

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER
SECTION 108A(1) OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

Mr Liam Conway

v

National Union of Teachers

Date of Decisions

11 November 2014

DECISIONS

Upon application by Mr Liam Conway ("the claimant") under section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

1. Upon withdrawal by the claimant, I dismiss his application for a declaration that in breach of paragraph 3(10) of paragraph one to Appendix III of the rules of the union, the Regional Secretary did not convene a meeting of the Disciplinary Committee to consider the case against him within 40 school days of the formal making of the complaint.
2. Upon withdrawal by the claimant, I dismiss his application for a declaration that in breach of paragraph 3(10) of paragraph one to Appendix III of the rules of the union, the claimant was not given 10 school days' notice of the date of the meeting of the National Disciplinary Committee on 4 July 2013.
3. I refuse the claimant's application for a declaration that on or about 22 May 2013, the Union breached paragraph 1(f)(i) of paragraph one to Appendix III of the rules of the union by processing a disciplinary case against him on the basis of complaints made by Mr and Mrs Tollervey of continued unprofessional conduct and bullying.

REASONS

1. Mr Conway brought this application as a member of the National Union of Teachers ("the NUT" or "the Union"). He did so by a registration of complaint form which was received at my office on 14 October 2013.

2. Following correspondence with my office, Mr Conway confirmed his complaints in the following terms:

Complaint 1

In breach of Appendix III section 3 (10) of the rules of the Union, the Regional Secretary did not “convene the meeting of the Disciplinary Committee to consider the case within 40 school days of the formal making of the complaint or submission...”. Mr Conway received the complaint by email on May 22 2013. The meeting of the Disciplinary Committee was arranged for 27 and 28 November 2013. The period of 40 school days from the date of submission expired on 3 September 2013.

Complaint 2

In breach of Appendix III section 3 (10) of the rules of the Union, Mr Conway was not given 10 school days’ notice of the date of the meeting of the National Disciplinary Committee on 4 July 2013.

Complaint 3

On or around 22 May 2013, the Union breached Appendix III section 1 (f) (i) of the rules of the Union by processing a disciplinary case against Mr Conway on the basis of complaints made by Mr and Mrs Tollervey of continued unprofessional conduct and bullying, whereas Mr Conway’s actions were protected from disciplinary action by Appendix III section 1 (f) (i), which provides that disciplinary action may not be taken for ‘opinions expressed by members on matters related to Union policy and management’.

3. I investigated the alleged breaches in correspondence and a hearing took place on 22 October 2014.
4. At the hearing before me, Mr Conway represented himself. Oral evidence for Mr Conway was given by himself, Mr Craig Kennedy, Ms Jane Crich and Mr Roger Tanner, each of whom had presented written witness statements. The Union was represented by Mr Clive Romain, its in-house Senior Solicitor. Oral evidence for the Union was given by Ms Marian Darke, retired Regional Secretary of the South East Region, who also produced a written witness statement. The Union also produced a written witness statement from Mr Ian Stevenson, Regional Secretary of the Yorkshire Midland Region. Mr Stevenson did not attend the hearing to give oral evidence but Mr Conway stated that it was not his intention to ask him questions in cross-examination in any event. There was also in evidence the rules of the Union and a 431 page bundle of documents containing correspondence and other documentation as supplied by the parties for use at the hearing. At the hearing, I accepted two further documents into evidence by consent, which were added to the bundle as pages 432 and 433. Both sides provided skeleton arguments.

Findings of Fact

5. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
6. Mr Conway is a history teacher in the Nottingham Area. He has been a member of the NUT since 1980 and has held local office since 1987, since when he has attended each NUT annual conference. At the time relevant to this complaint he was the Joint Secretary of the Nottinghamshire Division and the Assistant Secretary/Minute Secretary of the Central Nottinghamshire Local Association. In 2014, Mr Conway was elected as the sole Secretary of the Nottinghamshire Division, as the Secretary of the Central Nottinghamshire Local Association and as the National Executive Member for Nottinghamshire and Derbyshire.

