

PH/1/19-20

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

McFadden

v

Unite the Union

Date of Decision

4 April 2019

Preliminary Hearing Decision

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## **Preliminary hearing decision**

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

I direct that the application is listed for a full hearing to decide the applicant’s original complaints (see appendix 1), or the complaints as amended on 7 January 2019 should no objection be raised by the Union to these.

## **Reasons**

2. This is Mr McFadden’s second application to this Office in relation to the Unite the Union (“the Union”) initiating disciplinary proceedings against him. The first application was received on 25 October 2016 and the outcomes are set out in paragraph 9 below.
3. Mr McFadden brought this current application as a member of the Union. He did so by a registration of complaint form received at the Certification Office on 14 March 2018.
4. Following correspondence with my office, Mr McFadden confirmed his complaints on 11 June 2018. These are set out at Annex 1. He has subsequently sought to amend them but the final terms of the complaint are not yet agreed.
5. Following consideration of the parties’ initial submissions, I directed that the complaint be listed for a hearing to consider the following preliminary issue:

Whether the Union was entitled, around 28 November 2017, to initiate a disciplinary process in respect of Mr McFadden, beginning with an investigation by the Union’s North West Region’s Finance and General Purposes Committee into the events that precipitated a complaint from a Union member regarding an incident alleged to have taken place on 3 October 2015.

6. On 15 February I set out the list of issues which I would need to consider when determining the preliminary issue as follows:

Whether it was outwith the Rules of the Union, for the Union to have started and conducted a second disciplinary investigation and/or disciplinary proceedings against Mr McFadden taking into account;

- a. cause of action estoppel and/or issue estoppel
  - b. the rule in *Henderson v Henderson* [1843-1860] All ER Rep
  - c. some other principle of estoppel or abuse of process as set out for instance in *R (Mandic-Bozic) v British Association for Counselling and Psychotherapy & UK Council for Psychotherapy* [2016] EWHC (Admin) 3134 or *Regina (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1,
  - d. the principle of natural justice (as referred to in the Executive Directions to be read in conjunction with Rule 27);
  - e. the implied rule of natural justice;
  - f. whether it was so unreasonable as to amount to perversity as set out for example in *Dooley v UCATT* UKEAT/0523/12/SM Para 39
  - g. the Union Rule Book (and in particular Rule 27 read in conjunction with the Executive Council Guidance on the Discipline of Members)
7. At a hearing before me on 21 March 2019, Mr McFadden was represented by Mr Marc Beaumont of Counsel. The Union was represented by Mr Michael Potter of Counsel, instructed by Mr Neil Gillam of the Union's legal department. There was in evidence a bundle of documents prepared for a vacated hearing which had been listed for 16 January 2019 consisting of 367 pages containing correspondence, the Rules of the Union and a further bundle of correspondence exchanged between the parties and my Office between 11 January and 4 March 2019 consisting of 80 pages. Both Mr Beaumont and Mr Gillam provided skeleton arguments for the vacated hearing and for the Preliminary hearing.

## **Findings of fact**

8. In November 2015, Unite the Union informed Mr McFadden that it had received a complaint about his conduct from another Union member. The Union launched an investigation under Rule 27 which resulted in charges being brought under Rule 27.1.7 and disciplinary sanctions being imposed on Mr McFadden. He appealed against the Panel's decision but was unsuccessful.
  
9. Mr McFadden brought a complaint, to the then Certification Officer, about the Union's conduct of the investigation and disciplinary procedure. The Assistant Certification Officer ("ACO") considered three preliminary issues and found in favour of Mr McFadden. He granted the following remedies:
  - i. A declaration that Unite acted in breach of its Rules in pursuing the disciplinary proceedings against the Claimant and in imposing on him the penalties imposed in those proceedings and that those proceedings were null and void and of no effect.
  
  - ii. An order that Unite shall take all reasonable steps to ensure that the Claimant is, within 14 days of this order, restored, for the remainder of the respective terms of each office, to each of the posts and positions within Unite from which he was removed by reason of the penalties imposed in those disciplinary proceedings.
  
  - iii. An order that Unite shall forthwith communicate to each of its branches in its North-West region or area my decision in this case.
  
10. On 23 November 2017 the Union informed Mr McFadden that the disciplinary sanctions had been lifted and the relevant branches had been contacted.

11. On 28 November 2017, the Union wrote to Mr McFadden to explain that they were of the view that the complaint about his conduct remained open and required to be dealt with under Rule.

12. There followed a second disciplinary process, based on the same complaint. Mr McFadden then made a number of complaints to me about the conduct of that case which forms the basis of the current application.

### **The Relevant Statutory Provisions**

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

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

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are –

(a) the appointment or election of a person to, or the removal of a person from, any office;

(b) disciplinary proceedings by the union (including expulsion);

(c) the balloting of members on any issue other than industrial action;

(d) the constitution or proceedings of any executive committee or of any decision-making meeting;

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

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

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

#### **RULE 27: MEMBERSHIP DISCIPLINE**

27.1 A member may be charged with:

27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.

