

D/12-20/18-19

Decision of the Assistant Certification Officer on an application made under Section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992

Coyne & Brooks

V

Unite the Union

Date of Decision

5 October 2018

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## **Introduction**

1. Unite the Union is the largest trade union in the United Kingdom. In this litigation it has always been referred to as 'Unite' or 'the Union'; and I will follow that practice in this decision. It was constituted by the merger in 2007 of the Transport and General Workers Union ('TGWU') with Amicus. Other unions have since merged with Unite, the latest being UCATT with effect from 1 January 2017. The membership of Unite as at April 2017 was said by Unite to be 1.4 million.
2. The structure of Unite is readily ascertainable from its rule book, the precise terms of which it is not necessary to refer to in detail in this decision; for the issues which I now have to resolve are not, save in one respect, concerned with the construction of the union's rules. The government, management and control of Unite is vested in the Executive Council ('EC'), which is a body of over 60 elected lay members. No current or former employee of Unite and no current employee of any other union is eligible to stand for the EC. Elections for the EC take place every three years.
3. Responsibility for the administration of the affairs of the union lies, pursuant to rule 15.3, in the General Secretary ('GS'), who is the senior salaried employee of Unite and is, in effect, Unite's Chief Executive. Pursuant to rule 15.1, the GS is elected by a ballot of the whole membership of the union, other than 'ordinary retired members' who are not eligible to vote. The GS is, by law and by the rules, subject to a maximum term of office of 5 years.
4. There is a structure of paid employees who work for the central administrative and executive functions of the union, based in London. The most senior member of the union staff below the GS is the Chief of Staff, Andrew Murray (AM). Beneath him there are five Assistant General Secretaries. There is also a regional structure; each of the seven regions has its own regional committee of lay members, its own elected Regional Secretary and its own staff. Regional Committees have responsibility for the management of the

union's affairs in their regions, in conformity with decisions of the EC and are responsible to the EC; see rule 8.3.

5. Members belong to branches which may be based on individual work places or may be based on locality, employment sector or otherwise. I was told that there are over 3000 branches or workplaces which are treated as branches of Unite. Branches vary considerably in their size; some may be very small; others may be very large. Each branch has or should have a Branch Secretary ('BS') who has access to the names and contact details of the members of his/her branch. The BS and other branch officers are elected by the branch annually.
6. In 2010, Len McCluskey ('LM') was first elected as the GS of Unite. He was re-elected in April 2013 after an election had been called well in advance of the end of his five-year term; on a turnout of 15.2% of the voting members of Unite, he received 144,570 votes; his sole opponent received 79,819 votes.
7. At the time of the 2013 election, rule 15.1 provided as follows: -

'All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union.'
8. For a full history of what happened thereafter to rule 15.1, the reader may wish to read paragraphs 10 to 15 of my decision on the first of the ten grounds of complaint which I have been asked to resolve, dated 4 May 2018. For present purposes, it is only necessary to say that, as a result of an amendment proposed to Unite's Rules Conference in 2015, supported as having the purpose of giving stability to the union and, with the approval of EC, carried without opposition, rule 15.1 was amended to read as follows: -

'All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the union other than 'ordinary' retired members who shall not be eligible to vote. The fixed term of office for each General Secretary election will be set at 5 years. If the General Secretary position becomes vacant due to

retirement, resignation or death within a fixed term of office a General Secretary election will be called.'

9. In December 2016, well within the five-year period since that last election of the GS in April 2013, it was proposed to the EC and the EC decided to bring the next election for the position of GS forward, by about a year; the electoral process was to start in December 2016 and to conclude in April 2017. The reason for doing so was said to be that the EC election was to be carried out on that timetable and that, if the GS election took place at the same time, there would be a cost saving to Unite of about £1 million.
10. At the same time that the proposal to bring the GS election forward was put to the EC, LM gave notice of his resignation from office to take effect from 28 April 2017, the date by which the result of the proposed new GS election was to be disclosed. It was widely known or anticipated that LM would stand again for a third term of office, as he did; and, by resigning not immediately but with effect from the end of the electoral process, he was able to continue in office and to perform his duties as GS until that point was reached. The EC adopted those proposals and the GS election went ahead on the proposed timetable.
11. There were three nominations for the position of GS; those nominated were LM, Gerard Coyne ('GC') and Ian Allinson ('IA').
12. During the election period, to enable LM to continue to carry out his duties as GS, the EC decided to appoint an Acting GS to ensure that matters relating to the administration and conduct of the election were overseen by a senior official who was not a candidate. Ms Gail Cartmail (GCa), a long-serving full-time official of Unite and, before 2007, of Amicus, who was an Assistant General Secretary, was appointed to the post of Acting GS. Unite decided that that position should be replicated in the West Midlands region, where the Assistant Regional Secretary, Mr Quinn, was appointed to the position of Acting Regional Secretary of that region.
13. The result of the GS election was announced at the end of April 2017. LM received 59,007 votes, GC received 53,544 votes, IA received 17,143 votes.

The turnout was 12.2%. LM was, therefore, declared as re-elected and continued to hold the office of Unite's GS.

14. GC was a long-serving member of Unite. He became an employee of TGWU in 1988 and became regional secretary for the West Midlands region in 2001. When Unite was formed, he became Regional Secretary for that region of Unite. In 2015, he told LM that he intended to stand for GS at the next GS election; he believed that, as a result of the amendments to rule 15.1 set out above, that election would not take place until 2017/18 and had not expected that it would or could take place earlier. He was caught unprepared when it was decided that the election would take place a year earlier than anticipated.
15. I will come, in due course, to the detailed facts which are relevant to the complaints upon which I am required to adjudicate. At this stage it is necessary, however, to state that, shortly after the electoral process was concluded, Unite brought disciplinary action against GC, as a result of which he was dismissed from his employment in June 2017. Unfair dismissal proceedings between GC and Unite are in train in the Employment Tribunal. Nothing I say in this decision is intended to indicate anything as to or to influence the outcome of those proceedings.

### **The Scrutineer, Returning Officer and Election Commissioner**

16. Rule 16.2 of Unite's rules required the EC to appoint an independent scrutineer to supervise, in effect, the voting process and a returning officer to deal with the conduct of the election. Electoral Reform Services ('ERS') was appointed to both positions; and Mr Simon Hearn, deputy Chief Executive of ERS, played the leading role on behalf of ERS in discharging the duties of those positions and provided reports upon complaints made to ERS or to him. Rule 16.3 required the EC to appoint a suitable independent person to act as Election Commissioner to adjudicate on any complaints made under rule 16.24, relating to the conduct of the election. Professor Keith Ewing was appointed as Election Commissioner. He produced two reports in response to complaints. The first, Decision 1/2017, addressed complaints made by Richard Brooks (RB) on behalf of GC. Those complaints covered the same

ground as many of the complaints which I am now asked to consider. The second report, Decision 2/2017, related to a complaint made against GC by Unite originally to Mr Hearn and referred by him to the Election Commissioner. I was told that counsel were agreed that I should look at those decisions and give such weight to them as I thought fit but that I was not in any way bound by their conclusions. There is no suggestion that either was in any sense partial; but I have had the advantage of the effects of detailed procedural directions, meticulously prepared witness statements and cross examination by and addresses from highly experienced advocates, which Mr Hearn and Professor Ewing did not have or did not have to the same extent. I have decided, in order to ensure that I was not influenced by them, not to look at Professor Ewing's conclusions, save on isolated occasions which I have identified. Although I had looked at them before the oral hearing and when they were referred to during the hearing.

### **The complaints**

17. In June 2017, GC and another long-standing member of Unite, who had assisted GC in his campaign for the office of GS, RB presented a complaint to the Certification Officer under 10 grounds and sought by way of relief that, as a result of the matters complained of, the Certification Officer should declare that LM had not been validly elected as GS in 2017. In effect, they sought and now seek a re-run of the 2017 GS election.
18. I was appointed by the Certification Officer as Assistant Certification Officer to hear and adjudicate upon those complaints. On 26 January 2018, I held a directions hearing at which the Applicants, GC and RB, were represented by Mr Millar QC and Unite was represented by Mr Segal QC. From the discussion at that hearing, there emerged an agreed list of issues which were to be resolved. That list of issues is annex A to this decision.
19. It was plain to me from my pre-reading of the documents provided before the directions hearing that the first complaint, that Unite had no power under its rules to call the election for the position of GS as it did in December 2016, was of a wholly different nature from complaints 2 to 10. While complaints 2 to 10

were based on the manner in which Unite allegedly conducted itself during the GS election in 2016/17, by complaint 1 GC and RB were contending that, under its rules, Unite had no power to hold that election at all. I proposed to the parties that complaint 1 should be dealt with as a preliminary issue; they agreed; and I directed that that preliminary issue should be heard by me on 27 March 2018. I also gave directions for the conduct of the remaining complaints, should it be necessary to adjudicate upon them, and gave provisional dates for a hearing of those complaints.

20. I heard evidence and argument on the preliminary issue on the appointed date. In my decision on that issue, I resolved the issue in favour of Unite. GC and RB appealed to the Employment Appeal Tribunal against that decision; the appeal was heard and dismissed on 13 June 2018.
21. Therefore, it became necessary to hear and resolve complaints 2 to 10; and I heard evidence and arguments from counsel on the previously appointed dates, 25 to 28 June 2018. I was provided with six lever arch files, amounting to almost 2,500 pages of documents and witness statements. There were witness statements from 32 witnesses, covering 210 pages. It is fair to say that when I saw the size of the task, I was concerned that the hearing could not be completed in the allocated days; but counsel managed to reduce the number of witnesses who gave live evidence to 11; and moving with a high degree both of competence and speed, by limiting cross-examination by agreement so that a point would be put in cross-examination to one witness only although others could also address that point and by cutting down the witness evidence, counsel managed to complete the hearing, subject to the provision of only a small amount of further material and to this decision, by an only slightly delayed 'end of play' on Friday 29 June. I need to express to counsel and those working with them my admiration for their efficiency and my gratitude for their skilful and helpful presentations. My gratitude applies too to the meticulous preparation of the documents and the witness statements by the legal teams.

## **Jurisdiction**

22. Section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992, so far as material, provides 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.

(3) The applicant must be a member of the union, or have been one at the time of the alleged breach or threatened breach.’

23. Section 108B provides as follows: –

‘108B Declarations and orders.

(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.

(2) If he accepts an application under section 108A the Certification Officer—

(a) shall make such enquiries as he thinks fit,

(b) shall give the applicant and the union an opportunity to be heard,

(c) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made,

(d) may make or refuse the declaration asked for, and

(e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.

(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.

(6) A declaration made by the Certification Officer under this section may be relied on as if it were a declaration made by the court.

(7) Where an enforcement order has been made, any person who is a member of the union and was a member at the time it was made is

entitled to enforce obedience to the order as if he had made the application on which the order was made.

(8) An enforcement order made by the Certification Officer under this section may be enforced in the same way as an order of the court.'

24. It is not in dispute that complaints 2 to 8 have been brought before the Certification Officer on the basis that the union, in the respects identified in those complaints, broke one or more of its rules, If I find that Unite acted in breach of rule, as claimed, unless I consider that it would be inappropriate to do so, I must make an enforcement order imposing one or both of the requirements set out in Section 108B subsection 3. It is by this route, so far as complaints 2 to 8 are concerned, that GC and RB seek to achieve a new election for the post of GS.

25. Complaints 9 and 10 are based on the contention that Unite failed to give every person entitled to vote in the GS election a voting paper and a convenient opportunity to vote by post as required by section 51(4) of the 1992 Act. Section 51(4) provides :-

So far as is reasonably practicable, every person who is entitled to vote in the election must—

(a) have sent to him by post, at his home address or another address which he has requested the trade union in writing to treat as his postal address, a voting paper which either lists the candidates at the election or is accompanied by a separate list of those candidates and

(b) be given a convenient opportunity to vote by post.

26. Sections 54(1) and (2) provide: –

'54 Remedy for failure to comply with requirements: general.

(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).

(2) An application under those sections may be made—

(a) by a person who is a member of the trade union (provided, where the election has been held, he was also a member at the time when it was held), or

(b) by a person who is or was a candidate at the election;

and the references in those sections to a person having a sufficient interest are to such a person.'

27. Section 55 gives to the Certification Officer a similar jurisdiction and powers to those contained in section 108B. It is not suggested that my powers and duties in these proceedings are materially different as between the section 108A and the section 54 complaints.
28. Sections 108B(2)(c) and section 55(6) both require the Certification Officer to ensure that, so far as is reasonably practicable, an application made to him is determined within six months of being made. The task of preparation of the very substantial evidential and documentary material required by the nature and detail of the complaints in this case and the process of preparing for, finding dates for and conducting three hearings – the directions hearing, the preliminary point hearing and the substantive hearing and the time needed to prepare and draft the necessary decisions-- has meant that it was not reasonably practicable to determine any of the complaints within the six months period from their being made, in June 2017. The contrary has not been suggested.

### **Evidence**

29. I have referred above to the documentary material provided to me. Of the 26 witness statements put in on behalf of the applicants, six witnesses were called, namely GC, RB, Margaret Armstrong (MA), John McMahon (JM), Kelly Gillespie (KG) and Simon Hemmings. Counsel were, helpfully, able to agree the contents of a schedule which set out which parts of the remaining twenty witness statements put forward by the applicants were disputed or not agreed

to be admitted in evidence. Of those twenty witness statements, the entire contents of six were said to be in dispute; they were the witness statements of Carl Daly, Mokhtar Hussein, David Roberts, Joan McGuire, Megan Bridgewater and John Taroni. I read those witness statements in my general reading-up of the bundles in the days before the hearing started; but, other than as specifically referred to in this decision, I have not looked at them since and, insofar as I have any recollection of their contents, I have put it out of my mind.

30. As to the remaining 14 witness statements, counsel agreed paragraphs of those statements which are not accepted; and I have, in looking at those witness statements, limited myself to those paragraphs which do not come within that category.
31. Unite provided six witness statements. All of the makers of those statements gave oral evidence, with the exception of Peter Irwin whose statement, Mr Millar and Mr Segal told me, was not challenged and, therefore, could be taken as read.
32. I have read all material in the witness statements, other than the material excluded as set out above, and all the documents referred to in the witness statements, in the oral evidence and in the parties' opening and closing submissions, both oral and in writing. The fact that I do not refer to any item of evidence in this decision does not mean that I have not considered it.
33. In considering any issue of fact, I have applied the ordinary civil standard of proof on the balance of probabilities. No suggestion to the contrary has been made by either party.
34. There has been some but not a large amount of disputed primary fact; to a substantial extent, resolution of the factual issues is dependent upon inference and conclusions of secondary facts based on the primary facts. My task in achieving such resolution has not been made easier by the tendency of most of the witnesses at times not to give direct answers to questions put to them but, in effect, to adjust their answers so as to advance or support the case of

the party which called them. This was not, as it seemed to me, done consciously or with intent to deceive; it is a tendency which I noticed as the evidence developed and which perhaps those who hold trade union officers share with others in prominent positions in other ways of life.

35. In considering the evidence, I have also had to bear in mind that the GS election gave rise to inevitably polarised beliefs and recollections; GC's campaign agenda differed from that of LM's campaign; and GC began and continued his campaign with the disadvantage of surprise, to which I have referred earlier, and other disadvantages to which I will shortly come. The temptations to all involved to conduct their campaign close to or even across the lines set out by the Ballot Guidelines was strong as have been the temptations to deny any accusations of line crossing; and, of course, as between LM and GC, the eventual result was very close.

### **Ballot guidelines**

36. Unite published Ballot Guidelines which applied to the GS and EC elections. Rule 16.1 of Unite's rules provided that the elections should be, 'organised and conducted in accordance with the directions of the Executive Council'. The guidelines were put forward by the EC; and it is not suggested that breach of those guidelines did not amount to a breach of rules for the purpose of section 108A of the 1992 Act. The introduction to those guidelines read as follows: –

'The Executive Council is the governing body of Unite the union, responsible for the union's administration and governance, and its policy in between Policy Conferences. All eligible members are urged to consider standing for election to the Council. The union has produced a guide *Executive Council – Roles and Responsibilities* outlining what the EC does, and what is involved in being a member of it. This can be found on the union website alongside these guidelines, ballot notice and other EC election information. The General Secretary is responsible for the Administration of the Union.

The following guidelines to the conduct of the election of a General Secretary to hold office from 2017-2022 and Executive Council for the May 2017–April 2020 electoral period are intended to ensure that the election conforms to law and the union’s rule book, and to indicate what candidates and their supporters can and cannot do. It is aimed to ensure an open, fair and democratic process. It should be read in conjunction with Rules 14 and 16 of the Unite Rule Book – “Executive Council” & “Election of Executive Council Members and the General Secretary”.’

