

**DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE
UNDER SECTION 108A OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR P NARAIN

v

UNITE THE UNION (AMICUS SECTION)

Date of Decisions:

3 January 2008

DECISIONS

Upon applications by Mr Narain (“the Claimant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

1. I declare that Amicus breached rule 38 of its rules on or about 20 October 2005 by suspending the Claimant from office as a lay union representative on the grounds of alleged misconduct, which suspension was not carried out in accordance with rule 38. Amicus ceased to exist on 27 April 2007 upon amalgamation with the Transport and General Workers Union to form what is now Unite the Union (“the Union”), the agreed Respondent.

When I make a declaration I am required by section 108B(3) of the 1992 Act to consider whether an enforcement order is appropriate. I make an enforcement order in the following terms; Unite the Union shall forthwith treat the suspension of the Claimant from office as a lay union representative between 20 October 2005 and 30 January 2007 as invalid and ineffective for all purposes.

2. I refuse to make the declaration sought by the Claimant that Amicus breached rule 38(12) of its rules by not giving the Claimant a fair opportunity to respond to the charges against him, following the decision of its National Executive Council on 31 January 2007 to submit his case to a disciplinary panel and to continue his suspension.

REASONS

1. The Claimant is a member of the Amicus section of Unite the Union (“the Union”). By an application dated 23 November 2006, the Claimant made a complaint of breach of rule against Amicus, his then union, arising from his suspension as a lay union representative by Amicus on 20 October 2005. By a second application received at the Certification Office on 11 May 2007, the Claimant made a further

complaint of a breach of rule arising from the decision of the National Executive Council (“the NEC”) of Amicus on 31 January 2007 to submit his case to a disciplinary panel and to continue his suspension. Following correspondence with the Claimant, he identified two complaints which were confirmed by him in the following terms:-

Complaint 1

“On or around 20 October 2005 in breach of rule 38 of the rules of the union a disciplinary penalty was imposed on Mr Narain which consisted of his on-going suspension from office as a Union Representative.”

Complaint 2

“On or around 31 January 2007 the NEC of the Union suspended Mr Narain from office as a union representative. Given the length of time since Mr Narain’s original suspension on or around 20 October 2005 and that as Mr Narain’s potential witnesses are no longer available to him at the union’s disciplinary hearing, Mr Narain will not have been given a fair opportunity to respond to the charges laid against him by the union. This is a breach of rule 38(12) of the Union.”

2. I investigated the alleged breaches in correspondence and ordered that the two complaints be consolidated so as to be heard consecutively. A hearing took place on 13 December 2007. At the hearing, the Claimant represented himself. A witness statement from Mrs M Roberts was provided by the Claimant but she was not present at the hearing. The Union was represented by Mr Andrew Burns of counsel, instructed by Mr P Evans of Rowley Ashworth solicitors. Both parties provided written skeleton arguments. A 212 page bundle of documents was prepared for the hearing by my office, containing all the documents considered relevant by the parties. There was also before me a bundle of statements which had been prepared by the Union for use at the Claimant’s internal disciplinary hearing.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows:-
4. Unite the Union, the Respondent, was formed on 27 April 2007 by the amalgamation of Amicus and the Transport and General Workers Union (“the TGWU”). The rules of the Union provide for there to be two sections, known as the Amicus section and the TGWU section, which are to operate for a transitional period under their former rules in respect of their former members. The Claimant was a member of Amicus and became a member of the Amicus section of Unite the Union on 27 April 2007. It was agreed that the correct name of the Respondent is Unite the Union.
5. The Claimant is an experienced union representative, having held lay positions since 1986. He entered the employment of AXA-Life in Bristol in 1998 and has been an elected lay representative of Amicus and its predecessor unions there since 1999. At one time he was the Chair of the AXA-Life Bristol Representatives Committee. At the relevant time, in September/October 2005, the Claimant was a lay representative at his place of work, a member of the National Consultative Committee (“NCC”) of AXA-Life and a deputy representative on the Joint

Consultative Committee (“the JCC”). The JCC brought together union representatives from the three divisions, or operating companies, of AXA, namely AXA-Life, AXA-Insurance and AXA-Shared Services. The Claimant gave evidence that the position of lay representative is an elected one but that such elections are frequently not contested. He stated that he was last elected in 2004 and that he thought that his period of office was for two years.