27.1.2 Being a party to any fraud on the Union or any misappropriation or misuse of its funds or property.

27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.

27.1.4 Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, religion, age, gender, disability or sexual orientation.

27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers.

27.1.6 Obtaining membership of the Union by false statement material to their admission into the Union or any evasion in that regard.

27.1.7 Breach of the Union's policies on diversity, bullying and harassment in the workplace, which will include cyber bullying and harassment.

27.2 Disciplinary Hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice.

27.3 A charge under this rule may be heard by a Branch, Branch Committee (where so determined by the Branch), Regional Committee or the Executive Council. The Executive Council may delegate to a subcommittee of the Executive Council. It would be usual practice that disciplinary charges would be heard at branch level in the first instance. Disciplinary charges deemed to be of a serious nature may be initiated by the Regional committee or Executive Council.

27.3.1 Serious allegations of breach of Clauses 27.1.1. to 27.1.7 may be referred directly to the General Secretary. The General Secretary will appoint a senior employee of the Union to conduct an investigation which may lead to disciplinary charges being laid on behalf of the Executive Council.

27.3.2 Allegations of serious breaches of clauses 27.1 .1 to 27.1.7 which are subsequently shown to be vexatious, malicious or defamatory may be considered a breach of Rule and liable to be referred to this disciplinary procedure.

27.4 The Executive Council or the relevant Regional Committee may suspend a member charged under this rule from holding any office or representing the Union in any capacity pending its decision. A member shall



be given written notice (or, if the member was informed verbally confirmation in writing) of any such suspension as soon as is reasonably practicable. In cases of a serious nature, as a precautionary measure, a member under investigation prior to disciplinary charges being laid may be suspended from holding office or representing the union in any capacity.

27.4.1 A member under disciplinary investigation or charged with a disciplinary offence, including workplace representatives or branch officers suspended from holding office, may not attend:

Meetings of his/her own branch;

Meetings of other branches of the Union; or,

Constitutional committee meetings of the Union Other than as part of the disciplinary process as set out in this Rule.

27.4.2 If allegations against a member are proven to be unfounded they will be restored in good standing. If appropriate, their credentials will be restored

27 .5 The range of disciplinary sanctions shall include the following:

27.5.1 censure;

27.5.2 withdrawal of workplace credentials;

27.5.3 removal from office;

27.5.4 barring from holding office and

27.5.5 expulsion.

27 .6 The full range of disciplinary sanctions shall be available to the Executive Council and Regional Committees; however the range of disciplinary sanctions for other bodies shall be limited to the following :

27 .6.1 Branch, shall have the power to censure;

## 27.7 Appeals

27.7.1 A member shall have the right to appeal against any disciplinary sanctions.

27.7.2 In the case of a sanction imposed by a Branch, or Branch Committee, the appeal shall be to the Regional Committee, whose decision shall be final.

27.7.3 In the case of a sanction imposed by a Regional Committee the appeal to shall be to the Executive Council, whose decision shall be final.

27.7 .4 In the case of disciplinary action initiated by the Executive Council the appeal shall be to an Appeals Committee elected from the Policy Conference, whose decision shall be final. Such an Appeals Committee shall be constituted on the basis of at least one delegate from each Region, under a procedure to be agreed by the Executive Council. There shall be an eligibility criterion to serve on the Appeals Committee of at least 5 years continuous membership of the Union.

27.8 An employee may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union. Complaints against employees shall be investigated under the Members' Complaints Procedure agreed by the Executive Council and if disciplinary action is deemed appropriate this shall be executed under the procedures negotiated with employees' representative bodies for that purpose

### **RULE 27. DISCIPLINE OF MEMBERS: EC DIRECTIONS**

Rule 27.2 provides that disciplinary hearings shall be organised and conducted under directions issued by the Executive Council. This document sets out those directions and must be read in conjunction with Rule 27.

### The Disciplinary Process

The disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice. These directions are designed to ensure that this is the case.

### Investigation and Charge

A member may be charged with one OR more of the offences detailed in Rules 27.1.1 to 27.1.7. A member may not be charged with any matter falling outside of these rules, and at the end of these directions a general statement is provided concerning the law in this area.

If there is any doubt as to the matter under consideration, then the body proposing to deal with the matter should seek legal advice from the union's Director of Legal Services.

Rule 27.3 provides that charges are to be heard by a Branch (or Branch Committee), a Regional Committee or the Executive Council (or a sub-committee of the Executive Council).

Where the charge is to be heard by a Branch (or Branch Committee) the charge shall be brought by the Branch. When the charge is to be heard by the Regional Committee, the charge shall be brought by the Regional Committee. Where the charge is to be heard by the Executive Council (or a sub-committee of the Executive Council) the charge shall be brought by the Executive Council (or a sub-committee of the Executive Council) or the General Secretary.