37. The Ballot Guidelines set out, in the case of the GS election, four distinct phases in the electoral process; they were the nomination by branches and workplace of their chosen candidate, the provision by each candidate of an electoral address, campaigning and, finally, voting followed by a count and declaration. The timetable which formed part of the guidelines set the nomination phase as 16 January to 17 February 2017, the last day for receipt of election addresses as 27 February, the date for the dispatch of voting papers as 27 March, with a deadline for duplicate papers on 13 April and a deadline for the return of voting papers of 19 April. The result was to be declared on 28 April.

38. It is necessary to set out in full the principal relevant provisions of the guidelines. They are as follows: –

‘(6) Prior to the nomination period for candidates opening, branches and workplace representatives will be advised that they can email details of prospective nominees to branches and workplaces. Prospective nominees will be allowed to provide a 150 word statement *only*, together with their membership details and the name of the constituency in which they wish to stand, which will be circulated by the union with the letter inviting nominations.

(...)

(8) Nominations can be made by branches and workplaces (where there is no workplace branch). Branches will be sent nomination forms.

Forms for workplace reps will be available from Regional Secretaries and, for branches only, online. Nominations can only be made at a meeting properly convened for that purpose during the nominating period. All notices of meetings must be made available to the Returning Officer when nominations are submitted. Sample notices which can be used are included here for convenience, as an appendix.

(...)

(11) All prospective nominees:

- for General Secretary must receive at least 50 branch nominations or workplace nominations (the total must include nominations from more than one region).
- for the Executive Council must receive at least three nominations from branches, workplaces or a combination of both to become candidates, except candidates for regional seats who must receive at least three nominations from branches alone.

Once candidates have received the required minimum number of nominations they will be so advised, and sent weekly updates of branches and workplaces nominating them.

(12) After the close of nominations and before the dispatch of ballot papers, the union will send an email to all branches and workplace representatives containing an election statement from candidates. Candidates must strictly observe the deadline notified for receipt of such a statement.

(13) All eligible candidates will be sent postal and email contact addresses to the secretaries of branches which have nominated him/her where the secretary has signed the Data Protection Permission on the nomination form. Candidates themselves will be required to sign a similar declaration prior to the release of this information.

(14) All candidates who have confirmed in writing that they accept nomination will be invited to submit an election address of up to 600 words for General Secretary and 300 words for the Executive Council.

Guidance, *which must strictly be adhered to*, concerning how this address should be completed will be contained on the Election Address Form sent to the candidates for this purpose. If the address contains more than the set word limit, only the first 600 or 300, respectively, will be printed, and no illustrative or visual material may be included. All legal liability for the contents of each candidate's election address rests solely and entirely with the candidate in question and not the union.

(15) Branches may expend their own funds in support of a candidate nominated by them and any costs incurred by the Regional Administration in providing assistance will be charged against the appropriate branch fund. Otherwise, no union funds or other resources may be used to support any candidate, nor may the union's corporate identity or logo (or anything which in the opinion of the Returning Officer may be identified as such) be used in any material supporting any candidate(s). Unite's own social media platforms may not be used for election campaigning.

(16) Candidates must ensure that members should only be written to, telephoned, e-mailed, texted or otherwise communicated with at their home or on private communications appliances if they are given a clear option to unsubscribe or otherwise decline to receive and further such communications.

(17) No candidate shall email any Unite employee at their work in support of their campaign. No Unite employees should campaign or provide administration support using union facilities for any candidate.'

39. The guidelines also provided that the Independent Scrutineer required by law would be Electoral Reform Services, who would also be the Returning Officer; and the Independent Election Commissioner provided for by the rules would be Professor Keith Ewing.
40. Some passages of the guidelines set out above require specific comment. Paragraph 13 provided that an eligible candidate would be sent contact addresses of the secretaries of the branches which had nominated him or her.

It was not intended that nominees should obtain details of the Branch Secretaries of branches which had not nominated him or her. Because branch secretaries hold the details of their members, access to branch secretaries in order to obtain such details was of central importance to the candidates and their campaigns. Therefore, the candidate with a greater number of nominations would inevitably have an advantage over a candidate with a smaller number of nominations during the campaigning period. This arrangement had been present during the 2013 election, although it may not have been present during the 2010 election.

41. Guideline paragraph 15 also enshrined a similar advantage to the candidates with greater numbers of nominations. A candidate could only receive funds from a branch which had nominated him; and other than by that route, no union funds or other resources could be used to support any candidate, nor could the union's corporate identity or logo be used in any material supporting a candidate.
42. Mr Millar, in opening, drew a distinction between Paragraph 15 of the 2016/17 guidelines and Paragraph 27(a) of the 2013 guidelines which expressly excluded the use of a union's membership database; but in my view the words 'other resources' in the 2016/17 guidelines include the union's database. I do not see how it could be argued – and it has not been – that the union's database was not part of the union's resources.
43. I need to refer to rule 17 specifically, only in order to underline the importance of separation between the activities of the union and the activities of candidates in pursuance of nomination and election and the importance to a candidate of achieving contact with members other than at their places of work. As will appear later, it was accepted that Unite employees could campaign for a candidate outside their work time.
44. Before I turn to the specific facts of each sub-complaint, I need to draw attention to the introductory words to complaint 2, namely 'Did union employees breach the "level playing field" rules contained in ballot guidelines 15 and 17?' Reference to the "level playing field" appears, too in complaints 3

and 4. To the extent that each guideline had to be applied equally to each candidate, those guidelines created, in terms of their application, a level playing field. However, the applicant's case, as put by Mr Millar, tended to enlarge on the concept of an equal application of the guidelines and to travel towards a rather less recognisable concept that the election as a whole had to take place on a level playing field.

45. I have already indicated two respects in which that greater aspiration was unachievable. The calling of the election a year earlier than anticipated by GC undoubtedly put him at a disadvantage as compared with LM who had a long-established track record in the post and a substantial and developed support network. The rule that a branch could expend funds only in support of the candidate which it had nominated and that a candidate would receive contact details only of the branch secretaries of branches which had nominated him clearly had the effect that a candidate with fewer nominations would be likely to receive less support and to be less able to campaign on the basis of access to members and to funds. GC received nominations from a considerably smaller number of branches than LM. I accept that branches vary in size and resources; but there has been no suggestion that those who nominated GC were, on average, larger or more economically buoyant than those who nominated the other two candidates.
46. During the evidence, a third disadvantage to GC emerged. While he was no doubt well known in his region, he did not have the public exposure which LM received as he continued his national duties as GS throughout the election campaign.

### **United Left**

47. It became clear from the evidence that there was a further advantage held by LM. Steve Turner ("ST") was LM's campaign coordinator in the 2010, 2013 and 2017 GS elections; and he was also active in a substantial group of Unite members who shared philosophical and political views about the policies and direction of Unite and its predecessor, the TGWU. That group is now called 'United Left'. ST does not hold office in United Left; he is an

assistant general secretary of Unite and therefore cannot be an office holder in United Left; but he has been closely associated with United Left and its predecessors for 35 years. Employees of Unite may be members of United Left; but its officers are lay activists within the union. There are other groupings of members of Unite; but, according to ST, they are relatively small and in some cases relatively new. United Left describes itself as the 'socialist rank and file movement' in Unite and has a Founding Statement of Aims and Principles from which I quote the following passages: -

'United Left is a self-funded organisation for Unite members, with the principle aim of promoting a socialist agenda within the Union, committed to campaigning for a democratic union controlled by the members, within a culture of lay delegative structures.

United Left seeks to bring together lay activists, including shop stewards, conveners, branch officers, etcetera for mutual discussion and debate to promote through the union's constitutional structures a socialist agenda. Whilst lay member led, United Left welcomes the support and involvement of paid officers of the union.'

And

'United Left is not an unconstitutional body in its relations with the union, in that it does not seek to subvert, or replace the democracy of the union but to support it. United Left is therefore formally non-constitutional in that it provides a forum for like-minded individuals, who supports its general aims and objectives, to come together for mutual discussion in support of the union's wider objectives.'

48. United Left charges a membership fee and raises funds to support its production and dissemination of literature and the cost of campaigning. A principal activity of United Left is to compile and maintain a database and

network of branch secretaries, officers, representatives and members. When the 2016/17 election was called, United Left had its database from earlier campaigns; it held details of most, albeit not all, of Unite's branches. In order to further its aims, it operates on a national basis, within regions, branches and work sectors and had a national co-ordinator; and it was concerned by those means to work towards the re-election of LM and the election of a 'slate' of EC members whom it wished to support. According to ST – and he was not challenged as to this – an overwhelming majority of Unite's EC members are also members of United Left. He said that the United Left database has been built up over 50 years. He also said that LM had his own database which was, until the 2016/7 election, separate from that of United Left and separate from that of the union itself.

49. United Left is not a part or an arm of Unite. While its members are members of Unite and some Unite officers are members of United Left, it is not an organ of and does not act on behalf of Unite. ST, and no doubt other full time officers within Unite who support United Left, worked during the 2017 election campaign, using its database to obtain access to branch secretaries, representatives and members and thereby to campaign for the re-election of LM. According to ST, officers of Unite, such as himself, worked in that role in their spare time. At first during the 2016/7 campaign there was no definition of what was employees' working time, as opposed to non-working time. Normal working hours varied: more senior employees did not have normal working hours. In January 2017 AM sent out an email to employees which stated that normal working hours were to be treated for the purpose of campaigning as 9 am to 5 pm Monday to Friday. For an employee to act on behalf of any candidate's campaign during normal working hours would have been a use of Unite's resources and in breach of EC Guidelines 15 and 17.
50. I will come later to individual complaints; my purpose in taking the readers to the general evidence about United Left at this stage is to show that GC, in seeking to stand against LM, faced a very substantial handicap in that he did not have the support of such a powerful and effective organisation which was not part of Unite but which had the ability and the will to campaign on LM's

behalf. He had his own campaign organisation and, perhaps, his own support group; but they were likely to have been smaller than United Left and the LM campaign team.

51. Mr Millar said in opening that the basis of the complaints arose from the activities of full time officers of Unite who engaged in widespread and systematic efforts to defeat the intention that the playing field should be level in order to secure the re-election of LM. Complaints 2 to 8 fall within that general case, I have said that I will come to specific details in due course; but there was no evidence that Mr Turner or other senior officials at his level campaigned on behalf of LM in 2016/7 during Unite working hours as opposed to out of those hours. As Mr Millar accepted in his opening skeleton, the ballot guidelines did not prevent union officers or employees from canvassing or campaigning for the candidate of their choice, provided that they did so outside work time and outside their roles as employees. Therefore, an employee of Unite, however senior, if a member of United Left, could, outside his work time and when not performing the duties of his employment, contribute to the efforts of United Left to achieve the election of its preferred candidate. Equally, a member of Unite's staff could in the same way campaign for any of the other groups which might be seeking to achieve its preferred result. I should say that the evidence told me little or nothing about any such groups, save as set out above.

52. The preamble to the guidelines stated, in its second paragraph:-

“It is aimed to ensure a fair and democratic process”

The words “it is” could be an error for “they are”, i.e. “the guidelines are”; or they could mean “It is aimed by Unite”. I do not recall any argument as to this ambiguity; and in practical terms both interpretations amount to the same message - that the aim of Unite the guidelines issued by Unite with the force of rule was to ensure a fair and democratic electoral process. Mr Millar submitted that the numbered guidelines should be interpreted in such a way as to achieve such a process - or, as he put it in his written opening, to achieve equality and a fair application of the guidelines to all. I accept that the

guidelines applied equally to all; but I do not accept that the guidelines can be construed as achieving equality between the candidates; for the reasons I have set out, that could not be achieved.

### **Complaint 1**

53. Complaint 1 has been determined, as set out earlier, by my decision on the preliminary issue to which it gave rise. That complaint, therefore, fails.

### **Complaints 2 to 8**

54. Complaints 2 to 8 are based on allegations put forward by GC and RB of actions on the part of Unite during the course of the 2016/17 General Secretary election campaign which were in breach of its rules and/or Ballot Guidelines. Complaints 9 to 10 are of a different nature; they are based on breaches of the balloting requirements relating to the 2016/17 General Secretary election; and I shall deal with them separately at the end of this decision.
55. There is substantial overlap between complaint 2, which is a broad complaint that Unite employees had breached the 'level playing field' rules contained in Ballot Guidelines 15 and 17, divided into seven separate sub-heads of complaint (a) to (g). Sub-complaint 2(c) falls within complaints 5 and 6. Complaint 4 falls wholly within the scope of sub-complaint 2(a).
56. I have come to the view that my approach and that of any reader of this decision will be better informed if I were to consider the specific complaints before I come to the more general complaint, complaint 2(except in one case, complaint 4). When I have set out my conclusions on each of complaints 3 and 5 to 8, I will then come to complaint 2, within which I will include complaint 4. The text of the complaints is set out in full in annexe 1 to this decision; but to save cross-referencing, I have set out the individual complaint or sub-complaint which I am addressing at the beginning of each relevant section of this decision.

### **Complaint 3**

57. Complaint 3 is as follows: -

Did union bodies and/or senior officials breach the said 'level playing field' rules by attempting to prevent Mr Coyne raising and pursuing an investigation, during the campaign, into misuse of union resources in the purchase of a luxury flat for Mr McCluskey? Or did the Executive Council rather seek to explore whether inaccurate allegations made or implied by Mr Coyne, damaging to the union, could be corrected or clarified?

58. The rival positions under this complaint are clear from the text of the complaint and need no further elaboration on my part.

59. There are two principal documents relating to the purchase by LM of the flat identified in the complaint, in London, SE1 for £695,500, in addition to the actual purchase document. The first is headed 'Agreement For Qualifying Employee Property Purchase Scheme'. It is dated 29 February 2016 and was made between LM and Unite, under a scheme which had applied in the case of other senior employees. In its essentials, the agreement provided that Unite would have an equitable share in the property which would have an initial value of £417,300, equal to 60% of the purchase price. It was provided that, if for whatever reason LM ceased to be an employee of the union, he must, no later than 12 months from the date on which he ceased to be an employee, notify the union as to whether he would purchase the union's equitable share or sell the property to the union at open market value less the open market value of the equitable share or sell the property on the open market and repay the equitable share to the union. LM would be entitled to stay in the flat for 18 months after ceasing to be an employee, no doubt unless he bought out the union's equitable share. The agreement provided that, if LM were to cease to be an employee of the union, the union would be entitled (but not obliged) to receive early repayment of the value of its equitable share.

60. Pursuant to that agreement, the second document gave a first legal charge registered against the property in favour of trustee companies who hold property and assets on behalf of the union.
61. It can be seen from those documents that the arrangements which existed between LM and the union did not constitute a gift by the union to LM or a loan, with or without interest. Nor did it give LM a right to live in the property for as long as he wished. Unless Unite in the future decides not to seek to recover the value of its equitable interest, if LM ceases to be an employee, he will have to buy out Unite, sell the property to Unite or sell the property on the open market and pay to Unite the then value of its equitable interest; and (unless he buys the property outright) he will have to leave the property within 18 months of ceasing to be an employee.
62. There is nothing to show that Unite informed its members openly about this agreement, the details of which were not known to GC. It was known that LM had purchased the flat and that a sizeable portion of the purchase price had been provided in some form by Unite. It was natural for GC, as part of his campaign, to be interested in and to wish to raise the transaction. It was asserted by or on behalf of GC that the EC did not know of or approve of the transaction; whether that was or was not so does not appear to me to impact on the decision which I have to make.
63. On 23 December 2016, an unsolicited and anonymous mailshot, which appeared to have been sent out from Glasgow on the previous day, was received by about 2,600 Unite branch secretaries. It consisted of two pages which set out five items, three of them apparently taken from the website of the Daily Mail, 'Mail Online'. The second item on the first page said: -

'Unite Union give Len McCluskey £400,000 loan to buy London flat'.

and continued: -

'Unite insider says there will be much disquiet over payment of £417,000 for leader's apartment under equity share deal. Unite

the union has contributed more than £400,000 towards the purchase of a £700,000 central London flat for its leader, Len McCluskey, Land Registry documents show’.