7. The Union is organised in Regions. This case concerns the Yorkshire & Midland Region. The regional office is in Doncaster. The Regional Secretary is Mr Ian Stevenson. Within the region there are local associations, which may affiliate to form divisions. The Central Nottinghamshire Local Association and the South Nottinghamshire Local Association have affiliated to form the Nottinghamshire Division, to which those local associations send delegates. There is also a separate Nottingham City Association. Mr Romain has described the Union as a federation of its Constituent Associations which are given a large degree of autonomy. At the relevant time, the Joint Secretaries of the Nottinghamshire Division were Mr Conway and Mr Wels. The Treasurer was Ms Louise Regan. She was also the Treasurer of the South Nottinghamshire Association. Mr Wels and Ms Regan are married. The lay auditors of the Nottinghamshire Division and the South Nottinghamshire Association were Mr and Mrs Tollervey.
8. This case concerns a complaint brought under the rules of the Union by Mr and Mrs Tollervey against Mr Conway for continued unprofessional conduct and bullying. Mr and Mrs Tollervey did not give evidence before me but I note from the documents that in 2002 Mrs Tollervey was dismissed from teaching allegedly as a result of stress, anxiety and depression caused by a bullying head teacher. She states that, following her recovery in about 2003, she decided to help the Union and was supported in this by Mr Conway who, she stated, was “one of the friendly and welcoming people” who helped her to get involved. She and her husband became the lay auditors of the Nottinghamshire Division and the South Nottinghamshire Association. Subsequently they also became what she described as ‘mailing assistants’. This is a position which is not known in the rules of the Union but I was told involves stuffing envelopes in mailings to members. In this capacity Mr and Mrs Tollervey were paid £25 per hour from Union funds. Their relationship with Mr Conway broke down in 2012 when he took issue with the absence of any authority from the division for these payments and for their general lack of oversight of the other alleged problems with the finances of the Nottinghamshire Division, which he attributed to Ms Regan and Mr Wels.
9. From or before early 2012, Mr Conway, Mr and Mrs Illingworth and others, had concerns about the conduct of the financial affairs of the Nottinghamshire Division. They were particularly critical of the activities of Ms Regan, Mr Wels and Mr and Mrs Tollervey who, for their part, felt they were being unfairly bullied and harassed by Mr Conway and the others. The dispute between these two respective groups and their supporters has proved to be both lengthy and intractable, notwithstanding internal enquiries by the Head Office of the Union, the use of external auditors, an inquiry by my office and an attempt at ACAS conciliation. The dispute has also resulted in three previous cases before me and a further case yet to be heard. It has also led to a number of complaints under the rules of the Union against Mr Conway and his colleagues by members of the opposing faction. Mr Conway asserts that eight such complaints have been made against him and 19 complaints in total have been made against him and his colleagues. As these are complaints that are made by members against other members under the rules, the Union has the task and expense of administering them. The facts of the current case must be seen against this background.

10. Mr Conway raised his concerns about the financial affairs of the Nottingham Division in an email to the General Secretary of 12 March 2012. In her reply of 22 March, the General Secretary informed Mr Conway that a complaint against him had been made by Mr Wels. Mr Conway and his colleagues persisted to express their concerns and the General Secretary caused a report to be prepared on the finances of the division by the Union's internal accountant. In late June/early July 2012 the report concluded that no improper or unacceptable behaviour or practice had been found. Mr Conway and his colleagues were not satisfied with this report and persisted to express their concerns.
11. On 9 July 2012, further complaints under the rules of the Union were made against Mr Conway and his colleagues by Mr and Mrs Tollervey, Ms Regan and Mr Wels. Mr and Mrs Tollervey complained that the conduct of Mr Conway, Mr and Mrs Illingworth and their son Robert Illingworth was in breach of the Union's Code of Professional Ethics and had undermined and discredited their integrity as lay auditors.
12. On 20 September 2012 there was a meeting of the Central Nottinghamshire Association at which Mr Conway raised the finances of the Nottinghamshire Division for discussion. Whilst Mr and Mrs Tollervey later recorded Mr Conway as having stated at the meeting that he had nothing against them and they had done good work for the Union, they maintained that he appeared at the head of a crowd of about 25 members, most of whom had never before been at such a meeting and harangued those present. Mr and Mrs Tollervey described it as a disgraceful ambush by Mr Conway and asserted that his "plotting, deceit and behaviour was unprofessional conduct". Mr Conway denies any bullying behaviour or other wrong doing at that meeting, whilst accepting that he did raise the issue of the finances of the Nottinghamshire Division for discussion.
13. The complaints made against Mr Conway and his colleagues in July 2012 were heard by the National Disciplinary Committee ("the NDC") on 8 and 9 October 2012. Both parties to this complaint rely on different parts of the decision of the NDC. Mr Conway relies on the following passage:

"The panel has to consider, however, the right under the Union's Rules that a member has to pursue vigorously matters of concern about Union finances, provided they are genuinely held. The panel recognises that the Liam Conway and his colleagues did genuinely believe that there was a cause for concern and that it would not be, in the panel's view, appropriate to try to intervene in such a way as to discourage members from pursuing matters of concern to them in relation to financial matters."