If the union receives notice of a matter which may lead to a disciplinary charge against one or more members, then the situation should be investigated to determine if there should be a charge. The means of investigation shall be determined by a body referred to in Rule 27.3 or by the General Secretary.

Notice of the fact of an investigation being undertaken shall be sent to the office of the General Secretary.

The investigation shall be completed as soon as is practicable in the circumstances and the outcome of the investigation shall be recorded in writing. The investigation shall report to the body (or the General Secretary) which commissioned the investigation with a recommendation as to whether there is a charge to answer.

After receipt of the investigation report, there shall be no unreasonable delay before a member is charged.

If a charge is to be brought, a letter shall be sent to the member setting out the circumstances (in outline form) giving rise to the charge and specifying the rule which it is alleged has been breached. The member shall also receive a copy of the investigation report and any associated documents. A copy of the letter of charge shall be sent to the office of the General Secretary.

### Suspension

A member charged may be suspended in accordance with Rule 27.4. In cases of a serious nature, as a precautionary measure, Rule 27.4 allows that a member under investigation prior to charges being laid may be suspended from holding office or otherwise representing the union. The General Secretary may also suspend a member under delegated powers if this is deemed by the General Secretary to be in the interests of the union.

Under the terms of Rule 27.4.1 members under disciplinary investigation or charged with a disciplinary offence may not attend:

- meetings of their own branch
- meetings of other branches of the Union

- constitutional committees of the Union

other than in connection with the disciplinary process.

Members under investigation shall not communicate (particularly by way of social media) matters relating to such investigation to fellow members whilst the disciplinary process remains in process.

#### Preparation for the Disciplinary Hearing

The Union shall ensure that any documents to be relied upon in support of the charge should be sent to the member at least 4 weeks before the disciplinary hearing is to take place. If the union is to allow witness evidence, then witness statements shall be prepared and sent to the member at least 4 weeks before the hearing.

The member must ensure that any additional documents upon which they wish to rely in their defence are received by the body or individual which has charged them at least 2 weeks before the disciplinary hearing is to take place. If the member is to rely on witness evidence, witness statements must be prepared and sent to the body or individual which has charged them at least 2 weeks before the disciplinary hearing.

The body hearing the charge shall arrange for the disciplinary hearing to take place within a reasonable period of the charges being brought. The body hearing the charge shall decide and give the member at least 4 weeks' notice of the date, time and place for the hearing

#### At the Disciplinary Hearing

The member may be accompanied and/or represented by another member of the union who is not an employee of the union.

The conduct of the hearing including in relation to attendance of witnesses and cross examination of witnesses shall be in the absolute discretion of the body hearing the case.

This can include a decision to rely upon the receipt of witness statements only.

### After the Hearing

The body which heard the charge shall write to the member notifying them whether the charge has been upheld, and if it has, any disciplinary sanction imposed in accordance with Rule 27. Reference should be made to Rules 27.5 and 27.6. A copy of the document confirming the outcome of the disciplinary hearing shall be sent to the office of the General Secretary.

### Appeal

Rule 27.7 provides that a member has a right of appeal against any disciplinary sanction imposed and sets out general provisions for how the appeal must be conducted. If a member wishes to appeal, notice of the appeal must be received in writing by the relevant body within 14 days of the date on which the result of the disciplinary hearing was sent to the member. The notice of appeal must set out the grounds of the appeal. The relevant body will then send a copy of the appeal to the office of the General Secretary. The union aims to conclude an appeal no later than 10 weeks after it was submitted save in exceptional circumstances.

### LEGAL GUIDANCE

As stated above, the union may only discipline members for conduct which is in breach of rule. In addition, the Trade Union and Labour Relations (Consolidation) Act 1992 directs the union as to the conduct for which disciplinary action can be pursued. If a member is disciplined in breach of the 1992 Act, this can lead to a claim against the union in the Employment Tribunal and the member may be eligible to receive financial compensation.

Members must not be subject to disciplinary action in breach of the 1992 Act. Whilst it may be necessary to take expert legal advice, the following is a list of the reasons for which disciplinary action cannot be taken:-

- a) they have opposed or not participated in a strike or other industrial action;
- b) they have failed to break their contract in connection with industrial action;
- c) they have claimed that the union or one of its officials, representatives or trustees has broken or is proposing to break the law or the union's rules;
- d) they have failed to agree to pay their subscriptions by check-off or have cancelled a check-off arrangement;
- e) they have joined another union or belong to another union;
- f) they work with non-union members or members of another union;
- g) they work for an employer who employs non-union members or members of another union;
- h) they have required the union to do something which is required to do by the 1992 Act;
- i) grounds of political party membership – only be permissible if the membership of that political party is contrary to a rule or objective of the union. There is not currently a Unite rule re political party membership.

Members may also not be subject to disciplinary action for proposing to do the things outlined above, or for encouraging or assisting others to do these things. Only the Executive Council and Regional Committees are authorised to expel members and if the conduct in question may lead to expulsion as an appropriate sanction, then guidance should be sought from the union's Director of Legal Services and/or the office of the General Secretary. Advice must be sought in relation to all cases involving proposed disciplinary action in relation to membership of a political party.