64. The origins of this document are not relevant to complaint 3, as opposed to its content. Those words correctly described the nature of the agreement between Unite and LM, except that the use of the word loan – in inverted commas – is not correct. There are other words at the top of the same page as that in which the words I have quoted above are set out which also give the impression that there was or at least might be a loan.
65. After he had been nominated, GC was entitled, pursuant to Ballot Guideline 14, to put forward an election address of up to 600 words. He proposed to put into that address these words: -

‘Just last year, Unite put £417,000 of your money into a luxury London apartment for his personal use... none of this can be justified. It is a scandal that we pay our General Secretary a big salary and then give him even more money to buy a property’.

When the EC learnt of that proposal, they responded that they wished to put in to a ballot packs a statement which read: -

‘The Executive Council of the union wishes to point out that it believes a statement in the enclosed election address of Gerard Coyne is untrue’.

66. Unite informed Mr Simon Hearn (“SH”), who in practice acted as scrutineer and returning officer on behalf of ERS, of its decision. He sent the proposed statement to GC and said that GC should have the opportunity to consider removing or amending the relevant words of his election address. GC asked for an undertaking that the EC statement would not be circulated. RB, on behalf of GC, then proposed that the words in the election address ‘and then give him even more money to buy a property’ be changed to ‘and then put even more money into property for his personal use’. Unite accepted that proposal; and the spat over the proposed wording of GC’s election address

appeared to be over. A compromise had been reached; the election address went out, adapted as proposed by RB; and no statement about its contents was put forward by Unite.

67. However, on the day before RB's proposal of a change of wording which led to that compromise, GC sent an email to GCa in her role as acting General Secretary. In summary, he said that the wording he wished to include in his election address was not untrue, that it was true that Unite had 'put' £417,000 into the flat for LM and that that was a matter of legitimate comment. The proposed EC statement would have been in breach of section 48 of the 1992 Act, which did not permit the sending out by Unite of the proposed statement; he described the statement which EC intended to put out as defamatory. He complained too of a lack of neutrality on Unite's part and of the favouring of LM.
68. GCa's evidence was that she took advice from SH and the union's legal department and decided that the union should not respond to the election address as it proposed; RB's amendment was then put forward and accepted; and the proposed response dropped out of the picture.
69. There was some discussion between counsel and with me as to what does or does not constitute 'defamation' under the Defamation Act 2013; I accept that the provisions of section 1 and section 2 of that Act wrought important changes to the law; however, in my view, none of the issues which I have to decide upon is dependent on the correct current meaning of 'defamatory'; and I do not intend to pursue the point further, in the context of this complaint or where it arises elsewhere – as it does. I should, however, point out that, whether technically defamatory or not, GC's original proposed wording was not wholly accurate; in law Unite had not given LM the £417,000; they invested Unite's money in the flat on the basis which I have described above. Unite had an indefeasible interest in the flat equivalent to the sum which it had invested plus any capital growth. Under the agreement, it was open to Unite, once LM had ceased to be an employee, to decide not to enforce its interest; whether that could or would be seen as a proper use of Unite's funds at that

time was not argued before me and I make no comment about it. The amended words proposed by RB and accepted by the union removed the inaccuracy and removed the cause for complaint.

70. Thus far in my narration of the evidence as to complaint 3, Unite had, in my judgment, not attempted to prevent GC from raising his concern about the use of Unite's funds in connection with the purchase of LM's flat but had sought to counter what it saw as an untruth in the original wording which GC wished to put into his election address. I do not need to decide whether, if Unite had insisted on circulating their proposed counterstatement within the ballot pack, there would have been a breach of section 48 of the 1992 Act; they did not so insist; and no breach of that section of the act forms part of the present complaint.
71. In these circumstances, I conclude that Unite was entitled to seek to take steps to ensure that GC's election address did not contain misleading information about a rival candidate.
72. However, the evidence as to the flat does not stop at that point. In mid-March, GC's campaign team circulated a publication called 'Unite Herald' to workplaces. It consisted of four pages; pages 3 and 4 contained mostly material about GC and his campaign; however, the first two pages contained, for the most part, brief written articles which denigrated LM, focusing in particular on the arrangements for the purchase of the flat, on an allegation that £75,000 which Unite had lent to Jeremy Corbyn's selection campaign for the labour leadership had been written off and, in a paragraph headed 'Pension Potty', on the allegation that LM was 'getting paid a salary for General Secretary despite having already collected his pension from the union'.
73. On seeing Unite Herald, GCa took the view that the newsletter constituted not only an attack on LM but also an attack on the union itself, that it might be thought to be an official union publication, in particular because at its head the word 'Unite' was in the same print and style as that which Unite used and which was protected by a trademark, that it contained untruthful and

defamatory material and that its distribution might constitute a breach of rule 5.2 of Unite's rules which provides: -

'A member must not knowingly, recklessly or in bad faith provide the union with false or misleading information relating to a member or any aspect of the Union's activities'.

74. She contacted Howard Becket ("HB"), who is a solicitor who had been in private practice for many years, was Unite's Director of Legal Services from 2011 to 2016 and remained responsible for Legal Services after becoming one of the five Assistant General Secretaries in 2016. He told me that, although not a specialist in defamation, he was concerned about what he believed to be inaccurate descriptions in Unite Herald of the nature of the arrangements for the flat, the provision of funds to Jeremy Corbyn and the 'Pension Potty' paragraph.
75. He and GCa took the view that some step had to be taken; they discussed whether to take stronger action against GC but decided that the lesser step which GCa adopted would suffice; and that step was the sending out of an email to branch secretaries the text of which I need to set out. It was as follows: -

'To: Unite Branch Secretaries

Dear Colleague,

You may have received copies of a "newspaper" called "Unite Herald" in your branch or workplace within the last 48 hours.

It needs to be made clear that this is not an official publication of Unite the union. It is in fact campaign promotional material for one of the candidates in the present election for General Secretary.

The publication in question consists almost entirely of attacks on the incumbent General Secretary of the union. It disregards the recent statement by your Executive Council calling upon everyone campaigning in the union elections campaign to conduct themselves in

a respectful manner, specifically not in a way that could bring damage to the reputation of the union or discredit on a fellow member.

The union is seeking legal advice regarding potential defamation claims and regarding breach of the union's trademark arising from this publication.

The material contained is also potentially defamatory of Len McCluskey.

All workplace representatives should therefore be aware that distribution of "Unite Herald" could potentially lead to the distributor being exposed to legal proceedings for defamation.

All workplace representatives are also reminded of Rule 5.2: -

"A member must not knowingly, recklessly or in bad faith provide the union with false or misleading information relating to a member or any aspect of the Union's activities."

The union will of course be dealing with this publication through other avenues, but lay officials and representatives should be aware of the potential implications of distributing "Unite Herald".

In solidarity,

Gail Cartmail

Acting General Secretary'

76. She also sent an email to GC which is better quoted than summarised; it was as follows: -

'Dear Gerard

I am writing to you following the Executive Council meeting last week. You will have seen the statement agreed by the Council expressing concern about some aspects of the campaign for General Secretary.

Particular concern was expressed at the conduct of your campaign in two respects. First, the highly personalised and unpleasant nature of some of your public comments/tweets etc., regarding Len McCluskey;

and second, generalised attacks on the union and its work which risk considerably misrepresenting the reality of what Unite is and what it does.

From the very outset of this campaign, all candidates were asked to conduct themselves in a respectful way regarding colleagues and fellow trade unionists, and to bear in mind the broader standing of the union in society when campaigning. In my view it is perfectly possible to do that whilst also expressing clear criticisms of the way the union is run at the moment, and of course setting out a different agenda for the future. Where such criticisms blur into misrepresentation is a matter of judgment, but it was the clear view of the EC that some of the decisions it has taken (or not taken) in relation to the union's investment in respect of Len McCluskey's flat and to the alleged funding of Momentum are being so misrepresented by yourself. While it may be your judgment that this works to your short-term advantage, it does no service to the integrity of our democracy, or to future working relationships.

I would earnestly ask you to reflect on these points and modify the tone of your campaign for the remainder of the campaign.

Yours

Gail Cartmail

Acting GS'

77. In his evidence to me, GC said that, in the course of an election campaign, it was to be expected that a candidate would be critical of other candidates or of the dealings of the union or the use of union resources under the leadership of the incumbent candidate. I agree. It is possible that, outside the heat of battle, no doubt at its height in mid-March, just before the sending out of the ballot papers, GCa would have disregarded Unite Herald as simply a piece of what in another world could be described as 'knocking copy'; and to seek to justify her action on the basis that Unite Herald could be seen as an official document emanating from the union was unrealistic, even if it did

use an aspect of Unite's 'get-up'. I do not accept that any member of Unite would or could, if she or he read Unite Herald, have believed it to be an official publication; its contents demonstrated it to be a publication issued by the GC campaign.

78. Nevertheless, Unite Herald contained material which was untrue and which was, therefore, whether defamatory (as Unite contended) or not, misleading to its readers. As to the flat, the article on page 2 of Unite Herald would clearly have been read as imputing that LM had bought the flat on the basis of a payment which he only had to repay if he were to sell the flat. In effect, as GC agreed in cross-examination, it was telling the reader that LM had a grace and favour flat in which he could live for life if he so wished. The truth was substantially different, as I have set it out earlier.
79. As to Pension Potty, the true position was that LM's salary was reduced by the amount of the pension which he received. The words used in Unite Herald clearly gave a false impression.
80. As to the money paid to Jeremy Corbyn's re-election campaign, the position is more confusing. In the Parliamentary Register of Members' Financial Interests for May 2017, Jeremy Corbyn's campaign disclosed that they had received from Unite an interest free unsecured loan for an indefinite period of £25,000 in July 2016, which loan had been written off in November 2016 and that he had received a similar donation of £50,000 in August 2016 which was written off on the same day. The evidence which I had from Unite was that those payments were donations and not gifts. I was told that the payments had been 'badged' as loans to the Electoral Commission. I take that to mean that they had been described as loans when the intention was not to seek repayment – which intention turned into reality, according to the register to which I have referred above. The paragraph in Unite Herald in this topic does not appear to me to have contained any inaccuracies but to have described the situation correctly in broad terms.
81. GC told me that 100,000 copies of Unite Herald had been printed; all went out to workplaces where he had been nominated and which supported his

campaign and to workplaces where there were members who supported him; some were also distributed at factory gates to people as they went into work. There were to be no further print runs. He said that those who were distributing Unite Herald would have wished to go on doing so but were stopped by GCa's email; there is, however, no evidence before me from anybody who was so deterred. Only one witness statement addressed that point (that of Mr Harry Harris) and the relevant paragraphs have been eliminated from that witness statement by agreement. I gained the clear impression from GC's evidence that substantially Unite Herald was distributed as his campaign intended.

82. After considering all the facts and arguments on this issue, I have come to the following conclusions.

1. I do not see the steps taken by Unite in relation to the mailshot or Unite Herald as part of a campaign to disrupt GC's campaign by preventing him from legitimately raising the issue of LM's flat. Unite was reasonably seeking to limit the effect of the erroneous statements of fact which I have described.
2. Unite was justified in drawing to the attention of Branch Secretaries, as it did by GCa's email, that United Herald contained false or misleading information and therefore in asking them not to distribute it. The content, in relation to the flat and in relation to LM's receiving both a salary and a pension were misleading (I do not need to and do not make a finding as to whether this was or was not deliberate); and Unite had acted reasonably in seeking to correct the position.
3. In relation to the terms of complaint 3 as set out in the list of issues, the actions of Unite did not breach the 'level playing field' rules, insofar as that is what the rules and Ballot Guidelines procured (as to which I have expressed my views earlier). I consider that Unite took justified steps to correct or bring to a halt inaccurate allegations made in Unite Herald.

#### **Complaint 4**

83. Complaint 4 is entirely subsumed within complaint 2(a), which has slightly wider wording. I intend to address complaint 4 as part of my consideration of complaint 2(a).

#### **Complaints 5 and 6**

84. These two complaints are put together in the list of issues; and I will address them together. They pose the following questions: -

Did union employees purport to act as Branch Secretaries of non-functioning branches during the nomination period in order to produce extra nominations for Mr McCluskey from such branches, in breach of Unite rule 17.11 (complaint 5) and/or ballot guideline 17 (complaint 6)?

Or were all branch nominations made in accordance with proper and normal procedures?

85. Those words include within them the terms of complaint 2(c), which are:-  
“Did union employees breach” the level playing field rules contained in ballot guidelines 16 and 17, by producing extra branch nominations for LM from non-functioning branches, or were all branch nominations made in accordance with proper and normal procedures.  
I intend, therefore, to address those 3 complaints together
86. In considering these complaints, the starting point is the definition of a non-functioning branch. It was agreed by GC in evidence that such a branch is one which does not have a branch secretary or any other officers or does not have meetings. In AM’s view, a branch is also non-functioning if the details of its branch secretary have not been entered into Unite’s records; but no one has suggested that that additional mode by which a branch can be said to be non-functioning is of practical importance for present purposes.
87. It is clear that Unite had a problem with non-functioning branches. In July 2016, Unite’s Policy Conference referred to many members being disenfranchised from the nomination process because, as a result of a reorganisation, a number of newly formed branches had not met and were not officered; it was said that the situation should be corrected. In November 2016, in an email to regional secretaries, AM described the problem as significant and as ‘more serious than anticipated’ It was noted at the December meeting of the EC that, of 3,089 branches (that figure excluded the Channel Islands and Ireland) 710 branches were non-functioning by the definition set out above. In January 2017, AM asked regional secretaries to tell him what steps had been taken to address the issue as a matter of urgency. According to his evidence, a member could not be transferred from a non-functioning branch to another branch without steps being taken to find out whether his branch could be revived and without consulting the members as to their wishes. That appears to have been a responsible view; but it may have prevented the rapid improvement which Unite sought; and the problem

was clearly of greater significance when the elections for GS and the EC were decided upon in December 2016. The obtaining by GC's campaign of details of branch secretaries is discussed elsewhere in this decision and need not be examined for the purpose of this issue. RB, who on behalf of GC, took the lead in investigating non-functioning branches, accepted that the figures relating to such branches which were put forward on behalf of GC were based on the material covertly provided in December 2016 by Jamie Walker to Margaret Armstrong (see under complaint 8 below); but the method by which the GC campaign got hold of that material does not inform the resolution of complaints 5 and 6.

88. Rule 17.11 of Unite's rules provides as follows: -

'If a branch is unable to fill a vacancy for secretary or treasurer, the Executive Council may appoint a full time officer to fulfil the duties of that office until such time as the branch is able to fill the position.'

GC described that provision as having been introduced by Amicus, before its merger with the TGWU, because a previous general secretary of Amicus had arranged for full time officers to secure branch nominations. That description is perhaps somewhat elliptical; I assume or infer that he meant to describe a practice of full time officers acting as branch secretaries or calling nomination meetings in a branch which did not have a branch secretary or where the branch secretary was not calling a nomination meeting. However, rule 17.11 does not prevent such a practice; it expressly contemplates that the EC may permit such a practice.

89. In his witness statement, GC complained that 163 branches which were not functioning in December 2016 became active during the nomination period and nominated LM. In at least 46, he states, a full-time officer acted as branch secretary. In addition, in 13 cases full-time officers acted as branch secretaries in branches which were active but not functioning because they had no branch secretary. He says that, in 59 branches, full-time officers acted as branch secretaries temporarily 'in order to secure a nomination' for LM.

90. RB, in his witness statement, accepted that, of the 163 branches referred to by GC, 86 were former UCATT branches which, in effect, could not be counted for the purpose of this issue. Therefore, there were, on his case, 77 branches which were non-functioning yet nominated LM. In 59 cases, he said, the branch secretary listed for the nomination meeting was a full- time officer.
91. There are various spreadsheets in the bundles which set out lists of branches and branch secretaries. I was not taken through them and do not intend or need to seek to analyse them in detail. AM's evidence was that, of the 77 branches referred to by RB, 37 appointed branch secretaries without the union's intervention; that did not appear to be challenged in the course of his evidence; and they have therefore to be removed from RB's figures; but the precise figures are not, in my view, important; on any view there was a substantial number of non-functioning branches to which a full- time officer was appointed as branch secretary or to arrange for a nomination meeting; those branches, it seems, all nominated LM. If those 40 or so branches had a membership on average of somewhere in the region of 125, their votes could have exceeded the difference between the number of votes received by GC and the number of votes received by LM.
92. The real issue which I have to resolve is not related to numbers nor to whether full time officers acted as I have described in the case of a substantial number of branches. It is whether the events which I have described amounted to a breach of Unite's rules. AM's evidence was that there was a longstanding practice within Unite of appointing full- time officers to act as branch secretaries in non-functioning branches, that it was an established, expedient and regular practice of the regional branch secretaries or other officers to appoint a full- time officer to fulfil a temporary role in a branch as required and that the EC had never been expressly asked for permission. He used the time-honoured words which arise so often in trade union cases in describing this as the 'custom and practice of the union'.

