D/21-35/01[1]

DECISION OF THE CERTIFICATION OFFCICER ON AN APPLICATION MADE UNDER SECTION 108A OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

Mr J Carrigan

-v-

ASLEF

Date of Decision: **8 August 2003**

DECISION

Upon an application made by the Applicant dated 18 October 2000 under section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), and

Pursuant to the order and judgement of the Employment Appeal Tribunal dated 20 January 2003 and 27 February 2003 respectively, allowing the Applicant's appeal and declaring that the Applicant's disciplinary hearing on 6 September 2000 was held in breach of the rules of the Respondent union.

I decline to make an enforcement order on the grounds that I consider that it would be inappropriate so to do.

REASONS

1. In October 2000 the Applicant made eight complaints to the Certification Officer against his Union, the Associated Society of Locomotive Engineers and Firemen, ASLEF, ("the Union") arising out of events which had occurred within the Union earlier that year. Other members had previously made a

[1] The decision on liability which was appealed by Mr Carrigan was issued by the Certification Officer on 2 March 2001.

number of complaints to the Certification Officer arising out of the same events. After correspondence with the complainants, the then Certification Officer, my predecessor, Mr Whybrew, identified fifteen complaints which had been brought by six applicants, including Mr Carrigan. The hearing of these complaints took place on 6/7 December 2000. In a decision dated 2 March 2001 three complaints were upheld and appropriate declarations were made. The Certification Officer exercised his discretion not to make any enforcement orders in respect of the three successful complaints. The remainder of the complaints were dismissed.

2. The Applicant appealed to the Employment Appeal Tribunal ("the EAT"). At a preliminary hearing, permission was granted for an appeal to proceed on a limited basis, namely against the dismissal of complaints 8 and 12, as they were dealt with by the Certification Officer. These were in the following terms:-

Complaint 8 *"The Executive Committee were in breach of rule 16 Clause 1, between March and October 2000, because they conducted meetings with a quorum of less than five as required by the rules. (S108A(2)(d) of the Act) (Complaint made by Mr Callahan and Mr Carrigan) And that the same rule was breached in that "Disciplinary hearings were held with only three members present." (S108A(2)(b) of the Act) (Complaint made by Mr Mackenzie, Mr Worboys and Mr Carrigan)"*

Complaint 12 *"That the Union had breached its rule 29 Clause 6 in that the disciplinary hearing of Mr Ballard was before three members of the Executive Committee instead of five. (S108A(2)(b) of the Act) (Complaint made by Mr Ballard) Also that the same rule was breached on 6 September 2000 by Mr Carrigan not being allowed witnesses to attend his disciplinary hearing thereby not affording him a full and fair hearing before the Executive Committee. (S108A(2)(b) of the Act) (Complaint made by Mr Carrigan)*

3. The EAT heard the Applicant's appeal on 20 January 2003 and its judgement was sent to the parties on 27 February. The Applicant's appeal was successful to the extent that the EAT made a declaration that the Applicant's disciplinary hearing on 6 September 2000 was held in breach of the rules of the Union as it, *"...was not a hearing before the Executive Committee and thus the Union took disciplinary action without the sanction of the rules."* (Judgment of the EAT, para 30). The EAT remitted to the Certification Officer the issue as to

whether or not it is appropriate to make an enforcement order and, if such an order were to be made, the terms of that order.

4. The parties each made written submissions prior to the hearing which took place on 24 July 2003. The Applicant was represented by a colleague, Mr W Mackenzie. The Union was represented by Mr B Langstaff QC. No evidence was called by either party. Two bundles of documents were prepared for the hearing by my Office. The Union provided a further bundle of authorities. This decision has been reached on the basis of the representations made to me by the parties, together with such documents as were provided by them.

Factual Background

5. The facts of this case and the context in which they occurred are set out fully in the previous decisions of the Certification Officer and of the EAT. It is sufficient for present purposes that I summarise the facts most relevant to the issue now before me.

6. In his decision of 2 March 2001, the Certification Officer described the state of affairs within the Union in 2000 as being, *"...in a mess"*. This was as a result of differences between the General Secretary and the Executive Committee ("the EC") and also differences within the EC itself. In January 2000 the President of the Union, Mr Tyson, resigned and in March, his successor, Mr Madden, also resigned. It was decided to call a Special Assembly of Delegates which would have the authority to sort matters out. This Special Assembly met on 18 April 2000 and decided, amongst other things, that the Applicant and two other members of the EC be suspended pending disciplinary action. The Special Assembly also decided that Messrs Tyson and Madden should be reinstated as members of the EC. In the Union's submission, a major factor contributing to the resignations of Mr Tyson and Mr Madden had been the behaviour of the Applicant and the two others who were suspended.