## **Summary of Submissions**

15. Both Mr Beaumont and Mr Potter made submissions in respect of two broad areas; estoppel and the principles of natural justice.

## Estoppel

16. Mr Beaumont's position was that the decision taken in the first set of disciplinary procedures prevents the Union from taking further disciplinary action arising from the same complaint. He argued that the doctrine of estoppel was part of the substantive general law of England & Wales and the Union was not exempt from it. He explained that cause of action estoppel, issue estoppel and the rule in **Henderson v Henderson [1843-1860] All ER Rep** were all part of the principle of res judicata. He submitted that the Union's disciplinary procedure is a contractual disciplinary procedure that is subject to the principle of estoppel in the same way as a professional regulatory body's contractual disciplinary procedure. Decisions taken by a Union's disciplinary panel were quasi-judicial in nature. Consequently, the Union was prevented, in law, from taking forward the second set of disciplinary proceedings. He referred to **Virgin Atlantic Airway Ltd v Zodiac Seats UK Ltd [2013] UKSC, [2014] 1 AC 160** in which Mostyn J cites **R (on the application of Mandic-Bozic) v British Association for Counselling and Psychotherapy and UK Council for Psychotherapy [2016] EWHC** and argued that 'cause of action estoppel' applied which created an absolute bar on litigating the matter twice. He also relied on the Supreme Court's decision in **Regina (Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1** that cause of action estoppel applies to contractual disciplinary proceedings. This case was used as authority for his submission that there was a direct analogy between the contractual relationships that were determined in both **Coke Wallis** and **Mandic-Bozic** and Mr McFadden's case in that they all involved the application of a contractual disciplinary procedure and Mr McFadden accepted that the disciplinary authority of Unite the Union derived from its contractual relationship.

17. In Mr Beaumont's view, the fact that the ACO had declared the original disciplinary decision void was not relevant. He told me that Mr McFadden had been subjected to two disciplinary procedures on the same facts; one of which had been pursued to the appeal stage with the other process yet to be completed.



His argument was that a cause of action estoppel applied because the Union could have brought the second set of charges, which arose from the same set of facts as the first set of charges, when it first initiated disciplinary action. The fact that the Union did not do so, and consequently there was no earlier decision on the new charges, did not prevent an estoppel being created as cause of action estoppel was not dependent on the existence of a prior adjudication as it embraced an actual adjudication as well as a failure to bring an adjudication earlier. He submitted that the first set of disciplinary proceedings were duplicative, unfair and resulted from “negligence, inadvertence or even accident” and were akin to an “afterthought.” According to Mr Beaumont, the Court’s decision in **Coke v Wallis** was on “all fours” with Mr McFadden’s case, with the professional body in that case relying on a slightly different factual version of the underlying facts whereas Mr McFadden’s case was a “stronger example” of cause of action estoppel as it relied on exactly the same underlying allegation of fact.

18. Mr Potter’s position was that the doctrine of estoppel applied when there was a determination, “finality of judgment or litigation” in relation to a cause of action between two parties and crucially in Mr McFadden’s case there was no binding decision: Unite the Union did not contend that estoppel applied to the ACO’s decision. He submitted that the decision making bodies referenced in **Mandic-Bozic** and **Coke Wallis** were both quasi-judicial bodies. In Mr McFadden’s case, however, the Union were simply determining a contractual/governance issue in which it had an interest. He contended that Union disciplinary panels could not be described as independent adjudicators and did not determine the existence of legal rights. Unite the Union was a private organisation of members who came together for industrial related objects and have a contract defined in the constitution and the legal bond between the members. He argued that the Union was enforcing its rights under its contract with Mr McFadden rather than reaching a decision on a dispute between two parties He explained that the Union disciplinary panel performed a similar function to that of a disciplinary panel convened by an employer and relied on the Court’s decision in **Christou and**

**another v London Borough of Haringey [2013] EWCA Civ** which he contended was comparable (although admittedly not identical) in which the Court found that the doctrine of res judicata did not attach to the decision of an employer's disciplinary panel. Mr Potter, accepted, however, that suspension or expulsion of a member by a Union was quasi-judicial in nature but submitted that such decisions were not amenable to the doctrine of res judicata as they were not made by a professional regulatory body reaching an independent decision in respect of a professional on its register.

19. He also argued that there was no extant decision in this case. The ACO had declared the decision, which was taken at the conclusion of the first disciplinary procedures, to be void. In his view, the doctrine of estoppel could not be applied in Mr McFadden's case as the original complaint about Mr McFadden's conduct had not been settled.

#### Natural Justice

20. There was more common ground between Mr Beaumont and Mr Potter in respect of the principle of natural justice. Both agreed that it was right to imply the principles of natural justice into the Rules of Union where it had not been explicitly set out. They also agreed that this imposed a requirement on the Union to act with an overriding duty of fairness.