93. It was also his evidence that that practice had been followed on many occasions in the West Midlands region of which GC was regional secretary.
94. There are pages of records within the bundle which give details about West Midland branches; but I was not taken to them in detail and have not had their meaning explained, other than by AM's general description; and I cannot say with any clarity whether they support that description. What I can say is that GC does not accept that description. He said that there had been no cases in his region of officers standing in in a branch secretary capacity for non-functioning branches. He described how, in the East Midlands region, appointments to branch secretary, as needed, were made by a sub-committee of the regional Executive Council.
95. In summary, then, there is a rule which requires EC approval for the appointment of an officer as branch secretary, evidence from AM that the custom and practice of the union was not to seek authority from the EC and to appoint officers to that role as required; and the evidence of GC that he did not know of that practice but that, in the East Midlands region at least, such appointments took place not through the EC but through the regional EC.
96. I should add that GC, in his oral evidence, said that, in the case of the non-functioning branches about which he complained, he did not know of any member who had said that members were told by the appointed officer to nominate LM; and there is no evidence before me to that effect.
97. To some extent, my resolution of this issue depends on my view of the evidence of GC and AM; and I have to say that, in that respect, I found the evidence of GC, when 'pressed' in cross-examination, to be unconvincing; and I saw no similar problem in the evidence of AM; but there is a more practical reason why I am influenced in the direction of Unite's case on this issue. It is not disputed that there were substantial numbers of non-functioning branches. I do not believe that I was told when the reorganisation project took place and what effect that had in precise terms; but it is likely that there were, whether because of that project or not, a large

number of non-functioning branches and that, particularly at election time, it was regarded as necessary to enable the members of such branches to exercise their democratic right by ensuring that there was a nomination meeting. I do not find it at all surprising that the EC was not asked to permit the appointment of an officer as branch secretary every time that happened; there is, indeed, no evidence that the EC was ever so asked. If it had been, I would have expected GC's side to have produce evidence to that effect. There is no evidence of any decision or resolution on the part of the EC to appoint an officer or sanction the appointment of an officer to such a role; yet, in my judgment, such appointments certainly did happen; and I cannot believe that the EC did not know that it happened. In those circumstances, I accept the evidence of AM that there was a custom and practice as described, of which the EC tacitly approved.

98. Accordingly, for the reasons I have set out, there was in my judgment no breach of rule 17.11 as alleged; and there was also no breach of ballot guidelines 16 or 17 (as to which no separate argument was addressed). Union employees were appointed to act as Branch secretaries of non-functioning branches during the election process; but the purpose was not to ensure nominations for LM; and the procedure was appropriate and not outwith Unite's Rules.

### **Complaint 7**

99. Complaint 7 is in these terms:-

“Did Mr McCluskey breach Unite rules 5.1 and 5.2 during the campaign in knowingly, recklessly or in bad faith disseminating false or misleading information to members to the effect that their branch had nominated him? Or were the emails referred to by the Applicants sent in error to a small number of branch offices, which errors were corrected wherever and as soon as possible?”

100. It will be seen that this complaint is based on breaches of rules 5.1 and 5.2 of Unite's rules. They provide as follows: -

'5.1 A member of the union must comply with these rules and with any duty and obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or as a full time officer.

5.2 A member must not knowingly, recklessly or in bad faith provide the union with false or misleading information relating to a member or any aspects of the union's activities.'

101. On 13 March 2017, Harry Harris, the branch secretary and city convenor at the Birmingham City Council branch of Unite, received an email from campaign@unite4len.co.uk at his private address; the email was sent at 4.48pm. It thanked him for nominating LM to be re-elected as GS. Six other witness statements put forward on behalf of GC, those of Kelly Gillespie, branch secretary of the Solihull DHL branch, Andy Kowalski, equality/diversity representative for the Leicester Retired Members' branch, David Edwards, branch secretary of the WM7079 branch, Mouzam Nassib, a shop steward at the WM7368 branch, Terry Burton, a workplace representative and a health and safety representative at the same branch and John Parker, branch secretary of the WM7334 branch, set out that those witnesses had received similar emails. KG stated that three other members of her branch had received similar emails but she said that she did not know of anyone who was not a representative or branch officer having received the email.
102. None of that evidence was disputed; but none of those branches had nominated LM.
103. Based on that evidence, Mr Millar raised two issues in opening; the first was that the emails were sent to private addresses; the second was that the emails constituted a serious misrepresentation that the branches of the recipients had nominated LM when they had not done so. The wording of complaint 7 as set out above clearly embraces the second issue; the first issue falls to be considered and will be considered under complaint 2(a) later in this decision. Mr Millar submitted that the sending of those emails was

potentially an effective vote -gathering tactic which could have influenced voters not directly involved in the branch nomination process to vote according to a false view as to who had been nominated by their branch.

104. Complaints were made to SH, by members who had received the emails and by GC, whose complaint was passed on to the election commissioner. In his report on that and other complaints, He said that LM acknowledged that, in error, the emails had been sent to 47 activists from 30 branches. ST on behalf of the Campaign to Re-elect LM – which was the campaigning title adopted by United Left for the purpose of the election – informed SH that a mistake had been made that there had been 47 recipients, who were branch officers, and that apologies would be sent. He subsequently identified 24 such branch officers, five of whom had ‘unsubscribed’ and could not be contacted. The rest, he said had received an apology. Professor Ewing, the election commissioner, wrote to GC referring to the figure of 47 recipients and the apologies which were proposed and described that as an appropriate response.
105. I have referred to Professor Ewing’s response because it is part of the narrative; but I do not base my conclusion on his view but on my own judgment, based on the evidence before me and the arguments from counsel. To do so, I need to refer to what I have said earlier in this decision about United Left, which is directly relevant. ST’s evidence was that, for the purpose of the campaign, United Left had combined its database of branch activists and officers with LM’s database; there was a mailing list of about 6,000 names of branch officers including branch secretaries and activists. Those whose branches had nominated LM were sent a thank you email; by error, a small number of names held on the database but of persons whose branches had not nominated LM were included in that distribution list.
106. I accept ST’s evidence. There is no evidence that the email was sent other than to a small number of branch officers and activists. If the emails had been sent as part of a dishonest campaign to encourage members to believe that their branch nominated LM when that was not the case, the email would

have had to have had a much wider distribution. There is no evidence of any such wider distribution or of anything other than a very limited distribution. It was known that a substantial number of branches had nominated GC. Kelly Gillespie's branch alone had about 1,600 members, she told me. On the basis that there were well over 3,000 branches and about 1 million potential voters (neither figure is precise but both are sufficient for this purpose) the average size of a branch would have had to have been in the region of more than 300 members. In my judgment, if the emails had been sent out by Unite, there was no deliberate conspiracy to put out false information to members; and the sending of the emails did not amount to action which could be described as knowingly, recklessly or in bad faith disseminating false or misleading information. I accept that there was an error which was corrected in a reasonable manner.

107. In any event, the evidence is that the distribution of the thank you emails was not made by Unite but by LM's campaign, run by United Left and LM's campaign team. I have no doubt that their combined resources enabled them to know who the branch secretaries and activists were in the branches which were supporting GC; they had made it their business over the years to identify local officers and activists and to obtain the email addresses of those persons and that they used that knowledge. There was, I conclude, no use by Unite, as opposed to United Left of its own database to enable the emails to be sent.

108. Accordingly this complaint fails.

### **Complaint 8**

107. The terms of Complaint 8 are:-

Did senior officials seek to undermine Mr Coyne's campaign by threatening Mr Coyne and his supporters with disciplinary proceedings and other detriments, in breach of their obligation of neutrality under ballot guideline 17? Or were investigations into candidates' conduct, including Mr Coyne's, conducted properly and neutrally as part of the

normal requirement to investigate complaints of misconduct during an election campaign?

108. The terms of complaint 2 (e) are:-

Did union employees breach the “level playing field” rules contained in ballot guidelines 16 and 17 by undertaking investigations into Mr Coyne’s conduct, during the campaign, so as to undermine his campaigning – or were investigations into candidates’ conduct, including Mr Coyne’s, conducted properly and neutrally as part of the normal requirement to investigate complaints of misconduct during an election campaign?

109. I have set out complaint 2(e) below complaint 8 because, as can be seen, although each relates to Unite’s undertaking investigations so as to undermine GC’s campaign, complaint 2(e) refers to investigations into GC’s conduct to undermine his campaign; complaint 8 relates to threatening GC and his supporters with disciplinary proceedings and other detriments. Essentially, both complaints go to alleged attempts to undermine GC’s campaign by investigating and adversely reacting to the conduct of GC and of his supporters. The alternative put forward in both cases is that Unite acted properly and neutrally as part of the normal requirement to investigate complaints of misconduct during an election campaign.

110. Therefore, I intend to address all these aspects of GC’s case as to the undermining of his campaign together.

111. I have identified three investigations which were covered in the evidence and set out in Mr Millar’s opening skeleton argument. They are: - (1) the investigation and suspension of Margaret Armstrong and her subsequent dismissal and the investigation of the mailshot to which I have referred under complaint 3 (2) the investigation into what has been called ‘phone banking’ by GC’s campaign (3) the investigation into Unite Herald.

### **Margaret Armstrong and the December 2016 download**

112. MA was employed by the TGWU from 1999, before its merger with Amicus, and thereafter by Unite. From 2006, she was a senior organiser. She has known GC since he and she first became employed by the TGWU in the same year; and she worked in GC's region. She was, in 2016/17, a supporter of GC; she was suspended by Unite in January 2017 and dismissed for misconduct in April 2017. In considering which of the two rival propositions in complaint 8 and 2(e) applies in her case, I cannot avoid going into the facts which are claimed to have led to Unite's decision to suspend and then dismiss her. I do not know or recall of any proceedings elsewhere; but it doesn't matter whether any may be in existence between MA and Unite; but I must make it clear that I am not, in anything I say in this section of my decision, seeking to reach any conclusions or indicate any views as to the outcome of any such proceedings.
113. During the 2010 and 2013 GS election campaign, it is MA's account that she and other organisers were treated as if they were a dedicated resource of LM's campaign. She supported LM in 2013 because she did not believe his opponent was fit to lead the union. Unite, she says, had a database called Stratum from which organisers could access the name and contact details of any branch secretary, shop steward and safety representative. Because this had happened in 2013, she assumed that it would also happen in 2017. She was asked at a meeting in December 2016 by a colleague to provide her private email address to him; he told her that he was collecting those details on behalf of Sharon Graham, the head of the organisers department. MA provided a fake address because she believed that, if she gave the true address, it would be used in LM's campaign. There is no evidence that, if Unite or United Left wanted to contact MA, they would have had any difficulty in doing so. She agreed that, in 2013, the details of branch secretaries were on the union's database and could be accessed.
114. However, ballot guidelines 15 and 17 did not permit the use of Unite's database in 2017 (nor was it permitted in 2013; see the 2013 ballot

guidelines paragraph 2.7 – although on the evidence this may have been given little weight on occasions). It was clear from the 2017 guidelines that Unite’s resources could not be used to support any candidate, save as expressly set out. MA said in answer to Mr Segal that she knew that what I am about to describe was not permitted under the 2017 ballot guidelines.

115. On or about 19 December 2016, there was a conversation between MA and Jamie Walker (JW), the West Midlands regional IT coordinator. The outcome was that, later that day, JW downloaded details of Unite’s branch secretaries from Unite’s database onto a memory stick and passed the memory stick on to MA. In a statement made to Unite on 11 January 2017, JW said that MA had approached him and asked him to help GC’s campaign by providing that data. MA’s account is that JW offered to provide that data because the GC campaign was suffering from the lack of a level playing field. It is MA’s evidence that JW later asked for the return of the memory stick so that he could remove his name from it and then gave it back to her next day.
116. MA said in her oral evidence that she felt that possession of this data would make things more even as between the GC and LM campaigns. In her witness statement, she said that she and GC did not have access to the data but she believed that LM’s campaign would have access to it, as in 2013. In that she was broadly correct; I have no doubt that United Left, for the reasons and by the methods which I have earlier described had that data or most of it; that, for them, was a priority.
117. Unite did not know at the time what had passed between MA and JW. MA provided the memory stick to the GC campaign printers and later returned it. It had of course by that time been downloaded and the data thus came into the possession of the GC campaign.
118. In the section of this decision which addresses complaint 3, I referred to the anonymous mailshot which was circulated to about 2,600 branch secretaries shortly after the download of the branch secretary data effected by JW and MA (‘the December 2016 download’). Whoever distributed that mailshot had

access to comprehensive branch secretary data. The mailshot did not only attack LM in relation to the flat; it included other personal attacks.

Unsurprisingly, when GCa learnt about it, she was concerned; she received a number of complaints about its contents and the fact that it was anonymous. The bundles contain letters/ emails of complaint sent to Unite. She was, in my view, entitled to be concerned; the proper conduct of a GS election did not contemplate such personal attacks. She discussed the position with AM and asked Paul Mease, head of Unite's IT department, to seek to identify who, if anyone, had downloaded branch secretary data; and she asked HB to investigate the data protection breach which appeared to have occurred. The timeframe of Mr Mease's investigation was limited by the fact that one of the branch secretary recipients of the mailshot had only become a branch secretary on 15 November 2016; and therefore the data breach, if there had been one, must have occurred between then and 23 December if, as GCa believed, the download had enabled the distribution of the mailshot.

119. On 6 January 2017, Mr Mease reported to GCa and AM that, in that period, there had been two downloads of the relevant data, one by JW and one by a researcher based in London, Mr Regan, who has not been referred to by either party as having acted in any way which is relevant for present purposes. As a result of Mr Mease's report, HB interviewed JW on 11 January; JW admitted that he had made the memory stick and passed it to MA. He was suspended. In his report on his investigation, HB said that JW accepted that the memory stick which he gave to MA had been used for the mailshot. That appears to me to be an overstatement; but he did say that, in his view, the mailshot 'can only have come from the data he downloaded and handed to Margaret Armstrong'.
120. On 12 January, MA went to Unite's central office in London for a meeting with Sharon Graham. At the end of that meeting, she was told that HB wanted to see her; and she met him. He showed her the mailshot, which she said she had not previously seen, and told her that it had been sent out from Glasgow on 21 December. He showed her JW's statement and told her the result of

Mr Mease's research. He has said that MA did not want to answer his questions; that is not in dispute; she said in her witness statement that she knew nothing about the mailshot and did not respond to HB's allegations, in effect, that her actions had resulted in the mailshot. She was then suspended by AM. When she got home she suffered an angina attack and was, as a result, signed off work for a substantial time.

121. There is much material in the bundle as to what followed between MA and Unite which I do not need to go into; whether the procedures followed by Unite leading up to the dismissal of MA were or were not appropriate is not a matter for me. It has not been suggested that the procedures were evidence of a campaign against GC; if it had been so suggested, the principles which apply in the Employment Tribunal to procedural unfairness would have had to be considered; and they were not. What I do need to consider is what passed between HB and GC on the subject of the mailshot.
122. His investigation of the mailshot led HB to visit the West Midlands regional office on 13 January. He spoke to GC who denied any knowledge of the actions of MA or JW and maintained then and has always maintained that neither he nor anyone authorised by him was responsible for the mailshot; but he accepted (see letter from RB to SH of 9 February 2017) that he obtained the branch secretary data. RB stated in that letter that prospective nominees (as GC then was) were entitled to access such data and that neither GC or his campaign were in breach of the ballot guidelines (described as 'campaigning provisions') but that LM was receiving considerable support from full time officers of Unite and that LM and his campaign were acting in breach of those campaigning provisions. HB asked GC if Mr Mease could interrogate the computer in GC's campaign office. In an email of 16 January, GC made three points, namely (1) LM had broken the rules by distributing widely as part of his campaign at least three documents, which he identified; and it was unfair that GC was being investigated for allegedly doing what LM had done when there was no investigation of LM (2) HB was a 'clear supporter' of LM and should not be carrying out any investigation and, indeed, on 12 January 2017 HB had

appeared at a hustings in Derby as a LM supporter. GC demanded that HB be replaced by someone who was independent; and (3) he would be willing to allow an inspection of his campaign computer.