6. On 21 September 2005 there was a meeting of the Joint NCC in London. The Union maintains that at this meeting it was agreed that the individual NCCs, in the three operating companies of AXA, should be combined to form a single NCC making decisions on trans-company issues. Those issues which related to a specific operating company would be decided by the NCC representatives from that operating company. The minutes of the meeting of 21 September 2005 record that all the NCC members from AXA-Life present at that meeting agreed with the proposal. The Claimant was not present at that meeting but disputes that an agreement was reached to form a single combined NCC.
7. On 3 October 2005, there was a meeting of the lay representatives at AXA Bristol. About seven or eight representatives attended, including the Claimant and two representatives who had attended the Joint NCC in London on 21 September. A third member who had attended that meeting arrived late. There is a conflict of evidence as to what occurred at this meeting. The Claimant maintains that he expressed his concern at what was being said about the outcome of the meeting on 21 September and was particularly concerned that it had not been the subject of proper prior consultation at local level. Others say that the Claimant conducted himself improperly in the way he expressed his views and questioned the representatives who had attended the Joint NCC.
8. After the meeting on 3 October 2005 there was an exchange of e-mails, arising out of which it is again said that the Claimant acted improperly.
9. The Regional Full Time Officer responsible for AXA-Life at that time was Mr Hugh Jones-Glass. He called a meeting for Tuesday 18 October 2005 of the lay representatives in AXA-Life to explain the decision that had been taken about having a combined NCC and other matters. About 12 representatives attended this meeting. There was again a conflict of evidence of what occurred at this meeting. The Claimant continued to express his concerns and objected to the way in which he was treated by Mr Jones-Glass. Mr Jones-Glass and others maintained that the Claimant behaved so inappropriately that the meeting had to be adjourned.
10. On 20 October 2005 Mr Jones-Glass sent an e-mail to the Claimant in which he stated, “*I have to inform you that your conduct at the meeting on Tuesday has left me with no other option but to suspend you as a Union Representative ...*”. Mr Jones-Glass also sent an e-mail that day to the Amicus Legal Officer, Ms Hirsch, informing her of what he had done and requesting that the General Secretary endorsed his action. Only minutes after receiving the e-mail from Mr Jones-Glass, the Claimant made a formal complaint about the conduct of Mr Jones-Glass at the meeting on 18 October, having previously indicated to Head Office his intention to do so. The Claimant has remained suspended from office within the Union since 20 October 2005.