21. There was disagreement, however, as to how the principle of natural justice applies to union disciplinary procedures. Mr Potter argued that natural justice was a "flexi-principle" that depended on the context and circumstances that "standards of fairness are not immutable" and it may not be necessary to import all of its principles into the Union's disciplinary procedures. He also explained that the Union's Rule 27 EC Directions were designed to ensure that the Union incorporated the specific rules of natural justice into its disciplinary procedure that are relevant to the context but did not include all of the fundamental rules pertaining to natural justice, for example the requirement that the parties act in

good faith was not explicitly referenced in the Union's Rules. He submitted that a new term should not be implied until the express terms in an agreement have been properly construed. In his view, the express terms of the Union's agreement with Mr McFadden were entirely adequate to address Mr McFadden's complaint and there was nothing in the Rules which precluded the Union from initiating a second disciplinary process to address the complaint it had received about Mr McFadden's conduct. There was scope in some cases to imply terms where they are necessary to ensure that the contract is given proper effect and business efficacy or it would be perverse not to imply a term but there was no basis for implying terms because it was reasonable to do so.

22. Mr Beaumont told me that, in his view, natural justice did not mean that a Union would always be prevented from taking forward a second set of disciplinary procedures. There may be circumstances, for instance where a Union had identified a potential need for additional procedures at the outset, where a second disciplinary procedure was fair. It was his view, however, that, on the facts of this case, the principles of natural justice acted as a bar to the second set of disciplinary procedures.

## **Considerations and Conclusions**

### Estoppel

23. There are two key areas which I need to determine to establish whether the Union was prohibited from initiating a second set of disciplinary proceedings because of the doctrine of res judicata, and specifically cause of action estoppel which is relied on by Mr McFadden. I need to consider firstly whether the concept of res judicata applies to the disciplinary proceedings and resulting decision, brought by Unite the Union against Mr McFadden. Secondly, I need to consider whether the decision taken in the first set of proceedings amounts to an extant decision which is amenable to the doctrine of estoppel.

Does Res Judicata apply?

24. Mr Beaumont referred me to **Lee v Showman's Guild [1952] 2 QB 329** and **Burn v National Amalgamated Labourers' Union of Great Britain and Northern Ireland [1919 B1555]**. In his view, each of these cases demonstrated that decisions taken by Unions were quasi-judicial in nature and, therefore, subject to the principle of res judicata. He also argued that the Union's disciplinary procedures in this case were akin to the contractual disciplinary procedure of a professional regulatory body such as the British Association for Counselling and Psychotherapy (BACP) and relied on the Court's decision in **Mandic-Bozic** to support his submission.

25. Mr Beaumont cited **Lee v Showman's Guild** to support his argument that a Union was capable of making quasi-judicial disciplinary decisions and there was scope to intervene where a Union is not complying with its Rules or acting fairly. He relied on **Burn** to support his argument that the power to suspend or expel a member for acting contrary to the rules is one of a quasi-judicial nature drawing my attention to P O Lawrence J's statement that:

'I have no hesitation in holding that the power to suspend or expel a member for acting contrary to the rules is one of a quasi-judicial nature'.

26. Mr Beaumont also submitted that the requirement to act fairly applies to a range of bodies including those set up by statute whose decisions are susceptible to judicial review as well as domestic bodies. In his view, the Courts regard the parameters of natural justice imposed on Unions by analogy with rules of administrative law which require statutory and domestic tribunals to exercise their discretion fairly and the Union were obliged to act fairly and were bound by the principle of fairness.

27. Mr Potter agreed with Mr Beaumont's submission that some decisions taken by a Union as part of its disciplinary process could be quasi-judicial in nature. He also did not challenge the argument that I, as Certification Officer, have a statutory jurisdiction to intervene in certain decisions of a Union conferred by the 1992 Act.

### **Mandic-Bozic**

28. Mr Beaumont also relied on the Court's decision in **Mandic-Bozic** to support his submission that the contractual relationship which existed between Mrs Mandic-Bozic and her professional bodies was analogous to the relationship between Mr McFadden and Unite the Union. In each case, an individual had voluntarily entered into a contract which included disciplinary procedures which could result in the member being suspended or expelled from the relevant body. Mr Beaumont also argued that the circumstances of the underlying facts were similar in that the individual faced two sets of disciplinary procedures arising from the same facts. For the avoidance of doubt it is worth reflecting here that Mr Beaumont was clear that he was not relying on issue estoppel.

29. Mr Potter did not agree that the Union's relationship with Mr McFadden was the same as a regulated professional's relationship with its regulator. In his view, the professional body in **Mandic-Bozic** was acting as a quasi-judicial body making an independent adjudication in respect of a complaint. The Union was, however, enforcing its contractual right to conduct disciplinary action against one of its members. Mr Potter referred me to the decision in **Christou v Haringey** which, he argued, demonstrated that the Union's disciplinary procedures could not, in this case, be subject to res judicata.