123. As a result, Mr Mease went to the regional office on 16 January but was not afforded access to the computer. On the next day he was able to obtain access to it remotely. He found no material on it.
124. I will come later, in addressing complaint 2, to the source of GC's belief, which I have no doubt was genuinely held (at least on the basis of making no distinction between Unite's database and the tentacles of United Left and the LM campaign) that LM had access to branch secretary data. As to HB, this is probably an appropriate stage in this decision to address the criticism made of him and of Unite's handling of the investigation into the December 2016 download and the mailshot that he was partial and not independent. HB accepts that his preference in the GS election was for LM and that that preference would have been known to some senior staff. After having been a solicitor in private practice for 20 years, he was employed by Unite in senior positions from 2011. All of his employment by Unite was, therefore, during LM's terms as GS; and, throughout, he reported directly to LM. However, his evidence was that he had made no public statement about his preference and did not, as others had, put his name to the document which was circulated by the LM campaign as containing a list of 60 out of 64 members of the EC who supported LM and of many other lay officers and full time officers who supported LM. He regarded it as inappropriate to do so. He was, as I have said earlier, responsible for Legal Services within Unite and was Unite's data protection officer.
125. While I understand both GC's desire to head off any investigation into his campaign's gaining access to branch secretary data by complaining about both LM's activities and HB's alleged partiality, the fact is that GC admitted that that data had been obtained by his campaign. On the other hand, if HB had carried out the investigation when he was partial and approached it with

bias, that would be evidence that Unite was carrying out the investigation as complaint 8 alleges.

126. On 16 January, having received GC's comments, HB emailed AM and GCa, stating that he had as Data Protection Officer a duty to investigate the allegations of data breach made by GC and proposed to ask Neil Gillam ("NG"), one of Unite's solicitors, to carry out that investigation; and he so informed GC. He also sent an email or letter to MA asking her questions about the December 2016 download, in which she appeared to have been involved. GC replied on 26 January, saying he had not heard from NG, that the investigation into his complaint was a sham and that he had concluded that HB was an integral part of LM's campaign team. Of course, by this time, it is fair to say, that, as between the LM campaign and GC, 'the gloves were off'. As MA fairly said, each side was becoming increasingly exasperated with the other. However although HB was, entirely properly, pressed by Mr Millar in cross-examination, I did not get the impression that, in the part he played in relation to the investigation of the December 2016 download and the mailshot, he was acting in anything other than an impartial way; nor did I see anything in GCa's evidence to indicate that she had asked HB to investigate on the basis of a belief that he would not do so impartially. HB's reaction to GC's email of 16 January, in which GC put forward the contentions I have summarised earlier, was not to haver but immediately to appoint Neil Gillam (NG) to investigate the data breach on the part of LM of which GC complained.
127. There was one specific piece of evidence on which GC relied to show bias on the part of HB. On 12 January, the day before HB's meeting with GC at the West Midlands regional office, the first hustings in the election campaign was held at Derby. HB accepted that he attended that meeting; but he did not, he said, attend as a LM supporter and played no part in the meeting; he went to hear the arguments put forward by or on behalf of the candidates. He said that he did not speak, or do any act on behalf of LM; and there is no evidence to the contrary.

128. It was also said in GC's email to HB of 26 January '17 that HB had attended a Unite Alliance meeting on 14 January and had addressed the meeting and sought to persuade those present to support LM and that he had also attended a branch meeting on 18 January when he was not a member of that branch. There is no direct evidence to support those allegations. As to the meeting on 14 January, HB accepted that he attended it but did not say anything by way of support for LM and did not know that the callers of the meeting were Unite Alliance. My notes do not record any oral evidence as to the nature or leanings of Unite Alliance; there is nothing to that effect in the documents.
129. The evidence that HB was biased in favour of LM is, in my judgment, flimsy at best. I accept his evidence as to the Derby meeting and the subsequent meeting; there is no evidence to the contrary, as opposed to suspicion. It is not proved that he was biased or lacking in independence in his investigation or that GCa appointed him on that basis.
130. Nor do I find that the investigation into the data breach was aimed at undermining GC's campaign. GCa explained her appointment of HB to the Election Commissioner; she said that HB was not a decision-maker but an investigator and that it would be difficult to find someone who was more appropriate. I heard no suggestion as to who else might have been appointed without going outside the ranks of Unite itself. In any event, in my judgment, that was not required. Whether or not the LM campaign had acted in a similar way – to which I will come under complaint 2 – the downloading by JW of the material which he passed to MA and which found its way into the GC camp was, on the evidence before me, justifiably seen as a serious breach of data protection principles and of the ballot guidelines, whether or not the download had led to the mailshot; and Unite was entitled to investigate it and did so, in my judgment, in a reasonable manner.
131. I should add 4 points to what I have said so far on this issue; they are: -

1. It is to be noted that Unite did not take disciplinary steps against GC in respect of his acquisition of the data which JW had downloaded or in respect of the mailshot
2. NG carried out the investigation required of him by HB into data breaches by or on behalf of LM and provided a report dated 24 February 2017. If Unite had plainly failed to investigate those matters, that would clearly provide evidence that the investigation of GC may have been for electoral gain; however, although GC is sceptical of NG's investigations, the fact that he was immediately appointed to investigate GC's complaint points away from such a conclusion. The content of his investigation will be considered under complaint 2.
3. One of RB's complaints to the Election Commissioner on behalf of GC was that HB had behaved inappropriately during the investigation and that GCa had responded unhelpfully to GC's complaint as to HB's partiality. Those points were investigated and rejected by the Election Commissioner; and, while I have considered them, in the context of the circumstances which I have described they do not affect my conclusions on this part of the case.
4. HB's report was forwarded to the returning officer despite the admissions that the branch secretary data had been acquired on 23 February. RB, on behalf of GC, asked the Election Commissioner to consider GC's complaint about data breach by LM/Unite; in his letter he referred to the December 2016 download, said that GC was not responsible for the mailshot and that there was not time between GC's receiving the database to allow for the mailshot to be generated by his campaign. Whether the mailshot was or was not generated by the GC campaign is not a matter which I have to decide. It appears to have been ultimately concluded by the Election Commissioner that RB's point about insufficient time had force; and the dismissal of GC was based on the phone banking episode and not on the December 2016 download or of any of its possible consequences.

132. Therefore, in a moment I will turn to the phone banking episode; but before doing so, I should touch on RB's argument to the Election Commissioner that the effect of ballot guidelines 6, 15 and 17 together was that the latter 2 guidelines did not take effect until after nomination and that, until then, if ballot guidelines 15 and 17 did not apply until after nomination, prospective nominees were permitted, if they wished or needed, to access contact data without the restrictions which would apply after nomination. The argument was put forward to explain why, in receiving the data from the December 2016 download, the GC campaign had done nothing wrong. In my view, ballot guideline 6 did not so permit. If ballot guidelines 16 and 17 did not apply at all until after successful nomination, guideline 13 would have had no function; the structure of the ballot guidelines, whereby details of the branch secretary of a branch would be provided only to a candidate who had been nominated by that branch, would be undermined if a prospective nominee could have obtained details of all branch secretaries before the nomination process was completed.. That would be contrary to the scheme of the guidelines; and I do not accept the argument. In my view, a member of the union became a candidate when he declared that he was standing for election to the GS position and would be seeking nominations. I note that Professor Ewing reached the same conclusion on this issue, for more elaborate reasons, with which I agree.
133. The investigation of the mailshot was, in my view, inevitable. It was distributed to branch secretaries within days of the December 2016 download of branch secretary data; and it was not unreasonable to suspect a connection between the 2 events. In his witness statement, AM said that GC's campaign had produced the mailshot. . That was an over-statement and should not have been said without qualification. In his oral evidence, he said that he could not identify and it had never been established who had sent out the mailshot; but he had drawn an inference on the basis, he said, of "cui bono" i.e. who stood to benefit. SH, having considered it, concluded that AM's view was speculative and that there had not been sufficient time between the download and the sending out of the mailshot for the one to have been instrumental in the other. He may or may not have been correct; I

do not need to and do not have the evidence to enable me to decide; but that does not, in my view, detract from what appears to me to have been a justified perceived need on the part of Unite to investigate what had happened.

### **Phone Banking**

134. Although those involved in trade union elections and in campaigning more generally may well understand the term 'phone banking', it may be helpful to those who have not come across that term in those contexts to explain it. In the context of an election campaign, it connotes the deployment of a number of persons to use telephones to contact and potentially to canvass those who are entitled to vote in the election. A bank of phones is used to make calls in which the caller uses a script to impart to or seek information from the recipients of the calls.
135. In January 2017, Siôn Simon MEP was the Labour Party candidate for the West Midlands Mayoral Campaign. During that month, phone banking was carried out at an address in London. On 7 January, Ryan Coley, who was a GC supporter and had emailed his campaign offering to help, received an email asking him to take part in a phone banking operation during the following week. On 10 January he went to the address which he had been given and there met Tomas Rathbone, two members of GC's family and others. According to a statement he later provided to ST, he was told that there would be up to 45 people who would be making calls on behalf of GC's campaign. He was given a script to use and used it. The script was as follows:

**Hello, can I speak to (name from list)?**

**Hi, my name is..... I am calling from the Labour Party.**

**We are canvassing members and I'd just like to ask you a couple of questions?**

**Would you be able to help in the West Midlands mayoral campaign to elect our candidate Siôn Simon?**

[If Yes] That's great – we will pass your details on to the campaign team.

**As a member of Unite, are you aware of the upcoming election for General Secretary?**

[If No] The election campaign is taking place and Gerard Coyne is the local candidate, he is from West Brom and is currently regional secretary of Unite for the West Midlands. Do you think you will support him?

[If Yes] **Can I ask who you will be voting for?**

[If Against – end call.] Thank you for your time.

[If Yes] That's great. We will let his team know and pass on your details if that's okay?

[If not sure/don't know] Can we pass your details on to his team, so they can give you some more information about the campaign?

136. It appeared from the script and from what Mr Coley had been told, according to his statement, that the phone banking exercise involved phoning members of the Labour Party whose details had been provided from that source but who were known also to be members of Unite. The script shows that the caller was to say that he/she was calling from the Labour Party and, having asked a question about support for Siôn Simon, was then to canvas support for GC in Unite's GS election. Mr Coley provided to ST an email from Mr Rathbone telling him that 278 calls had been made during 'last night's phone bank' and that there had been 69 contacts with 41 people wanting their details passed on to GC's campaign.
137. I need to point out before going further with this topic, now that I have outlined the information which came to ST and was passed by him to GCa and thus gave rise to what GC described in his witness statement, fairly, as a second major investigation, that it is not my task to reach conclusions as to whether or not there was serious misconduct on GC's part in relation to this phone banking. That issue is central to GC's unfair dismissal claim. In contrast, I

am only considering, for the purpose of complaint 8 and complaint 2(e), whether that second major investigation of GC was aimed at undermining GC's campaign or whether it was conducted properly and neutrally as part of the normal requirement to investigate complaints of misconduct during an election campaign. GCa was concerned about the information passed to her by ST. In her witness statement, she said that, while Unite had a close relationship with the Labour Party, there were many who did not regard that relationship in a positive light; and, as with all affiliated trade unions, Unite regards the integrity of its own internal election process as important. Interference by the Labour Party in such an election would not be regarded as acceptable; indeed, she describes the information which ST provided to her as 'astonishing'. Therefore, she immediately contacted Iain McNicol, the General Secretary of the Labour Party, met him and informed him of what had happened. He looked into it and, on 6 February, informed GCa that the phone bank was a Siôn Simon phone bank but that the script which had been used by Mr Coley and, presumably, others was not authorised and differed from the standard Labour Party script which did not mention Unite or its election. He said that the Labour Party had not divulged and would not divulge the personal data of Labour Party members to any third party without express permission.

138. By that time, GCa had instructed HB to investigate the phone banking; and HB emailed both Tomas Rathbone and GC, informing them that he was investigating and asking for assurances that such phone banking would cease forthwith. He said that, without such confirmation, Unite would have to consider legal redress, specifically by way of injunctive relief. There followed numerous exchanges which I do not need to describe in which AM was also involved. On 3 February, RB wrote to HB saying, in effect, that local Labour Party officials in the West Midlands had asked GC's team to assist them to obtain support for Siôn Simon and, in return for such assistance, it was agreed that questions in the phone calls could be asked about GC's candidacy for the GS position and that it was entirely proper for members of the Labour Party to work in cooperation with GC in that way. GC told HB that he believed that the script had been authorised by the Labour Party; Mr

McNicol said that it was not. There were further exchanges; at one stage specific questions were put in writing to GC which, as he was entitled to do, he declined to answer on legal advice. On 30 February, HB provided his report of his investigation into the phone banking, in which he concluded that any breach of data protection legislation was most likely to be an issue for the Labour Party and suggested that the question of any breach of the ballot guidelines by GC should be put to the returning officer.

139. I should add that there are documents in the bundles which show that LM's campaign team had used phone banking in 2013; MA gave some evidence about that; but the caller was to say that he/she was ringing on behalf of the LM campaign team. The issue which concerned Unite in 2017 was not phone banking per se but the way in which the particular phone banking described above was carried out, with the divulging from Labour Party resources of contact details of Unite members which, otherwise, the GC campaign could not have obtained.
140. The thrust of Mr Millar's criticism of the union's investigation into the phone banking episode was that there was no proper basis for dragging the GC campaign into it; there was no evidence, he said, that GC knew that some of his supporters were asking questions related to GC's candidature when carrying out phone banking for Siôn Simon's campaign to be elected as West Midlands Mayor. I am unable to accept that argument. GC accepted in cross-examination that what had been done was damaging to the union and that Unite had a right to investigate what had happened. He said that he questioned the impartiality of the investigation and that he would have co-operated with a neutral investigator; but (1) there is nothing in the history of this investigation which adds to the allegation of partiality which I have already considered (2) HB sought information from Tomas Rathbone, who made no comment and from GC, as to which see above (3) his conclusions, which I have summarised above, were not that GC had been guilty of breaking the ballot guidelines but that there was an issue to be considered by the Returning Officer and (4) there was evidence not only of data provided by (although without the authority of) the Labour Party without any

data sharing agreement between Unite and GC's campaign and of the use of that data as I have described, for the purposes of GC's campaign. In my view, there was manifest justification for the decision of GCa that what had happened had to be investigated; I do not see any evidence of partiality on HB's part in his investigation; and I am satisfied that the investigation was not launched or carried out to undermine GC's campaign.

### **Unite Herald**

141. Lastly, under complaints 8 and 2(e), I come back to Unite Herald. I have already addressed the issues which arise in relation to Unite Herald in addressing complaint 3. I concluded there that Unite was justified in acting as it did in relation to Unite Herald and that the steps which Unite took were not taken to disrupt GC's campaign as opposed to acting reasonably to stop the distribution of a publication issued by that campaign which contained two significant errors of fact, relating to the flat and to the arrangement for payment to LM of salary and pension. Whether those passages were or were not technically defamatory does not matter, in my judgment; I do not intend to repeat in this section of my decision what I have said already on the Unite Herald issue.

142. Accordingly, I have concluded, for the reasons which I have set out, that Unite did not undertake the investigations which I have set out in order to undermine GC's campaign or in breach of their duty of neutrality but, in each case, acted reasonably and properly in investigating alleged misconduct during the election campaign. Therefore complaints 2 (e) and 8 also fail.

### **Complaints 2 and 4**

143. The terms of these complaints are:-

#### **Complaint 2**

1. Did union employees breach the 'level playing field' rules contained in ballot guidelines 15 and 17, by:
  - a. giving the McCluskey campaign alone access to union databases for use in campaigning – or did the McCluskey campaign use an independent database for that purpose?

- b. using union facilities to print and post McCluskey campaign material – or did the McCluskey campaign use independent resources for those purposes?
- c. producing extra branch nominations for Mr McCluskey from non-functioning branches – or were all branch nominations made in accordance with proper and normal procedures?
- d. arranging opportunities for Mr McCluskey to meet with members and media during the campaign – or were the meetings identified by the Complainants undertaken in the normal course of Mr McCluskey’s campaign or were those meetings not campaigning meetings but meetings conducted as General Secretary in the normal course of that role?
- e. undertaking investigations into Mr Coyne’s conduct, during the campaign, so as to undermine his campaigning – or were investigations into candidates’ conduct, including Mr Coyne’s, conducted properly and naturally as part of the normal requirement to investigate complaints of misconduct during an election campaign?
- f. failing to investigate properly or at all, during the campaign, breaches of rules by the McCluskey campaign – or were alleged breaches of rule investigated properly?
- g. disseminating information to undermine Mr Coyne as a critic of Mr McCluskey’s conduct of the union?

#### **Complaint 4**

Did the union breach the said ‘level playing field’ rules by allowing the McCluskey campaign access to its membership and branch secretary databases during the campaign?