On the other hand, the Union notes that, whilst the complaints against the other respondents were not upheld, aspects of the complaints against Mr Conway were upheld. It notes the findings that, *"the panel strongly take the view that Liam Conway's actions were too persistent and insensitive, which was destabilising for the division causing stress to Roger and Christine Tollervey and to Louise Regan"* and that Mr Conway *"should have behaved in a more reasonable and less confrontational manner ..."*. The decision records Mr Conway as having commented at the hearing that Mr and Mrs Tollervey had little to answer for, except perhaps some oversight, and that he wished to make it absolutely clear that he was

not concerned to be over critical of Mr and Mrs Tollervey. The NDC did not impose any sanction on Mr Conway but stated *"The panel wishes to make it clear that the respondents must in future act in a manner which is consistent with the Union's Code of Professional Conduct and the Union's policy on bullying with regard to the affairs of the Nottinghamshire Division."* Mr Conway appealed this decision to the Union's National Appeals Committee but later withdrew that appeal.

14. On 17 October 2012, there was an emergency general meeting ("EGM") of the Nottinghamshire Division. Ms Regan chaired the meeting. A group of about 25 observers attempted to attend but were excluded by a vote of the elected members. An impromptu meeting then took place in the lobby at the top of the stairs. Mr and Mrs Tollervey maintained that they felt threatened, frightened and intimidated by Mr Conway's constant haranguing. On the other hand, they recorded Mr Conway as having said that he had nothing against Mr and Mrs Tollervey, that they had done much good work for the Union but had been misled by others. Mr Conway denied any misconduct at this impromptu meeting and later produced written statements by others to support his account.
15. Resolutions which supported the concerns of Mr Conway and his colleagues about the finances of the Nottinghamshire Division were approved at a special meeting at the Central Nottinghamshire Association on 14 November 2012 and at a meeting of the Nottinghamshire Division Council on 6 December 2012.
16. At meeting of the Nottinghamshire Division Council on 7 February 2013, Mr Conway again raised the issue of the finances of the Nottinghamshire Division. Mr and Mrs Tollervey commented on his conduct at this meeting as follows, *"Never ending repeats of allegations presented as fact is unprofessional conduct and bullying"*.
17. At the Annual General Meeting of the Nottinghamshire Division Council on 21 March 2013, there was a vote of no confidence in Ms Regan and Mr Wels.
18. Between 4 April 2013 and 13 May 2013 there was an unsuccessful attempt at conciliating the problems within the Nottinghamshire Division using the services of ACAS.
19. On 12 April 2013, Mr Conway and Mr and Mrs Illingworth, having concluded that they could not resolve this matter internally, made an allegation of financial irregularities within the Nottinghamshire Division to my office.
20. On 16 May 2013 there was a meeting of the Central Nottinghamshire Association at which Mr Conway again raised the matter of the finances of the Nottinghamshire Division. He gave, as an example of the problem, the payment of £762.50 to Mr and Mrs Tollervey for two days work stuffing envelopes.
21. On 22 May 2013, Mr and Mrs Tollervey made the complaint to the Union against Mr Conway that is the subject of this application to me. They complained of continued and unprofessional conduct and bullying in disregard of the advice of the NDC in October 2012. In making this complaint, Mr and Mrs Tollervey record that the main targets of the criticism were Ms Regan and Mr Wels. They described themselves as "collateral damage". Their complaint, with addendums and enclosures,

comprised some 67 pages in which they detailed the various occasions which they claim amounted to unprofessional conduct and, when seen cumulatively, bullying. They alleged that the bullying behaviour of them by other members had been instigated or initiated by Mr Conway and should be seen as bullying by proxy.