### **Christou v Haringey**

30. Mr Potter and Mr Beaumont expressed different views as to the relevance of **Christou v Haringey**. Mr Potter told me that a Union disciplinary decision cannot be regarded as binding in law; res judicata does not, therefore, apply and so no estoppel can arise. He argued that there is no independent body determining the legal rights of the Union member in the same way as a Court or tribunal

determines the right of an individual. Instead, the Union is exercising its legal and contractual right to govern its membership. This is similar to an employment contract where an employer is exercising its discretion, under a contract, to take disciplinary action, including the termination of a contract. The Court's reasoning in **Christou v Haringey** supported Mr Potter's argument that the doctrine of res judicata did not apply to the decisions of Union disciplinary panels as neither could be described as independent adjudicators and therefore the Union were not estopped from initiating a second set of disciplinary proceedings against Mr McFadden.

31. Mr Beaumont took issue with the relevance of the decision in **Christou v Haringey** to the present case. This was because the Court held that the doctrine of estoppel does not apply to contracts of employment and, in his view, such contracts are in a special category which can be distinguished from the contracts that regulate members relationship with their Union. In **Christou v Haringey** the Tribunal had to consider fairness in the context of the relevant statutory provisions when considering whether the Claimants' dismissal was fair. By contrast, a Union member who is not an employee is not subject to a separate cause of action for unfair dismissal. He further argued that an employer is in a special position in relation to disciplinary matters and is not obliged to interpose an independent adjudicatory body. Mr Beaumont also argued that the Union contract is an equal contract between the parties whilst the contract between an employee and the employer is always hierarchical which means that the employer has other issues to take into account, such as protecting its own interest, when reaching a disciplinary decision. In Mr Beaumont's view, the hierarchical nature of the relationship was an important factor in determining that the concept of res judicata did not apply in **Christou v Haringey** and, therefore, was not relevant in determining whether the principle could be applied to a Union's disciplinary procedure.

32. I do not agree with Mr Beaumont's submission that **Christou v Haringey** is not relevant to these proceedings. That case is concerned with one party, the employer, enforcing its contractual rights over another party, the employee. I agree with Mr Beaumont that the relationship of employer and employee is hierarchical. In disciplinary matters, however, the Union Member has voluntarily entered into a contract which gives the Union rights to determine disciplinary issues in certain circumstances. The member must agree, as part of the membership contract to be subject to the disciplinary process and so there is, in this area at least, a hierarchical relationship.
33. Even if that is not the case, there remains a question as to whether the relationship between the Union and a member is on a par with the relationship between a professional body and the members it regulates so that *res judicata* applies to disciplinary proceedings. I do not believe that to be the case.
34. The relationship between a professional body, such as BACP in the **Mandic-Bozic** case, which controls access to a profession and its registrants or members must be different to that of a Union and its members. A professional has no choice as to whether to register with, or become a member of, the professional body if they wish to work within that profession. Consequently, when a complaint is made which requires determination, the professional body is determining the rights of that individual to work in that profession. A professional disciplinary case, in almost all cases, will have arisen following a complaint or referral from a third party (a client, employer or fellow professional for instance) and the professional body will be an independent adjudicator of that complaint. This is consistent with the decision in **Mandic-Bozic** where BACP, and the other professional body, were both determining a complaint which had been brought by a client. Had that complaint resulted in Mrs Mandic-Bozic being expelled or suspended from the BACP then her right to work in her chosen profession would have been adversely affected.

35. In my view, the relationship between the Union and its member is closer to the relationship between an employer and employee than to a professional body and a member or registrant. The Union member freely enters into the contract with the Union and, by entering into the contract, gives the Union a contractual right to take disciplinary action in certain circumstances. That disciplinary action is, usually, taken internally within the Union without any external adjudication. This is very similar to an employee entering into a contract with an employer.

36. Mr Beaumont drew my attention to paragraph 48 of **Christou v Haringey**:

'In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and if so, to determine how that should affect future relations between them. It is true that sometimes (but by no means always) the procedures will have been contractually agreed, but that does not in my judgment alter their basic function or purpose. The employer has a duty to act fairly and procedures are designed to achieve that objective. The degree of formality of these procedures will vary enormously from employer to employer. But even where they provide a panoply of safeguards of a kind typically found in adjudicative bodies, as is sometimes the case in the public sector in particular, that does not alter their basic function. It is far removed from the process of litigation or adjudication, which is in essence where this doctrine bites.'

37. I do not accept, however, that the case extract produced above supports his position. The employment process which is described here is similar, if not the same, as a Union disciplinary process. In my experience, the contract between a Union and its member gives the Union the right to undertake a disciplinary process. The process itself may also be contractually agreed. Where there is, as



is the case with *Unite the Union*, also an explicit duty to act fairly then the Union must do so. As with an employee disciplinary process, however, I do not accept that a Union's disciplinary procedures could be construed as litigation or an adjudication which is susceptible to the doctrine of *res judicata*. The Panels which were constituted to take decisions about Mr McFadden's conduct were all Panels or Committees of the Union. The members were expected to act without bias and to hear the facts fairly; however they were not an independent tribunal or adjudicator.