144. As will have been seen by any reader of this decision, many of the issues which I have addressed up to this point are relevant to complaint 2. I have dealt below with complaints 5 and 6 and 2(c) together. Complaint 2(e) and 8

have been taken together. I do not intend to return to them. Complaint 4 is almost identical with complaint 2(a). Everything which falls to be considered within complaint 4 also falls within complaint 2(a); and there is no purpose in dealing with them separately. I turn, therefore, now to address complaints 2(a), (b), (d), (f) and (g).

## **Complaint 2(a)**

### 2013

145. It is GC's case that the lack of neutrality and positive actions on behalf of LM on the part of Unite officers during the 2016/17 campaign replicated what had happened in 2013. It is logical for me, therefore, to consider first the alleged breaches of the electoral process in 2013 on which GC relies.
146. As identified in Mr Millar's opening and closing submissions, the principal witnesses as to 2013 were MA and John McMahon. In her witness statement, MA described in detail that the organising department, in which she was a senior organiser, was treated as a dedicated resource of LM's election campaign; she described how Sharon Graham, the head of the department, instructed the organisers to work to secure LM's re-election without any distinction between their working time and any other time; and she set out a number of detailed ways in which she and others worked and were provided with union data and materials so as to further LM's campaign. It is not, I believe, necessary for me to go through the details of each allegation which she made about 2013. Some of them do not support her general thesis; for example: -
1. She complained that, at a meeting in 2013 at which other senior officers and lay officials were present, ST went through the results of the 2010 election, providing specific data of the voting turnout in individual branches; but I was told by other evidence and accept that the turnout data per branch and details of which branch had nominated which candidate were, in fact, available data and that the provision of that data did not involve any improper use.

2. Many of the emails which she has produced to support what she said used personal email addresses and not Unite addresses and were sent at times outside ordinary working hours. MA says that many of the emails which she has provided to support her witness statement use personal email addresses and not Unite addresses and she was asked to supply her private email address; she infers that that was to disguise reality but did not say that she had been told of that purpose. The documents do not wholly support her evidence.
  3. The “100% Campaign” to which she refers appears to have been a legitimate campaign to seek to increase membership.
  4. ST’s evidence was that the data on Unite’s database called Stratum was legitimately available to all employees.
  5. The power-point presentation which MA described as having taken place in April/May 2013 appears from its terms to have been a legitimate presentation as to the arguments in favour of the political fund which was the subject of balloting in 2013.
  6. Reliance on the email from George Hicks dated 10 February 2013 was misplaced; as MA agreed, he was not a Unite employee but (as perhaps the tone of his email demonstrates) a lay activist working for the LM campaign.
  7. MA accepted that the departure from Unite of the East Midlands Regional Chair, Mr Axtell, did not occur because he was a supporter in the 2013 election of LM’s opponent, as set out in paragraph 15 of her witness statement, but that Mr Axtell had been negotiating to leave long before the 2013 campaign and had left before it.
147. However, a number of the points which MA made were not wholly undermined in cross examination, in particular her evidence that Sharon Graham required MA and, according to MA, other organisers, to take part in what she called ‘The Security Campaign’, the objective of which was to secure LM’s re-election, as part of their work. In my view, that aspect in particular of MA’s

evidence survived cross-examination; and Sharon Graham was not put forward as a witness on Unite's behalf. Of course, I do not draw any inference as to what Sharon Graham might have said if she had been a witness; but MA's direct evidence about the important part which Ms Graham played in causing and indeed requiring MA to work towards the re-election of LM in her work time remains. MA's role in the December 2016 download may have been questionable; but, on its own, it was not such as to cause me to give no credit to any of MA's evidence about 2013. I have concluded that, in 2013, to a not insubstantial degree the borders between what was permitted and what was not permitted by the ballot guidelines were crossed, as AM agreed in answer to Mr Millar, although I accept his evidence that he knew nothing about it at the time.

148. I have not forgotten AM's justified evidence that there was no reason why any employees of Unite, including organisers, who were supportive of LM should not coordinate their efforts in support of his campaign, providing that they did not do so in work time and did not use Unite's resources in order to do so. It is fair, too, to give weight to AM's point that none of the conduct of which MA complains was the subject of any complaint to Unite at the time and therefore there was no contemporary investigation. What MA has said appeared four years later and after she had been dismissed for her role in the December 2016 download. Nevertheless, I accept her evidence to the extent which I have set out.
149. The other principal witness as to the 2013 campaign, on behalf of GC, was John McMahon. He was employed as an organiser in the West Midlands office and was branch secretary of branch WM6090, a branch to which all or many of the employees at the regional office belonged. I feel bound to say that I was not impressed by his evidence; he did not appear to me to wish to answer questions fully and freely and was distinctly unhelpful about the circumstances in which he came to leave his position of branch secretary, apparently within days of his branch having nominated GC in 2017 and having agreed to donate £20,000 to his campaign. In his witness statement, he describes that (1) within days of the 2013 election being called 'we' (by

which I take him to mean he and his colleagues at the regional office) received large deliveries of merchandise such as pens, lanyards and posters promoting LM for General Secretary (2) he received by email a spread sheet showing large employers to target and a list of the contact details of branch secretaries (3) he was asked to call branch secretaries to find out whether their branches would endorse LM to promote LM and to visit workplaces for that purpose and carried out those instructions.

150. As to (1), it was the evidence of ST that none of the promotional material came from Unite and it all came from United Left or the LM campaign and, also, that none of that material was produced or distributed until the voting stage of the election process. I was impressed by ST's evidence; he appeared to me to be focussed, prepared to answer questions candidly and, if I have to choose between witnesses of fact on this issue, for the reasons I set out I prefer that of ST.
151. As to (2) I have already referred to the fact that all of this data was generally available during the 2013 campaign.
152. As to (3), Mr McMahon said that he attended branch meetings to campaign for LM during work time. AM said that in 2013 the lines between work time and non-work time for employees were often blurred; and I am prepared to accept that there is some degree of validity in what Mr McMahon said on this point; it ties in with and lends some support to the evidence of MA.
153. I have therefore concluded that, in some respects, in 2013 the lines between what was and what was not permitted on the part of employees of Unite were crossed by some employees, although not at all to the extent as set out in the witness statements of MA and Mr McMahon. My findings as to the 2013 campaign are relevant to the 2016/17 campaign; on my findings, in the previous campaign, Unite had a record of not wholly adhering to the rules which govern their election campaigns and of not achieving the neutrality which employees of the union must achieve.

154. Do the conclusions I have reached as to the 2013 campaign support GC's complaints about the 2017 campaign, as set out in complaint 2 or any other complaint? In my view, they do not do so to any substantial or persuasive extent. MA said that, in the latter campaign, she had no evidence that the conduct she complained of in the former campaign had again taken place. I have earlier described the occasion in December 2016 when she was asked to give her private email address; but her description of that incident is far too speculative in nature. MA in her witness statement described how, in January 2017, Sharon Graham phoned her when she was in a car with John McMahon, said that she had been told that MA had said that she would be supporting GC and asked whether that was true. MA confirmed that she would be supporting GC. Ms Graham said that she would be supporting LM and asked who was GC's campaign manager and that GC would need to have a team within a team as nine of the ten senior organisers were still supporting LM, as they had done in 2013. It seems to me that, in that conversation, Sharon Graham asked for information and pointed out that GC's campaign might have organisational difficulties but did not seek to recruit MA to the LM campaign or to give her any instructions to support it. MA was not alone in thinking that there was not a level playing field in 2016/17 between LM and GC; for the reasons I have set out earlier in this decision, I believe that she was justified in thinking that; but that, too, is not evidence of a repeat of the 2013 conduct which she described. The evidence is not, in my judgment, sufficient to justify inferring repetition in the 2016/17 campaign from what happened in the 2013 campaign; if GC's complaints under complaint 2 are to succeed, there must be evidence, to which my findings as to 2013 would provide support, that what is alleged to have occurred in 2016/17 did occur; and it is to that which I now go.

#### 2016/17

155. Complaint 2 is the principal vehicle by which GC's case, as put by Mr Millar in opening, that the processes of Unite and the actions of employees of Unite were used in a wholly partial manner to secure the re-election of LM. Complaint 2(a) relates to the use allegedly made of access to the union's

database for that purpose. The general case is based primarily on specific examples based on the evidence of specific Unite members.

156. I have referred, in addressing complaint 7, to Harry Harris, branch secretary of the Birmingham City Council branch. He received an email thanking him for his branch's nomination of LM when his branch had not done so. I do not need to return to the issue about the erroneous thank you letters; the point made under complaint 2(a) is that the email was sent during working hours on a working day, after AM had made it clear in his email of 26 January 2017 to Unite staff that they were not permitted to campaign during normal working hours, defined for all staff as 9-5 Monday to Friday. The email which Harry Harris received was timed at 4.48pm and was sent to the recipient's private email address.
157. However, it was sent not by Unite but by 'campaigns@unite4len.co.uk' an address of the operation of the LM campaign which had combined its database with the United Left database for the purposes of the election campaign. ST's evidence was that the activities of both involved lay members, all of the officers of United Left were lay members; and there is no evidence that the sender of the email to Harry Harris was an employee as opposed to a lay member or that, if he was an employee, he was at work on that day. I am not able to conclude that the email was sent by an employee who was, at the time that it was sent, doing so during working hours; and the sending of this email does not provide evidence that Unite had given access to its database to those who were running the LM campaign. It is likely that United Left knew who the branch secretary of the Birmingham City Council branch was and had his contact details.
158. The next episode which was put forward as supporting complaint 2(a) is the phone conversation between MA and Sharon Graham in early January 2017. I have dealt with that conversation in detail under complaint 8 at paragraph 153 above and do not need to repeat what I there said. The conversation appears to have taken place during working hours; but its content did not, on the evidence, support this head of complaint. A third example of officers

campaigning for LM during working hours is said to have occurred on 7 February 2017. On that day, Simon Hemmings, a shop steward and senior convenor at Rolls-Royce, Derby, was driving in his car together with Ian Wilson, also a convenor; between 12.30 and 1pm he received a phone call from Annmarie Kilcline, the East Midlands regional secretary. Mr Hemmings gave oral evidence; Mr Wilson did not; but his witness statement does not add anything material. Ms Kilcline said, 'Good afternoon' and then asked Mr Hemmings what was happening in the Rolls-Royce branch in terms of their nomination for General Secretary and whether the branch would be supporting LM. He replied that the branch would decide at a meeting in a few days' time. Ms Kilcline said 'Thank you' and the call ended. Mr Hemmings agreed in cross-examination that Ms Kilcline did not say anything to persuade him to support LM as opposed to GC. Of course, the call could have led to a campaigning response; but it did not.

159. I do not see how that call can be said to have involved any degree of campaigning on the part of Ms Kilcline. It appears to have taken place in work time; but Ms Kilcline simply made an inquiry which, as regional secretary for the East Midlands region, she was entitled to make.
160. In his opening, Mr Millar referred to a complaint about an unnamed officer recorded by Des Quinn, the West Midlands region's deputy secretary. There is no direct witness evidence about that episode. The bundle tells me that there was a complaint by a Unite member to Mr Quinn that a regional officer had been campaigning at a regional committee meeting on behalf of LM. Mr Quinn passed the complaint on to AM. AM advised Mr Quinn that he should obtain the impugned officer's side of the story and then determine whether a disciplinary investigation was required.
161. There appears to be no more evidence than that about this episode. Whether the complaint was soundly based I cannot say.
162. On 7 February 2017, Ms Kobla, a member at the Sports Direct branch, reported to GCa that, at her branch nomination meeting, Mr Primarolo, a full-time union officer, said that GC was against free movement of labour and the

European Community. She also complained that there had been manipulation in relation to the attendance at the meeting of agency workers. The current issue does not relate, however, to the identity of those present at the meeting.

163. I have no witness statement from Ms Kobla or from Mr Primarolo; and it is impossible for me to go beyond saying that, if Ms Kobla's account is correct, Mr Primarolo crossed the line and appears to have been campaigning for LM or, to be more accurate, campaigning against GC. Whether he did or did not I cannot make the subject of any finding on the evidence I have. The complaint was passed on by Unite to the returning officer; SH wrote to Ms Kobla on 20 February saying that there had been nothing irregular about the attendees of the meeting and that the words 'complained of' could be considered as an expression of opinion.
164. There are two other incidents of this type referred to in Mr Millar's opening; both were based on witness evidence, which, by agreement, was withdrawn.
165. The episodes I have discussed do not, in my judgment, establish that Unite officers were campaigning on behalf of LM during work hours to any material extent; there is a very small number of complaints which, for the most part, do not support the case which GC puts forward.

#### **Access to union database**

166. There is no doubt that Unite's database included, whether at central office or at regional level, the names and contact details of branch secretaries and, no doubt, details of branch officers and workplace representatives. If Unite permitted candidates or pressure groups to have access to its database, that could confer serious advantage; but ballot guideline 15 and 17 were clearly intended to prevent such access. I have earlier expressed my view that those guidelines applied to candidates from the time at which they declared themselves as such and not only from their successful nominations.
167. It is GC's case that such access was provided to the LM campaign. His team identified three particular documents as supporting that case, which

documents he identified in his email of 16 January 2017 to HB, after HB had been to see him on 13 January (see under complaint 8 above) to investigate the breach of data security represented by the December 2016 download. As I have set out earlier, GC answered by raising similar breaches on the part of Unite. He complained of the circulation of LM campaign material to all branch secretaries, referring to those three documents in particular; they were circulated between 23 December 2016 and 11 January 2017. He identified them again in his oral evidence. Those documents and other material of that kind clearly came from the LM campaign and not from Unite itself; that is not in dispute; but how did the LM campaign know how to distribute the material to branch secretaries and branch officers? GC asked me to infer that the necessary information was obtained from the Unite database; but, taking the evidence as a whole, I cannot draw that inference. I have referred more than once in this decision to the activities and what I may fairly call the 'reach' of United Left and the LM campaign database. If the contact information which that campaign would need had been readily available to them from the Unite database, there would have been no need for the organisation and system of local coordinators and activists which ST described. Although ST did not claim that the reach of United Left was 100% complete, the campaign sought to distribute its material as widely as possible. In some cases, the distributed documents said that they were sent to all branches; the United Left website made it clear that the distribution was not 100%; but I have no doubt it enabled coverage of a very high proportion of the desired targets. ST said that branches which had previously nominated LM or were seen as potential supporters this time were priority targets. I see no reason to doubt ST's evidence about this; whatever view one takes of the influence of pressure groups in what is supposed to be a democratic election, within and beyond the context of trade unions, I was impressed by the evidence of ST which embodied the vigour with which United Left and the LM campaign went about their task. In November 2016, in anticipation of the EC election (it had not yet been decided to hold a GS election at the same time), a missive to United Left regional and sector coordinators from United Left's chair said:

‘Can I remind all coordinators who haven’t already sent in their latest updated UL shop stewards, branch officers and contact lists to do so ASAP.’

168. GC relies on evidence from three individual witnesses that the contact information could only have come from the Unite database; those witnesses, as identified by Mr Millar in closing, are Kelly Gillespie, Lucy Parker and John McMahon; and I turn to consider their evidence

#### Kelly Gillespie

169. Kelly Gillespie (“KG”) joined Unite in 2012; she became a shop steward and was appointed branch secretary of the DHL Solihull branch in early November 2016; she was elected as an EC member in April 2017. She said that her details were not put onto Unite’s database until 3 December 2016.
170. Just before Christmas 2016, she received at home material from the LM campaign. The documents which she identified were, according to ST’s evidence, sent out by the LM campaign and not by Unite. KG complained in January 2017 to AM that her personal details should not have been made available to LM until her branch had nominated him and that her details must have been provided to LM by Unite, through access to Unite’s database. She was also one of the recipients of the mistaken thank you letter for nominating LM – although her branch had not done so – see under complaint 7 above. She made a further complaint about that in March 2017. In her witness statement she was critical of the way in which those complaints were handled; I will come to that under complaint 2(f). For the moment I am considering the wrongful use of Unite’s database. I have referred earlier to the reach of the data available to United Left, combined with the LM database for the purposes of the 2016/17 election, and to the steps taken by United Left to ensure that they had as much detail as they could attain about branch secretaries. KG agreed in cross-examination that, as branch secretary of her branch/shop, she would have been one of the people whose details United Left would have wanted to have. I am satisfied that the receipt by her of LM campaign material came about through the

operations I have described and not as a result of any data breach by Unite itself.

