

D/14/20-21

Decision of the Certification Officer on an application made under Section 31(1) of
the Trade Union and Labour Relations (Consolidation) Act 1992

Simpson (3)

v

Unite the Union

Date of Decision

15 October 2020

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Decision

1. Upon application by Mr Simpson (“the applicant”) under section 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

I refuse Mr Simpson’s application for a declaration that on or around 9 September 2019, the Union breached Section 30 (2) of the 1992 Act by not allowing him access to the accounting records of Unite Branch SC/100C9.

Reasons

2. Mr Simpson brought his application as a former member of Unite the Union (or “the Union”). He did so by an emailed application dated 27 September 2019.
3. Following correspondence with my office, Mr Simpson confirmed his complaint as follows:-

In breach of section 30(2) of the 1992 Act, Unite the Union failed to comply with Mr Simpson’s request of 9 September 2019, requesting access to the accounting records for the Union’s Community Branch SC/100C9

4. With the agreement of both parties I have considered this complaint and reached a decision following written submissions from Mr Simpson and Mr Potter QC (on behalf of the Union) and with access to an agreed bundle of documents. As there was no hearing I have not heard any oral evidence. There does not appear to be any dispute about the facts and, having read all of the documentation provided to me, I make the following findings of fact:

Findings of fact

5. Mr Simpson was a member of Unite the Union from 18 January 2017 until 22 May 2019 when he was expelled from the Union following a disciplinary process. He has made a separate application to me about the conduct of that disciplinary process.
6. On 9 September 2019 Mr Simpson requested access to the Union’s accounting records. On 10 September 2019 the Union declined to give him access because he was no longer a member of the Union.

The Relevant Statutory Provision

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

28 Duty to keep accounting records

(1) A trade union shall

(a) cause to be kept proper accounting records with respect to its transactions and its assets and liabilities, and

(b) establish and maintain a satisfactory system of control of its accounting records, its cash holdings and all its receipts and remittances.

(2) Proper accounting records shall not be taken to be kept with respect to the matters mentioned in subsection (1)(a) unless there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions.

29 Duty to keep records available for inspection

(1) A trade union shall keep available for inspection from their creation until the end of the period of six years beginning with the 1st January following the end of the period to which they relate such of the records of the union, or of any branch or section of the union, as are, or purport to be, records required to be kept by the union under section 28. This does not apply to records relating to periods before 1st January 1988.

(2) In section 30 (right of member to access to accounting records)— (a) references to a union's accounting records are to any such records as are mentioned in subsection (1) above, and

(b) references to records available for inspection are to records which the union is required by that subsection to keep available for inspection.

(2) The expiry of the period mentioned in subsection (1) above does not affect the duty of a trade union to comply with a request for access made under section 30 before the end of that period.

30 Right of access to accounting records.

(1) A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union.

In the case of records relating to a branch or section of the union, it is immaterial whether he was a member of that branch or section.

(2) Where such access is requested the union shall

(a) make arrangements with the member for him to be allowed to inspect the records requested before the end of the period of twenty-eight days beginning with the day the request was made,

(b) allow him and any accountant accompanying him for the purpose to inspect the records at the time and place arranged, and

(c) secure that at the time of the inspection he is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he requires.

(3) The inspection shall be at a reasonable hour and at the place where the records are normally kept, unless the parties to the arrangements agree otherwise.

(4) An "accountant" means a person who is eligible for appointment as a statutory auditor under Part 42 of the Companies Act 2006. (5) The union need not allow the member to be accompanied by an accountant if the accountant fails to enter into such agreement as the union may reasonably require for protecting the confidentiality of the records.

(6) Where a member who makes a request for access to a union's accounting records is informed by the union, before any arrangements are made in pursuance of the request

(a) of the union's intention to charge for allowing him to inspect the records to which the request relates, for allowing him to take copies of, or extracts from, those records or for supplying any such copies, and

(b) of the principles in accordance with which its charges will be determined, then, where the union complies with the request, he is liable to pay the union on demand such amount, not exceeding the reasonable administrative expenses incurred by the union in complying with the request, as is determined in accordance with those principles.