38. Whilst considering the independence of decision making, it is also worth noting paragraph 51 of **Christou v Haringey** which makes it clear that it is the independence, or rather the lack of independence, of those making the determination which was key in determining that the doctrine of *res judicata* did not apply. Specifically, Elias LJ notes:

'This is not to say that the doctrine of *res judicata* could never apply between employer and employee. It would, in my judgment, be open to an employer to agree that, say, a bonus payable to employees should be determined by an independent arbitrator and I do not see why in principle the doctrine should not apply to any such determination. But that would not be the natural inference to draw whenever the employer adopts and applies disciplinary procedures staffed by his own personnel. The critical question is not the formality of the procedures, but rather whether they operate independently of the parties such that it is appropriate to describe their function as an adjudication between the parties.'

In other words, the Union could choose to construct their disciplinary process in such a way that the principle of *res judicata* could apply to their decision making. In the absence of a disciplinary process involving an element of independent adjudication between the parties, however, *res judicata* will not apply.

39. I have considered whether the comments made in **Burn and Lee v Showman's Guild**, and the acceptance by Mr Potter that some decisions by a Union may be quasi-judicial in nature conflicts with the position set out above. Both relate to

issues where the member's access to a profession were at risk. That is not the case here. Mr McFadden has lost access to some Union positions and, more widely, to some positions that arose from his role in Unite the Union. The decision does not, however, prevent him from working in a given profession. Nor was the decision undertaken by an independent body or adjudicator.

40. On that basis, I am satisfied that the concept of res judicata in the form of cause of action estoppel does not apply to the decision made by Unite the Union to begin the second set of proceedings.

### **Is there a relevant extant decision?**

41. Having reached that conclusion it is not necessary for me to consider whether there is a relevant extant decision. It is useful, however, to express a view on Mr Beaumont's argument that the decision reached in the first disciplinary proceedings, which was declared void by the ACO, was an extant decision.

42. The background is that, after the ACO had declared the original disciplinary proceedings void, the Union initiated new proceedings under different limbs of Rule 27 but on the same underlying facts. Mr Beaumont argued that the decision taken under the first disciplinary procedures should be considered extant because of the impact on Mr McFadden. The fact that the ACO had declared that decision to be void did not detract from the stress it placed on Mr McFadden nor on the unfairness of the decision to begin new proceedings. He also argued that the fact that the new proceedings were raised under a different rule did not prevent Mr McFadden from relying on res judicata and cited the decisions in **Henderson v Henderson** and **Coke v Wallis** to support his argument.

43. Mr Potter submitted that as the first disciplinary decision had been declared void there was no finality to the proceedings. The Union had received an allegation about Mr McFadden's conduct, had dealt with that allegation and reached a final conclusion which was then declared void. The allegation, therefore, remained live.

In those circumstances, there was no extant decision and so, even if Mr McFadden could raise a res judicata argument in principle he could not do so in this case because of the lack of a decision to which res judicata could attach.

44. Mr Potter's argument is consistent with my understanding of res judicata and the circumstances in which it could apply to particular decisions. Even if I had found that res judicata applied to the Union's initial decision it is difficult to see how a decision which has been declared void and, effectively, set aside could still be challenged by raising an estoppel argument.

45. I also understand, however, the argument made on behalf of Mr McFadden that, although it was declared void, the first decision was a very real decision to him and, consequently, it appears unfair to restart the process. That, however, is an argument which is more relevant to my consideration as to whether the Union complied with the principles of natural justice.

### **Natural Justice**

46. There is agreement between the parties that the Union Rules incorporate the principles of natural justice whether explicitly through Rule 27 or implicitly. Similarly, both parties accept that the findings of my predecessor in **Foster v Musicians Union [D13-17/03 22 May 2003]** are relevant to this case. The disagreement is whether, in taking forward the second disciplinary action the Union applied the principles of natural justice.

47. Mr Potter told me the Union that followed its Rules and there was, in this case, no need to rely on any implied Rule to ensure that it was acting in a manner consistent with the principles of natural justice. It took these principles into account and acted fairly in its decision making. Mr Beaumont submitted that the Courts now tended to regard the rules of natural justice as requiring relevant bodies to exercise their discretion fairly. His position was that natural justice may not always be a bar to the initiation of a second set of disciplinary proceedings

and such an issue was fact sensitive but that, on the facts of this case, the Union did not act in a manner which was consistent with those principles. As I have explained at paragraph 20 above both parties agreed that, in complying with the principles of natural justice the Union was under an overriding duty to act fairly.

48. My view is that Mr Beaumont's argument that, on the facts of this case, the Union acted in a manner which is inconsistent with the principles of natural justice, requires me to hear and consider evidence as to the decision to proceed with the second set of disciplinary procedures. This hearing was designed to consider preliminary issues only, without any consideration or cross examination of witness evidence. If Mr Beaumont's argument was that there was, on the basis of natural justice alone, an automatic bar on launching a second set of proceedings then I could have considered this as a preliminary issue. In my view, it is not appropriate to reach a decision as to whether the Union acted in accordance with the principles of natural justice on the facts of this case without giving both sides the opportunity to present evidence. Consequently this should be considered, at the full hearing, alongside Mr McFadden's other complaints.