22. Mr and Mrs Tollervey's complaint was sent to their Regional Secretary, Mr Stevenson, who immediately forwarded a copy of it to Mr Conway. Mr Stevenson would ordinarily have been the Secretary to the relevant NDC but, as he had been involved in attempts to reach a conciliated settlement, it was agreed that this job would be undertaken by Ms Marian Darke, who was then the Regional Secretary in the South East Region. Ms Darke retired as Regional Secretary in June 2013 but continued to act as Secretary to the NDC in this matter.
23. On 12 June 2013, Mr Conway submitted his response to Mr and Mrs Tollervey's complaint, which comprises 17 pages and included 26 witness statements. He stated that he did not intend to submit a detailed response at that stage but considered the case against him should be dismissed at a pre-hearing of the panel. Mr Conway not only argued that the complaint was factually inaccurate, as supported by his witness statements, but that he had the protection of paragraph 1(f)(i) of Appendix III to the rules of the Union. This provides that the expression of opinions by members on matters of Union policy and management may not be the subject of disciplinary action.
24. On 4 July 2013, the NDC met by video conference for what was, in effect, a case management meeting. I accept that this was not a pre-hearing assessment as may be convened under paragraph 3(10) of Appendix III to the rules. The members of the NDC had read the substantial documentation and Ms Darke wished them to identify a way forward. The NDC had regard to the continuing enquiries into the alleged financial irregularities by my office and decided to stay the complaint until the completion of my enquiries.
25. In early 2013, the Union had instituted a further and more in depth enquiry of its own into the finances of the Nottinghamshire Division involving a firm of external accountants. The report of this enquiry was provided to the Union on 2 October 2013.
26. On 14 October 2013 my office received the present application from Mr Conway, which at that time related to the complaints now numbered one and three.
27. The stay that had been imposed on the complaint by Mr and Mrs Tollervay against Mr Conway became controversial. The Union considered that Mr Conway had consented to the stay but Mr Conway maintains that he did not. Be this as it may, it was clear by October 2013 that Mr Conway disputed his purported consent and wished his case to go ahead. By an email of 24 October 2013, Ms Darke informed Mr Conway that the complaint against him would proceed as he had effectively withdrawn his consent to the stay.
28. The NDC met on 27 and 28 November 2013 to consider the complaints of Mr and Mrs Tollervey against Mr Conway. Mr and Mrs Tollervey called no witnesses, other than themselves. Mr Conway called seven witnesses. In a majority decision which

was sent to the parties on 9 December, the complaint of continuing bullying was not upheld but the complaint of continued unprofessional conduct was upheld. The NDC found that there was insufficient evidence to substantiate the complaints of bullying and accepted Mr Conway's evidence that he had not targeted Mr and Mrs Tollervey. It noted that Mr and Mrs Tollervey had failed to highlight any particular instance of bullying. As to the complaint of continued unprofessional conduct, the NDC found that Mr Conway's conduct had breached the normally understood boundaries of professional conduct in his current role of Divisional Secretary and that he had continued to raise his concerns both at and outside meetings in a manner which the NDC believed to have been to the detriment of the Union locally and nationally, contributing to the Nottinghamshire Division becoming essentially dysfunctional. In a ten page decision and summary of proceedings, the NDC dealt with the preliminary issues raised by Mr Conway and his representative, Mr John Illingworth. Under paragraph 1(f)(i) of Appendix III, the Chair of the NDC commented that *"the issue was not about opinions, elections, or meetings, but about actions and behaviour"*. The NDC accepted that the expression of opinions was exempt from disciplinary action but concluded that the matter fell within its remit as it concerned the manner in which those opinions were allegedly expressed. The sanction imposed by the NDC was *'a severe reprimand and censure'*. In imposing this sanction, the NDC stated that it was shocked by Mr Conway's flagrant disregard for the advice given by the previous panel, having regard to his statement that he had given no credibility to its outcome, being procedurally fundamentally flawed, and had therefore not modified his behaviour since its publication.

29. On 19 February 2014, Mr Conway appealed against the decision of the NDC. One ground of his appeal was that the complaint against him had been conducted in breach of the rules. Such appeals are dealt with by the National Appeals Committee ("the NAC") by way of a full rehearing. In Mr Conway's case, the NDC consisted of three elected lay members and the NAC of six elected lay members.
30. At the AGM of the Nottinghamshire Division on 13 March 2014, Ms Regan and Mr Wels failed to be re-elected. Mr Conway was elected as Divisional Secretary.
31. On 20 March 2014, my office informed the Union and the parties of my decision on the matter of the alleged financial irregularities that had been reported to me. The Union had only supplied my office with a copy of its second audit report on 13 January 2014. I decided that it would not be a proportionate nor an appropriate use of public funds to appoint an inspector under my statutory powers. However, the Union was advised that my decision should not be interpreted as an unqualified approval of how the Union had dealt with the matter. I considered that the enquiries made by the Union had not been conducted with the rigour which the complainants would have wished and that the Union, faced with an absence of clear local procedures and questionable practices, had chosen to adopt a benevolent approach aimed at putting in place future good procedures and practices rather than allocating responsibility. I found that the enquiries made by the Union were not such that the report could have reached a firm conclusion that there was no evidence of fraud or of money being used for purposes other than the proper activities of the Union. Nevertheless, I observed that the Union had devoted a considerable amount of time and energy looking into the matters raised by the complainants and had put in place reforms to avoid the repetition of similar

concerns. I also acknowledged that the Union accepted that the disputed payments were authorised and were considered by it to have been incurred for the benefit of the division, either at the time they were incurred or, following its enquiries, retrospectively.