11. On 29 November 2005 the General Secretary of Amicus, Mr Simpson, wrote to the Claimant informing him that the matter of his suspension would be discussed at the next meeting of the NEC to be held in January 2006. This did not happen and Amicus took no apparent steps in this matter until June 2006, despite the Claimant's frequent reminders.
12. On 6 June 2006 the Claimant sent an e-mail to the General Secretary making a formal complaint against Mr Fleming, the relevant National Officer, for his allegedly inept and incompetent handling of the matter. Immediately upon receipt of this e-mail, the General Secretary replied saying that he had passed the matter to the relevant Assistant General Secretary, Mr Doug Collins, for him to deal with.
13. On 27 October 2006 the Claimant sent an e-mail to various members at AXA-Life which the Union subsequently alleged amounted to bringing "injury or discredit" on Amicus.
14. In November 2006, having heard nothing further from the Union about his suspension, the Claimant submitted a Registration of Complaint Form to the Certification Office which was received on 24 November 2006. In this complaint the Claimant alleged that his suspension by Mr Jones-Glass was in breach of rule.
15. On 16 January 2007 Mr Collins completed his report to the General Purposes and Finance Committee and to the NEC into the events in question.
16. On 23 January 2007 the Certification Office wrote to Amicus putting to it the complaint that had been made by the Claimant.
17. On 31 January 2007 the NEC of Amicus discussed the Claimant's case. It agreed that the NEC Disciplinary Panel should consider the issues in his case and also agreed to "*confirm that Paul Narain's suspension as a workplace representative be ratified and continued pending investigation, and if appropriate, hearing of disciplinary allegations against him*".
18. On 12 February 2007 Ms Hirsch wrote to the Claimant putting to him two potential charges. As regards his suspension, Ms Hirsch stated "*In regard to your suspension as a workplace representative, this will be ongoing pending further investigation and your disciplinary hearing. The NEC made this decision at its meeting on 31 January 2007 and this letter is written notice thereof under Rule 38(6)*".
19. On 14 March 2007 there was a hearing of the Claimant's complaints against Mr Jones-Glass and Mr Fleming. The Claimant did not cooperate with the investigation and did not attend the hearing. The complaints were dismissed.
20. On 17 April 2007, the General Secretary wrote to the Claimant putting to him two specific charges and informing him of eight allegations which formed the basis of those charges. The Claimant was also sent copies of seven witness statements and various e-mails. He was informed that his disciplinary hearing would take place on 15 May in London.

21. On 27 April 2007 Amicus amalgamated with the TGWU to form what is now Unite the Union.
22. On 3 May 2007 the Claimant wrote to the Union stating that he did not intend to legitimise the Union's breaking of its own rules by attending a hearing prior to the Certification Officer completing his investigations.
23. The Claimant's second complaint to me was received at the Certification Office on 11 May 2007.
24. On 15 May 2007 the members of the Disciplinary Panel convened to hear the case against the Claimant. The Claimant did not attend. The Panel decided to adjourn the hearing pending the outcome of his complaints to me.

The Relevant Statutory Provisions

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

Section 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 removal of a person from, any office;*
- (b) disciplinary proceedings by the union (including expulsion);*
- (c) ...*
- (d) ...*
- (e) ...*

Section 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 Union Rules

26. The Rules of the Union which are relevant for the purpose of this application are as follows:-

Rule 38 Discipline

- (1) *A member may be charged by the National Executive Council with:
 - (a) *Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of lay office or a representative of the Union.*
 - (b) *Being a party to any fraud on the Union or any misappropriation or misuse of its funds or property.*
 - (c) *Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.*
 - (d) *Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, creed, gender, disability or sexual orientation.*
 - (e) *Bringing about injury to or discredit upon the Union or any member of the Union.**
- (2) *A member may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union.*
- (3) *The member shall be given written notice of the charge referring the member to this rule, the sub-paragraphs of clause (1) under which he/she is being charged and the circumstances giving rise to this charge.*
- (4) *A charge under this rule shall be heard by the National Executive Council.*
- (5) *If the General Secretary is aware of the circumstances which may lead to a member being charged by the National Executive Council under this rule, he/she may with the agreement of the Chair of the National Executive Council or, in his/her absence, 2 other members of the General Purposes and Finance Committee suspend that member from holding any office or representing the Union in any capacity until the end of the next National Executive Council meeting. A member shall be given written notice (or, if the member was informed verbally, written confirmation) of any such suspension as soon as reasonably practicable.*
- (6) *The National Executive Council may suspend a member charged under this rule from holding any office or representing the Union in any capacity pending its decision on the charge by sending the member written notice to that effect.*
- (7) *The National Executive may delegate all of its powers under this rule to a sub-committee consisting of not less than 3 members of the National Executive Council. It may also appoint a substitute or substitutes to take the place of any member of the sub-committee who is unable to fulfil his/her role on the sub-committee provided that a substitute shall not replace a member of the sub-committee after the hearing of a charge has begun unless the substitute has been present throughout the hearing.*
- (8) *The National Executive Council shall not delay unreasonably before charging a member and it shall investigate, hear and adjudicate on a charge as quickly as is reasonably practicable.*
- (9) *Written witness statements shall be prepared setting out the evidence on which the National Executive Council intends to rely. The National Executive Council shall send the member charged under this rule copies of all the witness statements and other documents to be relied upon in support of the charge. Within 28 days of being sent those documents, the member shall send to the*

National Executive Council copies of all additional witness statements and other documents on which he/she seeks to rely.