7. Rule 16 of the rules of the Union provides for an EC consisting of eight members with a quorum of five. Following the suspension of the three members of the EC by the Special Assembly there was a bare quorum of five members who were to constitute the EC for the time being. The Union therefore found itself in a dilemma. Should it proceed with the discipline of Mr Carrigan and the two others before this five person EC it might be accused of acting unfairly, as Messrs Tyson and Madden could be said to have interests hostile to those being disciplined. At a meeting on 26 June 2000 the EC devised what it considered to be a solution to this dilemma. The solution was to create a subcommittee of three (excluding Messrs Tyson and Madden) which would conduct the disciplinary hearing and then report back to the EC with its recommendation. Any decision that might be taken to discipline would then be taken by the full EC.

8. The disciplinary hearing of the Applicant took place before this subcommittee on 6 September 2000. The subcommittee found that the Applicant was guilty of the misconduct alleged and it recommended that he be expelled from the Union. This recommendation was later ratified by a quorate EC.

9. The Applicant lodged an internal appeal against his expulsion. This appeal was heard on 6 February 2001 and there is a 164 page transcript of its proceedings. The Applicant's appeal was unsuccessful.

10. Rule 29 of the rules of the Union deals with discipline and rule 29(6) provides that, *"The member shall be afforded a full and fair hearing before the Executive Committee…"* In relation to complaint 8, the Certification Officer refused a declaration on the grounds that there was a long history of the Union operating through subcommittees and that decisions made at inquorate subcommittees could be authorised at a subsequent quorate meeting of the EC. In relation to complaint 12, only Mr Ballard complained of a breach of rule 29(6) but the Certification Officer found that, in his case also, the decision of the subcommittee, once ratified, became a decision of the EC and that the disciplinary process was accordingly conducted within rule. The Certification Officer went on to find that the Applicant had not been denied the opportunity

to call witnesses at the disciplinary hearing, as he had alleged. The EAT upheld the Applicant's appeal on the grounds that rule 29(6) had been broken by his disciplinary hearing having taken place before a subcommittee of the EC and not before a quorate EC.

The Relevant Statutory Provisions

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

S108B (3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

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

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

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

The Union rules

12. The union rules most relevant to the Applicant's complaint are:-

Rule 29 Disciplinary Action

(6) The member shall be afforded a full and fair hearing before the Executive Committee. The member will be entitled to representation by a Society member and will be able orally to supplement any written evidence or testimony he has submitted, to call other members of the Society as witnesses, to hear evidence against him and to have an opportunity of answering it, and to question his own and the Society's witnesses.

Rule 30 Appeals Committee

(1) The Appeals Committee shall consist of eight members, one from each district formed under rule 16, Clause (5) and elected in accordance with rule 10, section B. The term of office shall be three years with a certain number of members of the Appeals Committee retiring each year…

(4) The Appeals Committee shall hear appeals from members against any expulsion or other disciplinary action by the Executive Committee…

(6) The applicant shall be afforded a full and fair hearing before the Appeals Committee...

(9) At the appeal no new charge or issue may be raised by the applicant or the Executive Committee…

The Submissions

13. On the Applicant's behalf, Mr Mackenzie submitted that I should make an enforcement order effectively reinstating the Applicant as a member of the Union from the date of his expulsion, 6 September 2000. Mr Mackenzie argued that not only had the Union breached its own rules but that it had also acted unfairly towards the Applicant. With regard to the disciplinary hearing, he submitted that it had been unfair to the Applicant that Messrs Tyson and Madden had been excluded as the Applicant had wished to cross examine them. With regard to the internal appeal, it was argued that there were five grounds of unfairness. First, Mr Mackenzie submitted that it was unfair that the Appeal Committee should include two members who had been delegates to the Special Assembly on 18 April 2000, which had suspended the Applicant pending disciplinary action. Secondly, it was submitted that the Appeal Committee should have had regard to the fact that the disciplinary hearing had not been conducted by the EC in accordance with rule 29(6). Thirdly, it was submitted that the Appeal Committee had refused to allow the Applicant to adduce a 260 page bundle of documents upon which he wished to rely. Fourthly, it was submitted that the Applicant was denied permission to call Mr Worboys as a witness. Fifthly, it was submitted that Mr Tyson left the appeal before he could be cross examined by the Applicant or his representative. In addition, Mr Mackenzie pointed out that the Applicant had been a member of the Union for over twenty years and that he was only seeking to have his membership restored. He was not seeking to be reinstated on the EC. Mr Mackenzie did not consider it appropriate that I adopt a middle course by restoring the Applicant to his position immediately prior to 6 September 2000, namely as a member under suspension pending disciplinary action. In Mr Mackenzie's submission it would be impossible for the Applicant to receive fair treatment almost three years after the original disciplinary hearing.