32. The NAC met to discuss Mr Conway's appeal on 1 May 2014. It noted the points he had raised regarding jurisdiction but considered that it should give an opportunity for oral submissions to be made. It set the hearing date for 18-20 June. Following objections, the hearing was rescheduled for 7-8 July.
33. On 17 June 2014, Mr and Mrs Tollervey submitted their documents for the appeal which comprised some 49 pages and included witness statements from four members who supported their case.
34. On 23 June 2014, Mr Conway submitted his 'observations and attachments' for the attention of the NAC, which comprised some seven pages. They included his submissions on paragraph 1(f)(i) of Appendix III to the rules.
35. The NAC considered Mr Conway's appeal by way of a re-hearing over two days on 7 and 8 July 2014. Mr and Mrs Tollervey called two witnesses, Ms Regan and Ms Evans, in addition to the written witness statements in their earlier submission.
36. On 16 September 2014 the parties were informed of the decision of the NAC, but the full written reasons had not been prepared by the time of the hearing before me. The NAC decided not to uphold Mr and Mrs Tollervey's complaints of continued bullying but their complaint of continued unprofessional conduct was upheld in relation to one incident. The NAC considered the other incidents constituted inappropriate rather than unprofessional behaviour. I was later informed that the one incident related to the meeting of the Central Nottinghamshire Association on 16 May 2013. The NAC imposed no sanction. It stated that to do so would be inappropriate and would not assist in fostering good relationships between all concerned.
37. The hearing before me was delayed by the addition of a further complaint by Mr Conway, arising out of the defence submitted by the Union to the original two complaints, and by the availability of the parties.

The Relevant Statutory Provisions

38. 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

39. The rules of the Union which are relevant for the purposes of this application are:

PROFESSIONAL CONDUCT

56.

(a)...

(b) *Any questions as to the professional conduct of any member whether it arises on the personal application of any member or otherwise shall stand referred to the National Disciplinary Committee and be dealt with in accordance with the procedure set out in Appendix III Section 1 of these rules.*

(c) ...

DISCIPLINE

57. *All questions relating to the discipline of members and any appeals on the question of eligibility for membership shall be dealt with in accordance with the provisions of Appendix III Section 1 of these rules.*

APPENDIX I - PROFESSIONAL CONDUCT

IA - CODE OF PROFESSIONAL CONDUCT AND COMMITTEES

The following has been adopted by the Executive and approved by Conference:

(1) ...

(2) *Questions arising under Rule 56(b) shall be referred to the National Disciplinary Committee in accordance with that rule and appeals in such cases shall be dealt with by the National Appeals Committee.*

(3) and (4) ...

The Code of Professional Conduct

The following is a list of actions already declared to be unprofessional but this list is not exclusive. All actions which are alleged to be injurious to the interests of the profession or the professional honour of any member can be referred to the Committee for adjudication. It is however expressly provided in relation to paragraph (g) below that remarks made or actions taken in the course of debate or participation in the democratic process of the Union or in the advocacy or representation of the interests of Union members shall not be considered to be breach of the Code, unless, following the procedures set out in these Rules, such remarks or actions are shown to constitute an abuse of the privilege otherwise afforded by this proviso.

(a) – (f) ...

(g) *For any member to discriminate against, to harass, or to make any discriminatory or offensive remarks against others, including in particular colleagues and pupils, on grounds of race, nationality, colour, ethnic or national origin, disability, gender, marital or civil partnership status, trans gender status, sexual orientation, or religion, religious belief or similar philosophical belief; and further for any member to harass, discriminate or make discriminatory remarks against others on grounds or age, class, caring responsibilities or other status or personal characteristic in circumstances in which such discrimination may objectively be considered unfair.*

APPENDIX III - UNION DISCIPLINE

SECTION ONE - NATIONAL DISCIPLINARY PANEL AND NATIONAL APPEALS COMMITTEE

1 JURISDICTION

The rules and procedures set out in this Appendix shall apply in the following cases of discipline of members, with the exception of cases under Rules 37(c) and 56(c) and those referred to the Data Protection Committee, that is to say:

- (a) a complaint made by the Officers of the Union of breach of Union Rule 8;*
- (b) a complaint made by a local Association, a single Association Division or the Officers of the Union that a member has refused to comply with a lawful instruction of the Union;*
- (c) a complaint that a member has been guilty of conduct detrimental to the interests of the Union;*
- (d) an application for re-admission to membership by a person previously expelled by a decision of a Disciplinary Committee other than the Professional Conduct (Criminal Convictions) Committee;*
- (e) a case arising under Rule 37(e) (cases arising from a decision of the TUC Disputes Committee).*
- (f) professional conduct cases under Rule 56(b).*

It is expressly provided that the following may not be the subject of disciplinary action:

- (i) opinions expressed by members on matters of Union policy and management;*
- (ii) statements or actions of members in the course of Union elections or in the context of the conduct of the democratic processes of the Union unless such statements or actions may be seen to bring the Union into disrepute generally.*
- (iii) statements or actions of members in the course of representation of members' interests otherwise than upon a complaint endorsed by a local association that the statements or actions of the member complained against have brought the Union into disrepute generally.*

CONSIDERATION AND CONCLUSIONS

Complaints One and Two

40. Mr Conway's first and second complaints are as follows:

Complaint 1

"In breach of Appendix III section 3 (10) of the rules of the Union, the Regional Secretary did not "convene the meeting of the Disciplinary Committee to consider the case within 40 school days of the formal making of the complaint or submission...". Mr Conway received the complaint by email on May 22 2013. The meeting of the Disciplinary Committee was arranged for 27 and 28 November 2013. The period of 40 school days from the date of submission expired on 3 September 2013."

Complaint 2

"In breach of Appendix III section 3 (10) of the rules of the Union, Mr Conway was not given 10 school days' notice of the date of the meeting of the National Disciplinary Committee on 4 July 2013."

- 41. By an email dated 14 October 2014, Mr Conway withdrew his complaint one and complaint two, having regard to my decisions in the case of Parsons v NUT dated 6 October 2014.
- 42. Accordingly, I dismiss Mr Conway's first and second complaints upon withdrawal by him.

Complaint Three

43. Mr Conway's third complaint is as follows:

Complaint 3

"On or around 22 May 2013, the Union breached Appendix III section 1 (f) (i) of the rules of the Union by processing a disciplinary case against Mr Conway on the basis of complaints made by Mr and Mrs Tollervey of continued unprofessional conduct and bullying, whereas Mr Conway's actions were protected from disciplinary action by Appendix III section 1 (f) (i), which provides that disciplinary action may not be taken for 'opinions expressed by members on matters related to Union policy and management'."

44. Paragraph 1(f)(i) of Appendix III to the rules of the Union provides as follows:

"It is expressly provided that the following may not be the subject of disciplinary action:

- (i) opinions expressed by members on matters of Union policy and management;*
- (ii)-(iii)..."*

45. Properly read, there is no paragraph 1(f)(i) of Appendix III to the rules of the Union. Paragraph 1(a) to (f) list the types of complaints that may be brought to the NDC. The words that follow are a rider to the whole of what goes before and are not a part of paragraph 1(f). Accordingly, the complaint is of a breach of the rider itself, relying on paragraph (i) as the basis on which to argue that Mr Conway could not be the subject of disciplinary action. However, as there is no confusion caused by this incorrect description of the rule breached, I shall continue to refer to it by the description of it given by the parties in correspondence and at the hearing, namely paragraph 1(f)(i).

Summary of submissions

46. Mr Conway provided me with a lengthy written skeleton argument and subsequently read a further lengthy submission at the hearing. I have had regard to all the points made by him but summarise them for present purposes as follows. Mr Conway stated that paragraph 1(f)(i) of Appendix III to the rules is an important addition to the rules that he played a part in having adopted by conference in 1993, against the opposition of the National Executive. He explained that in 1992 disciplinary action had been taken against the then Treasurer of the National Union, Mr Murch. Mr Murch had been the Treasurer of the National Union who had appeared on a Channel 4 Despatches TV programme entitled 'Class Action' in which he had made claims about financial irregularities within the Union, arising out of which he was suspended from the Union. He explained that conference had intended to insert a rule which would prevent a member being subject to discipline in similar circumstances. Mr Conway considered that his alleged actions were much less controversial than the TV appearance of Mr Murch and must be protected by paragraph 1(f)(i). Mr Conway appeared at times to be arguing that disciplinary action may not be taken against a person for expressing his/her opinions on matters of Union policy and management, no matter how those opinions are expressed. However, he conceded during the course of argument before me that paragraph 1(f)(i) did not protect a person who, in the course of expressing such an opinion, did so in an abusive manner (eg with much swearing) or in a sexist, racist or other discriminatory manner. On the facts of this case, he submitted that his conduct was so far removed from such behaviour that the Union had been obliged to dismiss the case brought against him by Mr and Mrs Tollervey without it going to a full hearing. Although the complaint refers to the alleged breach of rule as having occurred on or about 22 May 2013, when Mr Stevenson sent a copy of Mr and Mrs Tollervey's complaint to Mr Conway, he argued that the breach occurred whenever the NDC or