- (10) *At the hearing of the charge, the member shall be entitled to be accompanied and/or represented by another member of the Union who is not an employee of the Union. There shall be no right to legal representation on the hearing of a charge. If the National Executive Council considers that there are exceptional reasons which make legal representation appropriate, it may allow the member and the National Executive Council to be legally represented at the hearing.*
- (11) *At the hearing of the charge, the National Executive Council shall be entitled to require the member charged to answer questions related to his/her conduct, which is the subject of the charge.*
- (12) *The National Executive Council shall not take accounts of any allegations to which the member charged has not been given a fair opportunity to respond.*
- (13) *Subject to the provisions of this rule, the National Executive Council shall decide its own procedures for investigating, hearing and otherwise dealing with a charge under this rule.*
- (14) *A member against whom a charge is found proven shall be liable to one or more of the following penalties:*
 - (a) *Censure.*
 - (b) *Removal from all or any specified office(s) held in or on behalf of the Union.*
 - (c) *Disqualification from holding all or any such office for a specified period.*
 - (d) *Expulsion from the Union.*
- (15) *Within 28 days of the conclusion of the hearing of the charge, the member charged under this rule shall be notified in writing whether or not the charge has been found proven and if so, the penalty imposed and the members' right to appeal in accordance with this rule.*

Complaint 1

27. The Claimant's first complaint, received on 24 November 2006, was agreed by him in the following terms:

"On or around 20 October 2005 in breach of rule 38 of the rules of the union a disciplinary penalty was imposed on Mr Narain which consisted of his on-going suspension from office as a Union Representative."

28. Mr Burns, on the Union's behalf, conceded liability in this complaint.
29. In my judgment, the Union was correct to concede liability. The rules of Amicus at the relevant time provided that a member could be suspended from holding any office by the General Secretary (Rule 38(5)) or by the NEC (Rule 38(6)). The rules do not provide that a member can be suspended from office by a Regional Full Time Official. Accordingly, the suspension of the Claimant from office by Mr Jones-Glass on 20 October 2005 was in breach of the rules relating to discipline within Amicus. On the day that Mr Jones-Glass imposed the suspension, he also requested that the General Secretary endorse his action. If this had been done properly, the Claimant's suspension may have been brought within

Rule 38(5) and the period of any unlawful suspension minimised. However, it would appear that Mr Jones-Glass's request went unanswered.

30. Accordingly, I declare that Amicus breached rule 38 of its rules on or about 20 October 2005 by suspending the Claimant from office as a lay representative on the grounds of alleged misconduct, which suspension was not carried out in accordance with rule 38.
31. When I make a declaration I am required by section 108B(3) of the 1992 Act to consider whether an enforcement order is appropriate. I make an enforcement order in the following terms; Unite the Union shall forthwith treat the suspension of the Claimant from office as a lay union representative between 20 October 2005 and 30 January 2007 as invalid and ineffective for all purposes.

Complaint 2

32. The Claimant's second complaint, received on 11 May 2007, was agreed by him in the following terms:

“On or around 31 January 2007 the NEC of the Union suspended Mr Narain from office as a union representative. Given the length of time since Mr Narain's original suspension on or around 20 October 2005 and that as Mr Narain's potential witnesses are no longer available to him at the union's disciplinary hearing, Mr Narain will not have been given a fair opportunity to respond to the charges laid against him by the union. This is a breach of rule 38(12) of the Union.”