14. For the Union, Mr Langstaff QC accepted that the Union had been found to have acted in breach of its rules but he submitted that a technical breach which does not cause unfairness is less important in the overall scheme than one which does affect fairness. Mr Langstaff argued that there was no proper basis

for attacking the fairness of the original disciplinary hearing, as opposed to its constitutional correctness, and that the appeal hearing was conducted fairly. Counsel relied upon the cases of McVitae and Others v UNISON [1996] IRLR 33, Leary v National Union of Vehicle Builders [1936] AllER 712, Calvin v Carr and Others [1979] 2 WLR 755 and Modahl v British Athletic Federation Ltd [2002] 1 WLR 1192. He relied in particular upon the statement of Lord Justice Latham in the Modahl case at para 61 that, *"The question in every case is the extent to which the deficiency alleged has produced overall unfairness."* Mr Langstaff argued that, on the facts of this case, the deficiency (ie the breach of rule) was cured by the fairness of the appeal process. Counsel rejected the specific allegations of unfairness made by the Applicant. He noted that, at the original disciplinary hearing, the Applicant had not sought for the hearing panel to include Mr Tyson and Mr Madden and well understood why they had been excluded. With regard to the internal appeal, Mr Langstaff noted that there had been a discussion at the appeal hearing about the two members who had also been present at the Special Assembly on 18 April 2000 in which the Applicant accepted that these two members were *"fair and impartial"* and in which the Applicant did not make an application to have them removed. Secondly, counsel argued that it was not improper for the Appeal Committee to consider that the original disciplinary hearing had been correctly conducted as the final decision had been taken by a quorate EC and that, subsequently, even the Certification Officer had considered this to be in compliance with the rules. Thirdly, counsel argued that the additional documents submitted to the appeal hearing by the Applicant were mainly those documents that had been prepared for the hearing before the Certification Officer on 6/7 December 2000 and that these were being relied upon to raise new issues contrary to rule 30(9) of the rules of the Union. Counsel observed that the transcript of the appeal hearing records no protest from the Applicant at the exclusion of his bundle on these grounds. Fourthly, as to the refusal to hear evidence from Mr Worboys, counsel noted that Mr Mackenzie had stated at the appeal that Mr Worboys was to be, *"...a witness to certain things that went on with the Certification Officer"* and that Mr Worboys, *"...was not really involved prior to the Certification Officer"*. Mr Langstaff noted that, having regard to the ruling of the Appeal Committee on

the issue of new evidence, Mr Mackenzie did not seek to call Mr Worboys. Lastly, Mr Langstaff noted that there is nothing in the transcript to suggest that the Applicant sought to cross examine Mr Tyson. In Mr Langstaff's submission I should decline to make any enforcement order in the circumstances of this case.

Conclusion

15. Section 108B(3) of the 1992 Act provides that where the Certification Officer makes a declaration pursuant to an application under section 108A, the Certification Officer shall make an enforcement order unless he or she considers that to do so would be inappropriate. The type of order that the Certification Officer may make is restricted by the later provisions of subsection (3). There is, however, no statutory guidance as to the circumstances to be taken into account in deciding upon the appropriateness of making an enforcement order. The statute therefore provides the Certification Officer with a wide discretion in whether to make such an order.

16. A union which disciplines any member in breach of its own rules puts itself in jeopardy of an enforcement order being made nullifying any disciplinary action taken against the member. However, whilst the making of an enforcement order must always be considered in such circumstances, it is not inevitable that one will be made. I must treat each case on its facts and have regard to all relevant circumstances.

17. The authorities that have been cited to me concern whether a fair appeal can cure a defective hearing at first instance. In each case the court had to decide whether the defendant had acted unlawfully by disciplining the plaintiff in breach of the principles of natural justice. The task before me is a different one. In the present case the EAT has made a declaration that the Union acted unlawfully by disciplining the Applicant in breach of an actual rule, rule 29(6). There is no finding that the Union had breached the principles of natural justice. Accordingly, it is not necessary that I analyse the facts of the present case alongside the authorities to which I have been referred. On the other

hand, in determining whether it is appropriate to make an enforcement order, I have had regard to the principles of fairness discussed in those authorities. I have considered the passage in Leary v NUVB in which McGarry J persuasively stated, *"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"* (page 720). I have also considered the passage in the later Privy Counsel case of Calvin v Carr in which Lord Wilberforce said, *"All those who partake in it* (the racing industry) *have accepted the rules of Racing and the standards which lie behind them; they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as, when the process of reaching these decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits."*

18. I have carefully considered the submissions of Mr Mackenzie, who put the Applicant's case in a most cogent and concise manner, and the equally able arguments of Mr Langstaff QC. In my judgement, there are two particular aspects of this case which distinguish it from many other cases involving a breach of rule at a disciplinary hearing.