49. I note, however, both parties' agreement that the Union is required to act within the principles of natural justice and that this includes a duty to act fairly. At the full hearing I expect both parties to explore, supported by witness evidence where possible, whether the Union applied those principles in taking forward the second set of disciplinary procedures.

50. Given my decision and the need for evidence, I do not need, and will not deal with, either the Rule in **Henderson v Henderson** in detail or the allegation of perversity.

51. I therefore direct that the application is listed for a full hearing to decide the applicant's complaints.

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

Sarah Bedwell  
The Certification Officer



## Appendix 1: The complaints

### Complaint 1

In breach of rule 27, and the EC directions to Rule 27 Discipline of Members, an investigation was launched by the Finance and General Purposes Committee of the Union's North West Region on 27 November 2017 into an incident which is alleged to have occurred on 3 October 2015. The EC Directions only permit an investigation where the union has received '*notice of a matter which may lead to a disciplinary charge*'. An investigation was carried out in 2015 into that allegation which it was claimed could lead to a charge. That charge was brought against Mr McFadden and subsequently found to be unlawful. That allegation is not capable of leading to a further charge and none has been suggested. The present investigation is therefore not permitted under the rules.

### Complaint 2

The Union breached rule 27 and the EC Directions to Rule 27 Discipline of Members by breaching the rules of natural justice implied into those rules in the following ways in relation to the investigation being carried out by Ms Brannan on behalf of the Union between 27 November 2017 to 11 May 2018:

- (i) Ms Brannan has not specified what Ms Guilfoyle has alleged against Mr McFadden in Ms Brannan's interview of her; did not permit Mr McFadden to attend the interview, hear what was said or question Ms Guilfoyle and has not provided her (or any) notes of the interview; in so doing the Union breached the natural justice requirements, at the investigation stage: a. that allegations known to the investigator should be disclosed to the defendant in full and with sufficient particularity to enable him to know the case against him so as to be able properly to defend himself; and b. that, especially where there will be no other opportunity to challenge the complainant on her account, the defendant should be afforded that opportunity.
- (ii) The Union is not entitled to reinvestigate a complaint which has already been investigated and/or which has already been the subject of a charge; in so doing the Union breached the provision of the rule which permits only one investigation and implicitly precludes an investigation after a charge has been brought and it breached the natural justice requirement that a prosecutor is not permitted to mount successive investigations arising from the same facts in the hope of obtaining a conviction or to harass the defendant or to subject

him to detriment (not least that of suspending him from standing for elected office)

- (iii) Ms Brannan is guilty of apparent bias having already determined that the alleged 'incident took place'; in so doing the Union breached the natural justice requirement that an investigator must be independent and impartial and approach the investigation with an open mind.
- (iv) The Union intend to bring a further charge against Mr McFadden arising out of the same alleged conduct; that is to subject him to double jeopardy and a manifestation of bad faith; in so doing the Union breached the natural justice requirement that a prosecutor is not permitted to bring successive charges arising from the same facts in the hope of obtaining a conviction or to harass the defendant.

### Complaint 3

On or about 27 November 2017 and thereafter the Union breached the EC Directions to Rule 27 Discipline of Members in that the investigation into the complaint against Mr McFadden was not completed '*as soon as is practicable in the circumstances*'. It was practicable to complete the investigation by the end of 2015 and it was so completed. In any event, the permissible circumstances do not permit the Union to wait two and a half years while it pursues a void charge against a member such as Mr McFadden. The EC Directions require that '*After receipt of the investigation report, there shall be no unreasonable delay before a member is charged.*' The investigation report was received in 2015 but no valid charge has yet been formulated and served on Mr McFadden, it is now too late to do so in compliance with the rules.

### Complaint 4

On or about 27 November 2017 and thereafter the Union breached rule 27.4 in that Mr McFadden was informed, by a letter from the Union of that date of the Finance and General Purposes Committee's ('the Committee') decision to suspend him, 'as a precautionary measure' from holding office pending an investigation into a complaint against him. The rule was breached in the following manner:

- (i) The Committee was wrong to suspend Mr McFadden in that the allegations were not serious enough to warrant Mr McFadden's



suspension and had not been so regarded after the investigation in 2015. The seriousness of the allegations had not altered since 2015.

- (ii) In any event, suspension pending investigation and disciplinary hearing is only justified (as the Committee purported to hold) as a precautionary measure. But there was no possible precautionary effect from that suspension since any risk of repetition (which is denied) was the same whether or not he was suspended, the evidence was complete and any risk of tampering with evidence was the same whether or not he was suspended.

The purpose and effect of the Committee's decision was to continue the suspension which the Certification Officer had held to be unlawful.