33. Rule 38(12) of the Rules of Amicus and the Amicus section of Unite the Union is in the following terms:

“The National Executive Council shall not take account of any allegations to which the member charged has not been given a fair opportunity to respond.”

Summary of Submissions

34. The Claimant submitted that Amicus had acted in such a way as to make it impossible for him to have “*a fair opportunity to respond*” to the charges against him. He argued that there was inexcusable delay between his suspension on 20 October 2005 and the events of 2007; namely the decision of the NEC on 31 January that a disciplinary panel should consider his case, the charges being put to him on 17 April and the proposed date of the disciplinary hearing on 15 May. The Claimant contended that no good reason had been advanced for this delay and that his case had been seriously prejudiced by it. He argued that the memories of the witnesses would inevitably be less reliable and that there were two witnesses who he had wished to call but who had since left their former places of work and for whom he now held no contact details. He also argued that he had been prejudiced by not having been given the charges against him, together with the supporting documentary evidence, until 17 April 2007 and that this had prevented him from preparing any defence whilst the memories of potential witnesses were fresh. He complained that most of the witness statements had been taken in April 2007, long after his suspension. He further complained that he had not been interviewed as part of the Union's investigation and that the terms of the General

Secretary's correspondence suggested that a fair hearing was unlikely. The Claimant also asserted that his unlawful suspension by Mr Jones-Glass was not made lawful by the decision of the NEC on 31 January 2007, as all the NEC had done was to ratify an unlawful act. He argued that there could not be a fair hearing taking into account the actions of the NEC, which had ignored the fact that he was never suspended lawfully and which had displayed a cavalier attitude to breaking Union Rules. The Claimant commented that natural justice required that he should have been charged much earlier, so that he could have a proper opportunity to state his case. He submitted that the disciplinary hearing should have been arranged as soon as was practicably possible after his suspension and that, as this had clearly not occurred, it was now unfair and a breach of Rule 38(12) to conduct a disciplinary hearing against him.

35. Mr Burns, for the Union, submitted that Rule 38(12) did no more than reflect the basic requirement of natural justice that a person accused should know the nature of the accusations against him/her and be given an opportunity to state his/her case. He referred to **Khanum v Mid Glamorgan Area Health Authority (1979) ICR 40**. In Mr Burns' submission, there could be no breach of Rule 38(12) before a disciplinary hearing had taken place and so he understood the Claimant's complaint to be that the Union was threatening that it would breach this rule when the disciplinary hearing was reconvened. Mr Burns argued, however, that the Claimant had been given the charges and had been given the opportunity to respond to them. In his submission, that was sufficient to defeat the Claimant's case. He argued that the time that had elapsed between the Claimant's suspension and the charges being put to him was irrelevant for the purposes of rule 38(12) as the delay presented no impediment to the Claimant exercising the rights granted by that rule. Mr Burns went on to consider whether the opportunity that the Claimant had been given to respond to the charges was "fair", having regard to the delay that had occurred since October 2005. In his submission on the facts of this case, the Claimant had not been deprived of a fair opportunity to put his case. Mr Burns noted that most of the matters relied upon by the Union were e-mails which could be considered objectively by the Disciplinary Panel. He also informed the Claimant that the Union would give him such assistance as it could in tracing the two witnesses with whom he had lost touch. Mr Burns commented that any inconsistencies in the witnesses produced by the Union could be used by the Claimant to demonstrate unreliability and that the Claimant could use any lapse of memory by the witnesses to argue that, by delay, the Union had not made out the charges against him. Mr Burns pointed out that the Union had arranged a hearing for 15 May 2007 but the Claimant had refused to attend, so exacerbating any problems of delay. He also argued that in civil litigation a delay of up to 18 months between cause of action and trial, though regrettable, is not treated as making a fair trial impossible.