NAC considered the case and failed to dismiss it without a full hearing by an application of paragraph 1(f)(i). He argued that this should have been done at the meeting of the NDC on 4 July 2013 when it imposed the stay, in October 2013 when it removed the stay and in November 2013 at the beginning of the full hearing. He argued that it should also have been done at the meeting of the NAC on 1 May 2014 and by the NAC at the beginning of the full hearing in July 2014. Mr Conway observed that Mr and Mrs Tollervey presented no third party witness evidence with their complaint, in contrast with the 26 witness statements he had presented with his response, which all supported his account that he had not acted in a bullying or unprofessional manner. He further noted that at the NDC hearing in November 2013, Mr and Mrs Tollervey had presented no third party witnesses, in contrast to the seven witnesses he had called. In Mr Conway's submission, the NDC erred in its approach to paragraph 1(f)(i) in the face of such overwhelming evidence and should have dismissed the complaints against him without a hearing. He derived support for his argument from the introductory paragraph of the Code of Professional Conduct which excludes from the disciplinary process *'actions taken in the course of debate or participation in the democratic process of the Union or in the advocacy on representation of the interests of Union members unless ... such remarks or actions are shown to constitute an abuse of the privilege otherwise afforded by this proviso'*. He further maintained that the mere repetition of his concerns, which the NDC had earlier found to be genuine concerns, cannot be grounds for him being excluded from the protection of paragraph 1(f)(i) in circumstances in which his concerns had not been addressed by the Union. He also maintained that, given his genuine concerns, he could not see how he could have acted any differently. He stated that he had pursued his concerns through the appropriate structures of the Union, that the way he had put his concerns was consistent with the usual manner of debate within the NUT and that he had not bullied anyone or acted in an unprofessional manner. He noted that the NUT has a federal structure with the constituent associations being accorded a large degree of autonomy. He considered that the positions that the Nottinghamshire Division had arrived at democratically were positions that he was entitled to pursue as an officer of that division. Mr Conway submitted that the tone of all his letters, the motions he had presented and the arguments he had advanced was reasoned at all times, as was testified by the witness evidence that he had presented.

47. Mr Romain, for the Union, submitted that paragraph 1(f)(i) of Appendix III to the rules, read together with the Code of Professional Conduct, sought to respect and balance the rights of members to speak freely and the rights of members to be free from bullying and unprofessional conduct. He observed that the complaint submitted by Mr and Mrs Tollervey on 22 May 2013 was of a continuing course of objectionable conduct but he highlighted four examples of such conduct from Mr and Mrs Tollervey's complaint; Mr Conway's behaviour at the meeting of the Central Nottinghamshire Association on 20 September 2012, his conduct at the EGM of the Nottinghamshire Division on 17 October 2012, his recording of discussions in an allegedly dishonest way and his failure to facilitate payments that were due to Mr and Mrs Tollervey. Mr Romain submitted that Mr Stevenson had no authority under the rules to do anything other than to immediately forward the complaint of Mr and Mrs Tollervey to Mr Conway on 22 May. He also noted that Mr Conway accepted at the hearing before me that he had no criticism of Mr Stevenson. He further argued that when the NDC met on 4 July 2013 it was correct in not striking out the

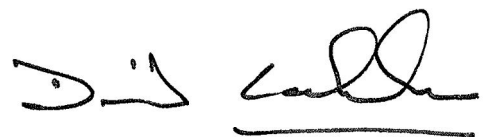
complaint and in not calling for a pre-hearing assessment to consider doing so. In his submission, it correctly decided to let the complaint proceed to a full hearing at which the paragraph 1(f)(i) point could be fully argued. As to the hearing on 27 and 28 November 2013, Mr Romain observed that there had been a full discussion of paragraph 1(f)(i) as a preliminary matter and that the NDC heard and considered the arguments of Mr Conway and Mr Illingworth. He noted that the NDC accepted that the expression of opinions were exempt from disciplinary action but made a distinction between that and the manner in which opinions are expressed. In his submission, the NDC's approach to this issue was balanced and correct.

