of D&O, was deputed to take these decisions and having considered the entire investigation report and its recommendations determined that four Rule I cases would proceed to full Rule I disciplinary hearings. The report was put to the NEC for noting in the usual way so that the recommendations of the D&O Vice Chair could be pursued.
  - d. That the Chair of D&O put to the vote her decision to reject the Vice Chair's recommendations. The NEC voted in favour of rejecting without explanation the recommendations of the Vice Chair.
10. Mr McKay has not disputed the position as set out by the Union.
  11. The Union have conceded that the NEC, by taking a vote to reject the Vice-Chair's recommendations without giving reasons for doing so, breached Rule I.5.3 as their actions contravened the established processes for applying that Rule, including those contained in the NEC Protocol of 2001.

### **Enforcement Order**

12. As the Union have conceded a breach of Rule I.5.3, I must consider whether it is appropriate for me to make an enforcement order to remedy the breach. In doing so, I must also consider whether the Union have taken any steps to remedy the breach and if so, whether they are sufficient to remedy the breach and, where I believe that they are sufficient, include those within my declaration.
13. Following the Union's acknowledgement that it had breached its Rules, in the manner set out at paragraph 11 above, I asked both parties to explain what, if any, enforcement order would be appropriate. On 27 October 2022 the Union informed my office that both parties had agreed the following steps should be taken to remedy the breach.

The NEC is to reconsider recommendations 2.2 – 2.5 in the disciplinary report of 15 March 2022 which was undertaken in line with rule I.5.2. The reconsideration by the NEC will be conducted in accordance with Rule I.5.3 and the NEC's protocol; and established custom and practice, being to accept the recommendations of the Chair (or Vice-Chair in this instance) of the D&O Committee unless there are objectively exceptional reasons for not doing so, namely that such a recommendation would be in breach of the Union's rules or where a procedural bar operated, which should be recorded. This reconsideration will be conducted in accordance with fairness and the principles of natural justice, taking into account that the NEC does not see the investigation report.

14. Both parties appear to be satisfied that this will remedy the breach that has occurred. On that basis, and taking into account the Union's willingness to engage with Mr McKay, I am satisfied that it is appropriate for me to issue an enforcement order which requires the Union to implement the agreement it has reached with Mr McKay as set out at paragraph 13 above. The Union's Rules require that the NEC should meet at least four times in each calendar year. On that basis I think it reasonable to allow the Union six months, from the date of this decision, to comply with my Order.

A handwritten signature in black ink, appearing to read 'Sarah Bedwell', written over a horizontal line.

Sarah Bedwell  
The Certification Officer