19. First, there are the circumstances of the original disciplinary hearing in September 2000. It has already been found that the Union had been in a mess earlier that year and that the Special Assembly of Delegates had been called to sort something out. The Special Assembly, the supreme governing body within the Union, had decided that disciplinary action should be taken against the Applicant and others. I accept that this presented the EC with a dilemma. There were only five remaining members of the EC and two of them, Messrs Tyson and Madden, could be said to be hostile to the Applicant. In these circumstances the Union chose a solution to the dilemma which has been found on appeal to be in breach of rule. It has not been argued before me that the chosen solution was arrived at in bad faith to disadvantage the Applicant. Further, I do not accept the Applicant's argument that he would have preferred to have his case heard by a disciplinary panel which included Mr Tyson and Mr Madden, in order that he could cross examine them and so better prepare

the ground for an appeal. On the other hand, I also do not accept the Union's submission that its breach of the rules was a mere technicality. To conduct a disciplinary hearing before a body other than the one provided for in the rules is more than a technicality. Nevertheless the breach of rules that occurred must be considered in its context and that context, I find, does present the Union with extenuating circumstances.

20. Secondly, there is the matter of the appeal. I find that this was a full rehearing at which both sides were at liberty to call witnesses, although, in accordance with rule 30(9), no new issues could be raised. I further note that the Applicant made no complaint about the alleged unfairness of the appeal at any time prior to the present proceedings. With regard to the specific allegations of unfairness now raised by the Applicant, I find that these have not been made out on the evidence. The membership of the Appeal Committee is provided for in the rules and the Union had no authority to require the two members who had been present at the Special Assembly of Delegates to stand down from the Appeal Committee. Indeed, it is ironic that whilst the Applicant criticises the Union for removing Mr Tyson and Mr Madden from the disciplinary panel, he also criticises the Union for not having removed from the Appeal Committee two members who might also be said to be hostile to him. In any event, this matter was raised at the appeal hearing and the transcript records the Applicant as having accepted that these two members were, *"fair and impartial"*. He waived any objection that he might otherwise have had. Further, I do not find that the Appeal Committee acted unfairly by not accepting the Applicant's case that the disciplinary hearing had been conducted in breach of rule. The Appeal Committee considered that the novel procedure adopted in this matter was lawful on the basis that the decision of the subcommittee had been ratified by a quorate EC. They were wrong in reaching this conclusion but they were not unreasonable, as is evidenced by the Certification Officer having reached the same erroneous conclusion. Further, the rejection of this argument did not taint the way in which the Appeal Committee proceeded to deal with the appeal. With regard to the exclusion of the bundle of documents which the Applicant wished to submit, I find that the Appeal Committee acted in good faith in its interpretation of rule 30(9), which prohibits the introduction of new

issues on appeal, and in its conclusion that what had occurred at the hearing before the Certification Officer on 6/7 December 2000 had no relevance to the disciplinary hearing on 6 September 2000. I have also had regard to the Applicant's lack of complaint about the Chair's ruling on this matter until these proceedings. As to the exclusion of Mr Len Worboys from giving oral evidence, I note Mr Mackenzie's following comment to the Appeal Committee, as recorded in the transcript:-

> *"I was going to call, Len, actually as a witness to certain things that went on with the Certification Officer. However, you made a ruling, Chair, and I am happy to take that. I will consult with Jim. As Len was not really involved prior to the Certification Officer, I do not think there is anything that he could add, but I cannot think of anything that I could ask him. It is a matter for me to ask him questions and the questions would have concerned the evidence given at the Certification Officer. I think we will leave it at that, Chair."*

I further note that Mr Mackenzie never actually sought to call Mr Worboys as a witness and that accordingly the Appeal Committee did not have to rule on this matter. As to the Applicant's complaint that he was unable to cross examine Mr Tyson, I find that he did not make an application to do so and that he cannot now properly complain that Mr Tyson left the appeal hearing before it was concluded. Having regard to the entirety of the evidence before me, and the submissions of the parties, I find that it could be said by an objective observer that, at the conclusion of the whole disciplinary process, the Applicant had received fair treatment and a consideration of his case on its merits. I find that the established deficiency in the original disciplinary hearing did not produce overall unfairness.

21. For the above reasons I consider that it would be inappropriate for me to make an enforcement order.

David Cockburn
Certification Officer