Conclusion – Second Complaint

36. Although the Claimant's second complaint alleges a breach of Rule 38(12), which relates to what the NEC shall not take into account in disciplinary proceedings, his submissions included reference to his continued suspension from office from 31 January 2007. He maintained that his continued suspension was unlawful as the NEC, at its meeting on 31 January 2007, had merely ratified the unlawful

suspension imposed by Mr Jones-Glass on 20 October 2005. The Claimant's submission is based on the language of the relevant NEC minute which states that his suspension "... *be ratified and continued pending investigation* ...". However, this minute is at best ambiguous and should be considered in its context. By Rule 38(5) the power to suspend is granted to the General Secretary for a limited period after which Rule 38(6) permits the NEC to continue that suspension. On the facts of this case it is highly likely that in considering the issue of the Claimant's suspension on 31 January 2007, the NEC did so with reference to its powers under Rule 38(6). This construction is supported by Ms Hirsch's letter to the Claimant of 12 February 2007 in which she informed him of his continued suspension. She stated that her letter "*is written notice thereof under Rule 38(6)*". In the circumstances, I find, on the balance of probabilities, that on 31 January 2007 the NEC exercised its powers under Rule 38(6) to suspend the Claimant. His continued suspension thereafter was on the basis of Rule 38(6). It was not on the basis of any purported ratification of the unlawful suspension that had been imposed by Mr Jones-Glass in October 2005. The NEC had no power to ratify the unlawful suspension that had previously been imposed by Mr Jones-Glass and, in as much as the NEC resolution of 31 January purports to validate that unlawful suspension in the period between October 2005 and January 2007, it is of no effect.

37. As to Rule 38(12), I find that ordinarily there can be no breach of this rule unless and until the NEC has taken account of any allegations to which the accused has not been given a fair opportunity to respond. The Claimant refused to attend the disciplinary hearing which was convened on 15 May 2007 and that hearing was adjourned. Accordingly, as the Disciplinary Panel has not yet considered any allegations, there cannot so far have been any actual breach of Rule 38(12). The most that the Claimant can allege is that the Union is threatening that it will breach this rule if the disciplinary hearing is in fact reconvened.
38. In my judgment, Rule 38(12) does not create an overriding duty on the Union to act fairly in its conduct of disciplinary proceeding. It is rather targeted at a particular mischief and its effect is to make express the requirement of natural justice that an accused person should know the nature of the charges against him/her and be given an opportunity to state his/her case in response to those charges. On the facts of this case, I find that the Claimant was given the charges against him and he was given an opportunity to state his case in response to them. The outstanding issue, therefore, is whether he was given a "*fair*" opportunity to respond. In my judgment, the inclusion of the word "*fair*" in Rule 38(12) does no more than make express that which would be implied in any event. An opportunity to respond which is so short or otherwise constrained as to prevent any considered response would not be an opportunity to respond as contemplated by this rule. The fairness of the opportunity to respond in Rule 38(12) relates to the ability to present a considered response. There may be different shortcomings in a disciplinary procedure but it does not follow that, because of them, the accused would inevitably be deprived of a fair opportunity to respond to the allegations against him/her. Such shortcomings are only relevant, for the purposes of this rule, if they lead to a situation in which the NEC is taking into account allegations to which the accused has not had a fair opportunity to respond, including any arguments based on those shortcomings.

39. On the facts of this case, the Claimant can now inform any Disciplinary Panel that he was unlawfully suspended by the union between October 2005 and January 2007. He can argue that no satisfactory explanation has been given for this delay. He can also make submissions based on the delay, as he has done to me. However, I find that the Claimant had, and still has, a fair opportunity to make these points to a Disciplinary Panel in response to the charges. The Union is not, in my judgment, threatening that the Disciplinary Panel will take account of any allegations to which the Claimant has not been given a fair opportunity to respond.
40. For the above reasons I refuse to make the declaration sought by the Claimant that Amicus breached rule 38(12) of its rules by not giving him a fair opportunity to respond to the charges against him, following the decision of its National Executive Council on 31 January 2007 to submit his case to a disciplinary panel and to continue his suspension.

David Cockburn
The Certification Officer