(7) In this section "member", in relation to a trade union consisting wholly or partly of, or of representatives of, constituent or affiliated organisations, includes a member of any of the constituent or affiliated organisations.

31 Remedy for failure to comply with request for access

(1) A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer.

(2) Where the Certification Officer is satisfied that the claim is well-founded he shall make such order as he considers appropriate for ensuring that the applicant

(a) is allowed to inspect the records requested,

(b) is allowed to be accompanied by an accountant when making the inspection of those records, and

(c) is allowed to take, or is supplied with, such copies of, or of extracts from, the records as he may require.

Considerations and Conclusions

Mr Simpson

8. Mr Simpson told me that the Act enabled a former member of the Union to access its accounting records for periods during which they were a member. He argued that this was reflected in the wording of s30 (1) (a):

A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union

9. He asked me to take into account the use of the past tense in the phrase “periods including a time when he **was** a member” which, in his view, demonstrates that former members could have access to records which related to the time when they were a member. He argued that, if this were not the case, then there would have been no need to include this phrase in section 30. His view was that the purpose of this section was to enable former Union members to have access to financial records so that they could hold the Union to account.
10. He also argued that a Union should not be permitted to avoid financial scrutiny of Union finances through the expulsion of a member who had raised financial concerns in writing. The context to this concern is that Mr Simpson was expelled from the Union on 22 May 2019. Mr Simpson has complained to me about the processes which led to that expulsion; those complaints will be listed for a hearing and are not directly related to how s30 should be interpreted. It is worth noting, however, that whilst Mr Simpson did raise questions about his Branch finances, following his appointment as Branch Treasurer, the Union do not agree that this was the reason why he was expelled. I would add, for clarity, that Mr Simpson appears to have been appointed as Branch Treasurer and Branch Secretary. I have referred to him in this decision as Branch Treasurer but recognise that, for a period of time, he undertook both roles.
11. Finally, Mr Simpson has, in making submissions to me regarding this complaint, argued that he had sought access to the Union’s accounting records whilst he was a member of the Union. He referred me to a number of emails which were written whilst he undertook an official role in the Branch and after he had been suspended during the investigation which led to his expulsion. Mr Simpson has provided me with a number of emails (dated 13 January 2018, 3 September 2018, 20 September 2018, 28 November 2018 and 30 November 2018). Having read the emails, I can understand why the Union did not treat them as requests for accounting records. They appear to have been written after Mr Simpson took up his role as Treasurer and was seeking to locate funds which he believed should have been transferred from the Union account to the Branch account. It is clear, however, that during this correspondence Mr Simpson requested a copy of the Branch audit report on 13 January 2018.
12. The complaint I am considering now relates only to the refusal of the Union to provide access to the request Mr Simpson made to them on 9 September 2020. Any complaint about the request of 13 January, therefore, falls outside the scope of this decision and I have not taken it into account. It is helpful to add, however, that Mr Simpson has separately raised the issue of the Branch audit report with me and the Union explained that Branch funds are not separately audited but are included within the Union’s annual audit. There is no requirement for each

Branch to be audited separately and, consequently, there is no Branch audit report.

Unite the Union

13. The Union argue that the right of access to accounting records set out in section 30 of the Act relates to the “contractual nexus” or relationship between the Union and its Members. Once that contract is broken there is no longer a mutual interest between the parties and so the right of access falls away. They explain that case law in relation to this right of access has focused on the right of a member to be accompanied by a professional accountant rather than on the right of someone who is not a member to have access to accounting records.
14. The Union’s view is that the phrase “periods including a time when he **was** a member” enables a member to have access to records which fall outside the period of their membership, provided that the relevant period includes time in which they were a member of the Union.
15. The Union has also explained that there is a remedy available to a Member who is expelled because they sought access to financial records because it is open to them to take legal action, for example through the Employment Tribunal. In doing so, the Member can seek disclosure of the accounting records as part of their legal action and the Union cannot, therefore, avoid financial scrutiny by expelling Members who seek access to their accounting records