### Lucy Parker

171. Lucy Parker is a longstanding member of Unite and was a member of the TGWU before it. She became the branch secretary of the Stoke-on-Trent City Council/Kier Stoke branch WM7260, in January 2013. In April 2014, she changed her address and, thereafter, received correspondence from Unite at her new address. Just before Christmas 2016, she received at her home address the anonymous mailshot and LM campaign material. At that stage her branch had not nominated anyone – indeed, nomination forms would not yet have gone out; see the timetable to the ballot guidelines--and she was shocked that the LM campaign team were able to access her at her home address; the address which that team would have had for the purpose of the 2013 campaign, she reasoned, would have been her previous address. She complained to Unite about what she believed had happened. Her case is similar to that of KG. It would be surprising, in my judgment, if, in the two and a half years which had passed since she changed her address, the reach of United Left had not extended far enough to be informed of the change of address of a branch secretary of a branch which had nominated LM in 2013 and would therefore have been on United Left's target list. Ms Parker's shock may have been based on a lack of knowledge of the reach or activities of United Left; but I would be surprised if United Left had not obtained her new address in time for it to be used by the LM campaign in 2016/17 as it was. I conclude that this episode, too, does not establish a breach of the Unite database.

### John McMahon

172. John McMahon received campaigning material from the LM campaign at his home just before Christmas 2016, sent to him as branch secretary of his branch. He moved to the address at which he received that material in August 2016 and notified his change of address to the regional and head offices of Unite. He too complained to Unite that he had received that

material at his home address and could not see how the LM campaign could have acquired his address without accessing Unite's database.

173. In the course of his evidence, he agreed that he had supported LM in 2013. He agreed in his oral evidence that his branch was a big branch, that it would be a priority for United Left to obtain contact details for his branch and that he, as branch secretary, would have been a United Left target. In my judgment, it is likely that United Left and or the LM campaign had obtained his contact details after his change of address.
174. Mr Segal made the point with some force that the number of complaints in this area, despite the numbers of copies of LM campaign material which must have been sent out to a very large number of branches, was very small. It is not in dispute that several hundred branches did not nominate LM; and the eventual results show that GC is likely to have had supporters in branches other than those who nominated him. Yet the evidence of complaints is very limited; there is no evidence that, if there was any breach of Unite's database, that took place on any widespread or systematic basis.
175. I have considered whether the history of the handling of complaints made to Unite by KG, Ms Parker and Mr McMahon supports the suspicions which each of them had as to how their addresses came to be used by the LM campaign team and supports GC's general case that Unite allowed access to its database to the LM campaign. My conclusion is that the handling of those complaints may not have been entirely satisfactory; but there is not enough in that to justify a finding of widespread or indeed of any breach of Unite's database; and the evidence simply does not prove any such breach.

### **Complaint 2(b)**

176. I have searched but have not found any separate reference to this subhead of complaint 2 in Mr Millar's opening or closing submissions and I have not seen any direct reference to this alleged activity in the evidence. Invoices were produced which showed that material sent out by the LM campaign in December 2016 and January 2017 were invoiced to ST. All of the material to which I have referred in addressing complaint 2(a) was dispatched by post

or email; but there is no evidence which enables me to find that the McCluskey campaign used union facilities as opposed to their own facilities to print and distribute their campaign material.

### **Complaint 2(c)**

177. This subhead relates to the non-functioning branches issues which has have been covered earlier in this decision under complaints 5 and 6.

### **Complaint 2(d)**

178. In his witness statement, GC pointed out that the fact that LM remained in position as GS between the declaration of the GS election and the announcement of its result, had the effect that LM was able easily to use and access Unite's resources, including its employees, to organise and facilitate the meetings and conferences which he was attending. I do not doubt that, by staying in office, LM was able to continue to present himself to the membership as carrying out important and high-profile work in his capacity as GS.

179. On 23 February 2017, RB, on behalf of GC, put forward a series of complaints that LM had acted in breach of the ballot guidelines. One of those complaints was the LM should have stepped down for the period of the campaign but that Unite was continuing to arrange meetings for members so that LM could put his case for re-election forward.

180. There was telling evidence on this issue; the bundle contains a number of reports of LM's activities around the United Kingdom. I have no doubt that, between December 2016 and April 2017, he met many branch officials and members, public figures, industrialists, officers of other trade unions and others in the course of his normal duties; and I have equally no doubt that employees of Unite, as they would have done before the election, were acting to arrange his meetings, his diary, his travel and the other requirements of his job; but I do not find that, in so acting, those officers were using union resources to support LM as a candidate; they were supporting him in his job as GS, in the same way no doubt as AM, as LM's chief of staff,

had employees supporting him in his job and GC had regional employees supporting him.

181. I said at the beginning of this decision that, by remaining as GS and carrying out the principal functions of his job, LM had an enormous advantage over GC who carried on with his job in the West Midlands region, no doubt did so with employee support and was, I am sure, obtaining exposure in carrying out that job within his region; but of course that exposure was more limited and to fewer members and would not have attracted the same publicity. That is one – and a strong – reason why in this election there never was and never could be the level playing field on which GC and RB now so heavily rely.
182. I have not seen any or any persuasive evidence that, in carrying out what I can describe as his industrial duties, LM crossed the line and said or did anything which could be construed as electioneering or that he played any role in the election arrangements. The complaints which were made by union members, including GC and RB, were considered by GCa, AM and others who they asked to pursue investigations. There is no evidence of any overt interference by LM in any of the activities which have been examined in this decision.
183. Because of the lack of evidence and paucity of argument on this issue, as to which I make no criticism at all, I felt it would be helpful to consider in this context what Professor Ewing, the Election Commissioner, had said in response to the complaint made to him by GC and RB. I said in my introduction to this decision that it was agreed that I could consider what he had decided but was not bound by it; for the most part I have not looked at his decisions so as to avoid being influenced by them; but in the context of this particular complaint I have done so.
184. In his decision on this complaint, he referred to a considerable amount of detail which was not argued about before me and looked in particular at three meetings. On the basis that it was lawful for Unite to hold the GS election although LM was to continue in office – as has now been

established as correct – he concluded that LM’s work as GS would inevitably have benefited his candidature but that none of the events and documents to which his attention was drawn crossed the line between his carrying out his tasks as general secretary on the one hand and electioneering on the other. On the evidence before me, I reach the same conclusion.

### **Complaint 2(e)**

185. As set out earlier, this subhead is entirely embraced within and is addressed under complaint 8.

### **Complaint 2(f)**

186. The wording of this complaint is perhaps not as clear as those who drafted it might wish it to have been with hindsight, after all the documents have been assembled and the witness evidence considered. There are three points within the wording which have caused me concern. The first is that the words are not ‘failing to investigate complaints of breaches of rules by the LM campaign’ but are ‘failing to properly investigate breaches of rules by the LM campaign’; but a glance at Mr Millar’s opening skeleton argument makes it clear that the criticism is of the manner in which Unite handled complaints made to it by or on behalf of GC and others.

187. The second is that the word ‘properly’ is not defined; that is not a criticism of the drafters of the list of issues. In my view that word means, in the context, ‘in good faith and to a reasonable extent’.

188. The third is that the complaint alleges that there were breaches of rule by ‘the McCluskey campaign’. I have more than once pointed out in this decision that, on the evidence, the McCluskey campaign was not carried out by Unite but by persons, whether officers of Unite, lay members of Unite or otherwise, who gave their time to the promotion of LM’s re-election, just as did those such as RB (a member but not an employee) who worked on GC’s campaign. However, I am prepared to assume that complaint 2(f) is directed at alleged failures on the part of Unite to investigate breaches of rule, including the ballot guidelines, by Unite.

189. Lastly, what are the complaints of breach of rules which I am to consider? In his opening skeleton argument, Mr Millar referred to the complaint made by GC about data breach on 16 January 2017 immediately after it had become clear that HB was investigating the December 2016 download and complaints by Kelly Gillespie, Lucy Parker, John McMahon and Howard Beynon. In his closing submissions Mr Millar referred principally to the first of those complaints. I shall deal with them each in turn.

### **The complaint of data access breach by Unite**

190. On 16 January 2017, GC sent to HB an email to which I have referred earlier in this decision. He said that he had raised with HB, when HB had visited him on 13 January, that LM had breached Unite's data integrity by circulating material to branches and that HB had responded that, having not received a complaint from branches, he was not investigating that. GC said in the email that there was clear evidence that LM's campaign had access to all branch secretary details and referred to the three documents circulated to branch secretaries by the LM campaign, to which I have also referred earlier. He said: -

‘I therefore call into question your suitability to conduct this investigation as a clear supporter of LM's campaign and the one-sided nature of the investigation’.

191. Whether that email should be regarded as containing a complaint or only a setting out of reasons why HB should not be the investigator of the December 2016 download is arguable; but HB decided to treat it as a complaint against Unite of breaches of data security and to ask NG to investigate that complaint. He informed GC of that decision on the same day as GC's email. On 26 January, GC emailed HB and NG, making a number of points into which I need not go for present purposes; he did not object to the appointment of NG; he objected to HB's role in any investigation of data breach by his campaign and complained that he had not heard from NG, that HB was not seriously interested in his complaint and that the investigation of his complaint would be a sham.

192. On the following day, NG replied to GC, explaining the delay, saying that he was presently looking into the complaint and that he would undertake the investigation thoroughly and impartially. On 9 February, RB on behalf of GC wrote a detailed email to SH in which he complained about HB as an investigator and the provision to LM of access to Unite's database. On 14 February, GCa informed GC that she would send him the results of NG's investigation; but on 23 February RB on behalf of GC placed the complaint before the returning officer and the Election Commissioner. GCA said that, as a result, it was not possible to send NG's report. Later that day NG sent his report to HB, GCA and to AM.

193. In summary, NG reported that: -

1. He had considered the complaint as a complaint of breach of the Data Protection Act.
2. He described his investigation, which included looking at LM's campaign website and interviewing LM.
3. He concluded that, as to the use in the LM campaign of documents claiming distribution of material to all branches, (an aspect of the complaint) that was an overstatement; LM had told him that he did not know whether United Left had details of all branches but hoped that as many as possible were on the list and that the claim to have communicated with all branches was a hope as opposed to a verifiable fact.
4. He had interviewed two employees who had each, in the course of their work, obtained branch secretary details from the Unite's database and was satisfied that they had done so for plausible reasons and that there was no evidence that any information from the database had been provided to any individual outside Unite.

194. His conclusion, therefore, was that there had not been any breach of Unite's database.

195. RB points out in his witness statement that the Election Commissioner, to whom the complaint had been referred, expressed the view that NG had approached the investigation on too narrow a front by looking at it under the Data Protection Act rather than on the basis of Unite's providing data to the LM campaign in breach of the ballot guidelines; but, in my view, if NG had asked himself that question, he would have come to the same conclusion; the evidence would have been the same; if Unite had shared data with the LM campaign, in the absence of a data sharing agreement, that would prima facie have constituted a breach of the Act as well as of the guidelines.
196. Mr Millar submitted that NG's investigation did not include examination of LM's campaigning; but NG's report says that it did; and there is no evidence to the contrary. Mr Millar also suggested that the investigation was in stark contrast to the nature of the investigation by Unite of the December 2016 download and other issues such as phone banking and Unite Herald; but I have not been persuaded by those submissions; The nature and content of and steps taken to carry out an investigation must differ according to what is being investigated and the extent of cooperation or obfuscation which the investigator meets. As an example, NG's report reveals that he was given access to LM's campaign computer; but the history of attempts by Unite to inspect the GC campaign computer as part of the investigation of the December 2016 download and the anonymous mailshot points in a different direction.
197. AM referred NG's report to SH on 27 February. I note that he drew his attention to the fact that NG had not directly addressed the issue of breach of election rules as opposed to data protection – a contra indication of any intention on AM's part to embrace a sham.
198. Although I had looked at it briefly before the hearing at the end of June of this year, I had not looked at Professor Ewing's response to GC's complaints, in order to ensure that I was not influenced by his decision, until after I had reached my own. I do not see in Professor Ewing's response any indication that NG's report was either biased or unreasonable in its scope or

conclusions; and that mirrors the conclusions which I had independently reached. In my judgment, NG's investigation was reasonably carried out and was not a sham. I have not seen any material to justify me in a conclusion that NG was not an objective investigator; he reported to HB; but I have already addressed the issue of HB's alleged lack of objectivity and do not need to repeat it.

### **Complaints by Others**

199. On 18 January 2017, KG emailed what she described as a formal complaint to AM. Her complaint was that she had received campaigning material from LM and that her contact address must have been obtained from Unite's database. I have set out under complaint 2(a) my conclusions on that complaint; I am now considering whether the way in which her complaint, and her later complaint on 19 March about the receipt by her and others of the false thank you letter, were handled was in breach of rule.
200. So far as the first complaint is concerned, KG did not receive an immediate response; and on 8 February she sent a chasing email to the same email address as that to which she had sent her first complaint and said that she would be sending a copy by recorded delivery. On 21 February, having heard nothing, KG escalated her complaint to Professor Ewing by forwarding her earlier emails. She took that step at 4.35am. At 8.05am on the same day, AM emailed KG; he said that he had no record of having received correspondence from her and pointed out that she had used a wrong email address for him. He said that he had forwarded KG's complaint to NG who was investigating other more or less identical complaints.
201. In her witness statement, KG expressed the view that her communication with Professor Ewing had prompted AM to send his email. The emails show that Ms Dykes, head of constitutional administration at Unite's central office, sent a copy of KG's email to Professor Ewing to AM at 8.02am.
202. In his witness statement, at paragraph 60, AM said that he had no record of having received the hard copies to which KG had referred and that her emails had used an incorrect address; as a result, KG and her complaint first

became known to him on 21 February. I have looked carefully through my notes of the cross-examination of KG and of AM; but I have not found that this issue was raised in cross-examination of either. That is not a criticism of counsel; nor is it a 'that was not put' point. This is a case with a multitude of issues, with which counsel were seeking to deal within a very limited time. I am, however, left with, on the one hand, the inference which KG drew from the sequence of events and, on the other hand, AM's direct evidence that he did not know about her complaint until 21 February. On that evidence, I cannot conclude on the balance of probability that AM was not telling the truth; thus, it is not established that KG's emails were deliberately or negligently ignored until she sought to bring the issue to the attention of the Election Commissioner.

203. What followed is also not clear to me from the evidence. On 23 February, GC referred his complaints to the Election Commissioner; and NG provided his report to GCa, AM and HB. His report did not embrace KG's complaint; and I have not seen any report by NG which does; but the issue of data breach by the LM campaign had already been placed before Professor Ewing; the email sent by GCa to GC on 24 February suggests that, once a complaint had been referred to the returning officer or the Election Commissioner, Unite felt that they should not handle it any further; I so infer from that email, in the absence of more positive evidence; and that would not have been unreasonable.
204. As to KG's second complaint, about the erroneous thank you email, I have even less material. It is convenient to consider the complaint of Mr Beynon at the same time; he was branch secretary of the National Grid branch and received the false thank you email. He complained to the returning officer and to GCa towards the end of March 2017. KG provided Professor Ewing with copies of the email received by other members. She said that, as far as she was aware, the email was not sent to anyone who was not a branch officer.

205. I have tried hard to find express evidence as to what followed. Clearly Professor Ewing was aware of the complaints about those emails; but I have not seen any separate report on that issue, nor have I found any reference to it in cross-examination of the witnesses. It may be that this specific complaint became subsumed within the generic consideration by Professor Ewing of data breach by Unite; or it is possible that this aspect of the various complaints made by or on behalf of GC was not regarded as a major issue. If there was any want of investigation, I should point out that KG's complaint was made to the LM campaign and not to Unite; and Mr Beynon's complaint was made to the returning officer and not to Unite. But Unite was aware of these complaints and could and should, even in the course of an election campaign, have communicated with more clarity what was happening in relation to them. However, the result of any investigation which could or should have been made but was not would, in my judgment, have clearly been that the false thank you emails were a mistake, that the mistake was that of United Left and not of Unite and was not part of a campaign against GC. No breach of the rules or electoral guidelines by Unite is established.
206. I now turn, finally under this subhead of complaint 2, to the complaints of Lucy Parker and John McMahon.
207. I have referred earlier to Lucy Parker's (LP) evidence about receipt of material from the LM campaign. I am now addressing not the issue of data breach but, for the purpose of sub complaint 2(f), the investigation of LP's complaints. Pages 1311 to 1330 in the bundle set out both the nature and history of her complaints, which were first put forward on 16/17 January 2017 to AM, HB and GCa and were based on her receipt of that material; she alleged that the LM campaign was receiving contact data from some Unite full-time officers. She was informed by AM on 18 January that her correspondence had been forwarded to NG, who was looking at it. In his report, NG recorded his receipt of LP's complaint, which was of a similar nature to the complaints made by or on behalf of GC which he was already investigating; and his report to HB dated 24 February set out his conclusions upon the complaints which he had been considering, including that of LP.