Summary of Evidence

16. Both parties agree that section 30 gives union members a right to access the accounting records of their Union. Mr Simpson’s view is that the reference to “periods including a time when he **was** a member” extends that right to former members of the Union. His argument is that there would be no need to include this phrase if the right did not extend to former members. The Union’s view, however, is that this simply ensures the member has access to records for a period which includes (but is not limited to) the time when they were a member of the Union. They argue that this is consistent with the contractual relationship between a Union and its members which no longer exists once the member has left the Union.
17. In reaching a decision, I have found it helpful to look at how the Act deals with other circumstances where it is conferring a right on individuals. For instance, in section 108 (3) of the Act it is explicit that a former member of a union may bring

a complaint to me if they were a member at the time of the breach complained about. Similarly, section 54(2) and section 55(1) of the Act, when read together, enable a wider class of people to bring a complaint to me about a statutory election. The complainant must be an interested person which is defined as a member of the Union, someone who was a member at the time of the election, or a person who was a candidate in the election. Furthermore, Section 30(7) clarifies that a Member, for the purposes, of Section 30 includes a member of any representative, constituent or affiliate organisations where relevant. It does not extend those rights to a former Member.

18. Bearing in mind the Act's clarity in these areas, and the contractual nature of the relationship between a Union and its members it is not reasonable to infer that the intention of section 30 was to extend the right of access to accounting records beyond union members. I cannot accept Mr Simpson's view that the use of the past tense could only mean that former members have a right to access records. Construing section 30 (1) in its totality, demonstrates that the right is conferred on union members, where records are available and where they relate to a period which includes a time when they were a member. In my view, the use of the past tense must be read in the context of the whole sentence rather than just the final clause of that sentence.
19. Similarly, Section 30(1) must be read in the wider context of Section 30 which refers only to "members". There does not appear to be any reference to extending the rights given in section 30(1) to former members either in the language it uses to describe the person on whom it confers rights, or in its clarification of who should be considered a member.
20. Mr Simpson makes a strong point that a Union should not be able to deny a member a right of access to its accounting records simply by expelling them. He is right, of course, and the Union have identified one potential route of challenge or remedy should these circumstances occur. In my view, however, this would not offer a proportionate response. Taking action through, for instance, the Employment Tribunal, is an onerous process and may be disproportionate where the Union member was not employed but working in a volunteer capacity for their Union. There are, however, other provisions in the Act which would enable the Union to be held to account.
21. The first is that the former member has a right to complain to me, under section 108A, if they believe that the disciplinary process which led to their expulsion was outside the rules of the Union. As I have explained the Act is explicit that a

former member can bring a complaint to me where the alleged breach occurred whilst they were a member of the Union. My powers in this area are, however, limited to an alleged breach of Rules. But it is also open to a former member to bring allegations of financial impropriety to me so that I can consider using my powers under sections 37A to 37E to investigate the financial affairs of a Union. Whilst I understand that this would not give the former member any right of access to the documents that formed the basis of the original request, it offers another route to hold the Union to account in respect of its financial affairs.

Consequently, I refuse Mr Simpson's application for a declaration that on or around 9 September 2019, the Union breached Section 30 (2) of the 1992 Act by not allowing him access to the accounting records of Unite Branch SC/100C.

Observations

22. It is worth noting that the fact that a member has been expelled should not, on its own, be grounds for me to investigate that expulsion or to launch an inquiry into the financial affairs of a Union. It is simply the case that these powers offer a remedy in circumstances where a Union Member has been expelled simply for requesting access to the accounting records of the Union.

A handwritten signature in black ink, appearing to read 'Sarah Bedwell', with a horizontal line underneath it.

Sarah Bedwell

The Certification Officer