208. On 2 February, Ms Parker wrote to AM, HB and GCa informing them that she had not heard anything and had raised her complaint with ERS, who had replied that her allegation of breach of the Data Protection Act would be addressed by Unite and that SH was investigating the complaint of data breach in the context of the election. On 14 February, GCa informed Ms Parker that she would send NG's report to her in the following week; on 1 March, she informed Ms Parker that NG had completed his investigation and that she had referred his report to the returning officer and was awaiting his advice.
209. Ms Parker appears to have then heard nothing further until she wrote to SH and the Election Commissioner in May; her letter to the Election Commissioner was sent to Unite's office; in her response, Ms Dykes, head of constitutional administration, pointed out that Ms Parker could not complain directly to the Election Commissioner and asked her to clarify what she wished Unite to do with the 'complaint you have submitted'. LP puts that letter forward as a further fobbing-off of her complaint; but Ms Dykes was correct in the point she made. I infer that she did not know of Ms Parker's previous complaints; and, in any event, the Election Commissioner was already aware of Ms Parker's complaint; it was referred to him by SH; and the Election Commissioner's report, dated 15 July 2017, addressed her complaint as part of the general complaint as to data breach which I have earlier recounted.
210. SH's report to Unite, of May 2017, must be taken to have embraced, at paragraph 2.4, complaints such as LP's in addition to that of GC; and a copy of it or the relevant section of it should have been sent to LP, who would then have known that the Election Commissioner was seized of the issue. It would also have been wise to have explained to LP why there was no report from the Returning Officer earlier than May, which was later than had clearly been expected at the time of GCa's letter to LP of 29 February. The handling and communication in those areas was clumsy; but it is clear to me that LP's complaint became swallowed up in the more all-embracing

complaints of the same nature put forward by or on behalf of GC, which were properly investigated by the Election Commissioner.

211. As in the case of LP, so in the case of John McMahon (JM) I have addressed the substance of his complaint earlier. As to the process of his complaint, he put forward a similar complaint to that of Ms Parker to AM on 14 January 2017. He received a response informing him that his complaint had been put before NG. On 9 February, he complained that he had had no further response and that if he did not receive a satisfactory response he would contact the Certification Officer and the Election Commissioner. On 2 March, AM informed him that the investigation had been completed and that 'the report of it' was with the Returning Officer. AM's letter was, in relation to other matters, written in terms of which AM may not now be proud; but, as in the case of LP, JM's complaint was passed on to NG and was included within his conclusions. What followed was similar to the course of events relating to the complaint of Ms Parker; it was eventually considered by the Election Commissioner as part of the material which he investigated.
212. In JM's case, I have reached the same conclusions as those in the case of KG and LP. Unite's provision of information about the course which the complaint was taking was poor; but the complaint was considered by NG, by the returning officer and, ultimately, by the Election Commissioner; and I do not conclude that it was not reasonably investigated or that there was any breach of Unite's rules or the ballot guidelines.
213. Accordingly, sub-complaint 2(f) also fails.

### **Complaint 2(g)**

214. In his oral opening and in closing, Mr Millar relied under this subhead on the email sent out by GCa on 21 March 2017 to branch secretaries after the distribution of Unite Herald, which I have described in my consideration of complaint 3 earlier in this judgment. He suggested that her reaction to Unite Herald was not genuine but represented a deliberate choice to take the opportunity to undermine GC's campaign when there was nothing in Unite Herald other than opinion to which Unite took objection.

215. In the light of what I said earlier in relation to complaints 3 and 8, I can address the present issue briefly. In my judgment, the contents of Unite Herald went further than objectionable opinion. I have already set out in some detail my views on the references in Unite Herald to the purchase of the flat and to the paragraph entitled 'Pension Potty'. Both were, in my view, denigratory of LM who was, of course, a candidate in the GS election and were also denigratory of Unite. I have considered more than once the content and manner of GCa's evidence; she was mistaken in her view that Unite Herald would be seen by any member who read its contents as an official union publication rather than as campaign material in favour of GC; its potential effect on any member who did not read it is irrelevant; however, in other respects, she was, in my judgment, entitled to see the contents of Unite Herald, as she did, as in serious respects untrue and as potentially damaging to the union and to one of the GS candidates. I do not suggest that GC or the authors of Unite Herald knew that any of the material was untrue; there is no evidence to that effect; but GCa was, I conclude, entitled to the view – and she took advice from HB about it – that Unite Herald contained false or misleading information relating to a member or the union's activities which had been made recklessly and in breach of rule 5(2) of Unite's rules.
216. Deep mistrust, particularly after the mailshot which Unite believed was attributable to the December 2016 download and to the GC campaign, existed between Unite and GC. Suspicion turned to exasperation on both sides; and GC, I have no doubt, felt seriously disadvantaged, as indeed he was, by the fact that LM was able to continue to achieve exposure and prominence in his continuing position as GS and was entitled to use his campaigns and United Left's database to an extent which was surely greater than the data available to GC. It is understandable that GC and his supporters would have felt that Unite was, in its reaction to Unite Herald and in the other respects discussed in this judgment, setting out to do him down, in breach of the ballot guidelines. However, I have come to the conclusion that the evidence in relation to this head of complaint – or elsewhere under complaint 2 – does not establish any deliberate attempt to undermine the GC

campaign or any unreasonable reaction to the content of Unite Herald; in my judgment, there was, under this sub-head, no breach by Unite of their rules or the ballot guidelines.

## **Complaints 9 and 10**

### **Complaint 9**

217. Did the balloting process breach Appendix 1 to the ballot guidelines and/or deny voters a convenient opportunity to vote within the meaning of s. 51(4) of the 1992 Act by reason of: late dispatch of ballot packs; the use of second-class post for the return of completed ballot papers; the impact of the Easter holiday, in circumstances where the Electoral Reform Services sent out over one million ballot papers between 27 and 30 March 2017, with a period for return of approximately 23 days?

### **Complaint 10**

218. Did the union fail to provide every eligible voter at the election with a ballot pack in breach of s51(4) of the 1992 Act and/or rule 15.1? Or did the union comply with those requirements by seeking to arrange for ballot papers to be sent to every member who was not an Ordinary Retired Member or not in arrears of subscriptions of more than 13 weeks and for whom they had a valid postal address?
219. It is convenient to address these two complaints, which go to the balloting process itself and do not involve arguments of the nature canvassed by complaints 2 to 8, together.
220. The ballot guidelines, at Appendix 1, provided that voting papers should be dispatched on 27 March 2017. For those who did not receive a ballot paper – as may always happen in an election involving the dispatch of over a million ballot papers – a helpline was opened on 7 April; and there was a deadline for dispatching duplicate ballot papers on 13 April. All ballot papers had to be returned to ERS by 5pm on 19 April.

221. GC's complaint under complaint 9 is that, because the ballot papers were sent out by second class post, in batches over a period of several days from 27 March rather than all on 27 March as is suggested the timetable provided, some voters did not receive their papers until the week ending Friday, 7 April. Because 14 April was Good Friday and 17 April was Easter Monday, members who received their ballot papers later would have had only a brief window in which they could vote in time.
222. As set out earlier in this decision (see paragraph 26) section 51(4) of the 1992 Act required that ballot papers should be sent so far as is reasonably practicable to every person entitled to vote in the election to his or her home address or another requested address and that each such person should have a convenient opportunity to vote by post.
223. On 13 March 2017, RB emailed SH, raising a concern that, in the West Midlands region, ballot papers had not arrived. SH responded by return, saying that ballot papers were distributed throughout the week commencing 27 March and would all arrive with members from about the middle of that week to early in the next week. He also said that the majority of the West Midlands voting packs had been posted on Tuesday, i.e. 28 March.
224. GC's evidence was, however, that some of the members in his region did not receive their ballot papers until the following week. As a result, his team sent out emails to branch members to find out whether they had received their ballot papers and obtained responses from 90 members who had not received ballot papers or who had received them too late, it was said, to be given a convenient opportunity to vote. In a letter to GCa on 12 April, GC said that those who had received their ballot papers late would have had only a few days in which to vote, including the Easter holidays. On the same day, GCa replied, dealing with matters of membership data which are not relevant for present purposes, and saying that the points raised about the ballot papers were for the returning officer and that she had forwarded his email to SH. He replied on 13 April to GC explaining, as he had earlier, that the ballot packs had been dispatched over a five day period from 27 March

and were reasonably expected to have reached members by no later than the middle of the following week, i.e. 5 or 6 April – which was why the timetable provided for the helpline to be opened on 7 April.

225. SH had already received an email from RB on 11 April saying that the GC campaign had received replies from 99 people to their email sent to members that morning and that of those 99 replies, 19 had not received their ballot papers.
226. Cutting through the detail, eventually 91 emails were provided by GC's campaign to Unite from individuals who said that they had not received a ballot paper. The undisputed evidence of Mr Irwin, Head of Membership at Unite, is that only 44 of those emails were from persons who could be positively identified as members; of those 44, 20 were within a category of membership which did not carry entitlement to vote, 22 were entitled to vote and had been sent ballot papers to the address recorded in Unite's membership records and two had invalid addresses.
227. There are no witness statements put forward on behalf of GC in which a member who was entitled to vote says that he did not get a ballot paper or, having not got a ballot paper as expected, he did not take advantage of the helpline; nor is there any such evidence that a ballot paper arrived too late.
228. The obligation upon the union under section 51(4) in relation to sending out ballot papers is qualified by the words 'so far as is reasonably practicable.' If the burden is on the claimant to prove that they complied so far as reasonably practicable, I find that they have discharged it. On the basis of the evidence which I have summarised, I cannot and do not conclude that there was a failure on Unite's part to comply with the requirements of section 51(4). There is no evidence of widespread failure in the posting of ballot papers; at the highest, it seems that a very small number of persons may not have received ballot papers. Mr Irwin was not asked to give live evidence so that he could be cross-examined about the 47 out of the 91 emails in which the sender could not be identified. SH's evidence was that a period of two to three weeks, as in this case, is a standard balloting period in union and local

government elections. There is no reason to doubt that ballot papers would have been received, at least overwhelmingly, between 29 March and 5 April. I see no reason why the presence of the Easter bank holidays should be regarded as unreasonably abbreviating the time available to members to vote if they wished to. There is no evidence that any identified member was away on holiday and was, as a result, unable to vote.

229. I understand why the GC campaign would have been concerned to know that some apparently eligible members in the West Midlands region had not received their ballot papers in good time or at all; but, on examination, those concerns have been allayed or, if they survive, they survive only in respect of a very small number in a total electorate of over one million. It is not proved that Unite fell short of what was reasonably practicable. I therefore conclude that there was no breach of section 51(4) of the 92 Act, either in relation to the sending out of the ballot papers or in relation to the giving to those eligible to vote of a convenient opportunity to do so.
230. Accordingly, complaint 9 fails.
231. I come, therefore, lastly to complaint 10. In opening, Mr Millar put this complaint forward on the basis that GC was informed by ERS that a total of 1,061,873 ballot packs had been sent out. However, Unite had given the number of contributing members as 1,137,468. Therefore, there was a shortfall between the number of members who were sent a ballot pack and the number of contributing members to which were to be added, nearly 50,000 members of UCATT who had become also eligible members of Unite.
232. However, Mr Irwin's unchallenged evidence is that, from the total eligible membership thus reached, there had to be deducted three classes of members, namely ordinary retired members, members who were out of compliance and members for whom Unite did not hold a valid address - which may occur where members have moved address and not updated the membership system and previous mail has been returned to sender. When those categories are taken into account, the shortfall of which GC complained is eliminated.

233. Mr Irwin's unchallenged evidence effectively disposes of this complaint; and I need say no more about it than that it must fail.

**Conclusion**

234. For the reasons which I have set out, none of the complaints succeed; and they are, therefore, all dismissed. I have not, therefore, had to consider remedies.

A handwritten signature in black ink that reads "Jeffrey Burke". The signature is written in a cursive style and is underlined with a single horizontal line.

His Honour Jeffrey Burke QC  
Assistant Certification Officer

## **Appendix A - LIST OF ISSUES**

### **Complaint 1**

- a. Had the office of General Secretary become “vacant” within the meaning of Unite rule 15.1?
- b. If not, did the union have the power under rule 15 to call an election for General Secretary in December 2016?

### **Complaint 2**

1. Did union employees breach the “level playing field” rules contained in ballot guidelines 15 and 17, by:
  - a. giving the McCluskey campaign alone access to union databases for use in campaigning – or did the McCluskey campaign use an independent database for that purpose?
  - b. using union facilities to print and post McCluskey campaign material – or did the McCluskey campaign use independent resources for those purposes?
  - c. producing extra branch nominations for Mr McCluskey from non-functioning branches – or were all branch nominations made in accordance with proper and normal procedures?
  - d. arranging opportunities for Mr McCluskey to meet with members and media during the campaign – or were the meetings identified by the Complainants undertaken in the normal course of Mr McCluskey’s campaign or were those meetings not campaigning meetings but meetings conducted as General Secretary in the normal course of that role?
  - e. undertaking investigations into Mr Coyne’s conduct, during the campaign, so as to undermine his campaigning – or were investigations into candidates’ conduct, including Mr Coyne’s, conducted properly and naturally as part of the normal requirement to investigate complaints of misconduct during an election campaign?
  - f. failing to investigate properly or at all, during the campaign, breaches

of rules by the McCluskey campaign – or were alleged breaches of rule investigated properly?

- g. disseminating information to undermine Mr Coyne as a critic of Mr McCluskey's conduct of the union?

### **Complaint 3**

Did union bodies and/or senior officials breach the said "level playing field" rules by attempting to prevent Mr Coyne raising and pursuing an investigation, during the campaign, into misuse of union resources in the purchase of a luxury flat for Mr McCluskey? Or did the Executive Council rather seek to explore whether inaccurate allegations made or implied by Mr Coyne, damaging to the union, could be corrected or clarified?

### **Complaint 4**

Did the union breach the said "level playing field" rules by allowing the McCluskey campaign access to its membership and branch secretary databases during the campaign?

### **Complaints 5 and 6**

Did union employees purport to act as Branch Secretaries of non-functioning branches during the nomination period in order to produce extra nominations for Mr McCluskey from such branches, in breach of Unite rule 17.11 (complaint 5) and/or ballot guideline 17 (complaint 6)? Or were all branch nominations made in accordance with proper and normal procedures?

### **Complaint 7**

Did Mr McCluskey breach Unite rules 5.1 and 5.2 during the campaign in knowingly, recklessly or in bad faith disseminating false or misleading information to members to the effect that their branch had nominated him? Or were the emails referred to by the Applicants sent in error to a small number of branch offices, which errors were corrected wherever and as soon as possible?

### **Complaint 8**

Did senior officials seek to undermine Mr Coyne's campaign by threatening Mr Coyne and his supporters with disciplinary proceedings and other detriments, in breach of their obligation of neutrality under ballot guideline 17? Or were investigations into candidates' conduct, including Mr Coyne's, conducted properly

and neutrally as part of the normal requirement to investigate complaints of misconduct during an election campaign?

### **Complaint 9**

Did the balloting process breach Appendix 1 to the ballot guidelines and/or deny voters a convenient opportunity to vote within the meaning of s.51(4) of the 1992 Act by reason of: late dispatch of ballot packs; the use of second-class post for the return of completed ballot papers; the impact of the Easter holiday, in circumstances where the Electoral Reform Services sent out over 1 million ballot papers between 27 and 30 March 2017, with a period for return of approximately 23 days?

### **Complaint 10**

Did the union fail to provide every eligible voter at the election with a ballot pack in breach of s.51(4) of the 1992 Act and/or rule 15.1? Or did the union comply with those requirements by seeking to arrange for ballot papers to be sent to every member who was not an Ordinary Retired Member or not in arrears of subscriptions of more than 13 weeks and for whom they had a valid postal address?

## **Appendix B – Abbreviations**

TGWU	Transport & General Workers Union
EC	Executive Council
GS	General Secretary
AM	Andrew Murray
BS	Branch Secretary
LM	Len McCluskey
GC	Gerard Coyne
IA	Ian Allinson
GCa	Gail Cartmail
ERS	Electoral Reform Services
RB	Richard Brooks
MA	Margaret Armstrong
JM	John McMahan
KG	Kelly Gillespie
ST	Steve Turner
SH	Simon Hearn
JW	Jamie Walker
HB	Howard Beckett
NG	Neil Gillam
LP	Lucy Parker