Conclusions

48. The complaint of Mr Conway is that by processing the disciplinary complaint made against him by Mr and Mrs Tollervey on or about 22 May 2013, the Union breached paragraph 1(f)(i) of Appendix III of the rules of the Union. However, the only event that occurred on 22 May was that Mr Stevenson forwarded the complaint to Mr Conway. In this connection it is significant that Mr Conway stated in cross-examination that he did not criticise Mr Stevenson for having processed the complaint. This may in itself be sufficient to dispose of Mr Conway's complaint to me, but I have gone on to consider the Union's failure to dismiss the complaint of Mr and Mrs Tollervey on other later occasions when Mr Conway's arguments regarding the application of paragraph 1(f)(i) were considered prior to the hearings themselves.
49. In the course of his submissions, Mr Conway withdrew from his more extreme argument that a person can never be disciplined for expressing an opinion on a matter of Union policy or management, no matter how that opinion is expressed. Mr Conway accepted that if a person did so in an abusive manner (e.g with much swearing) or in a sexist, racist or other discriminatory manner, disciplinary action might properly be taken against him or her. In my judgement, Mr Conway was correct to make this concession. Paragraph 1(f)(i) protects the expression of certain opinions but it is not a carte blanche which shields a person expressing such opinions from any disciplinary action which may relate to those opinions. The manner in which an opinion is expressed may give rise to disciplinary action, even though the different expression of the same opinion would be protected.
50. As there is a wide spectrum of ways in which opinions can be expressed, some will clearly be protected and some will clearly not be protected. The difficulty arises in determining those cases that fall between these two extremes. In the NUT, this responsibility falls upon the NDC and NAC, which bodies are well qualified for such a task being constituted of elected lay members. However, such bodies may fall into error should they too readily override the protection given by paragraph 1(f)(i). The genesis of this rule and its plainly expressed meaning require that it is given effect purposefully, so as to avoid the mischief it is intended to remedy. In any Union the robust exchange of views is to be expected, even more so when there is an issue which relates to the policy or management of the Union. To stultify the expression of opinion by an excessive readiness to focus on the manner of its expression would be to misapply paragraph 1(f)(i).
51. On the facts of this case, the NDC gave consideration to Mr Conway's argument based on paragraph 1(f)(i) at its meeting on 4 July 2013. I was informed that the

members of the NDC were experienced in such matters and the issue was discussed appropriately, in such a way that Ms Darke did not feel constrained to give specific guidance. They balanced the arguments contained in the considerable documentation before them and decided that the complaint should go to a full hearing where the paragraph 1(f)(i) matter could be raised again with oral argument. In my judgement, the NDC adopted the correct course. At a preliminary stage of a case, a complaint should ordinarily not be dismissed if there is a dispute on the facts which relate to the jurisdictional point upon which the case is being considered for dismissal. In the case of **O'Hanlon v. NUT (No. 3) (D/13-17/11-12)** I commented at paragraph 30 that in examining a complaint for dismissal at a preliminary stage, it must be assumed that the facts upon the complaint is based is true. Further, I reject Mr Conway's submission that the complaint of Mr and Mrs Tollervey should have been dismissed as it contained no third party supporting witness evidence, compared to the 26 witness statements he had presented. The written and oral representations of Mr and Mrs Tollervey were themselves evidence and, in as much as there was a conflict of evidence, the NDC was required to carry out a balancing exercise to reach its conclusions on the totality of the evidence and on the balance of probabilities. The NDC was entitled to find that such an exercise required there to be a hearing and oral submissions. The number of witnesses on each side of an argument is not necessarily conclusive when conducting such a fact finding exercise, relevant though it may be.

52. The full hearing of the NDC had the benefit of oral argument from Mr Conway and Mr Illingworth on the application of paragraph 1(f)(i). It considered this matter as a preliminary point and in its written decision records its view that the expression of opinions are exempt from disciplinary action but not the manner in which those opinions are expressed. It considered its task was to consider Mr Conway's actions and behaviour, not his opinions. In my judgement, the NDC directed itself correctly on the approach that it should take to this issue and came to a decision within the discretion that it is afforded by the rules of the Union.
53. By the time of the hearing before the NAC, Mr and Mrs Tollervey had submitted written statements from four members and two other members attended the hearing to give oral evidence. The case for the NAC not aborting the complaints before a full re-hearing in the light of this additional evidence was therefore stronger than the similar case considered by the NDC without the benefit of this additional evidence. Accordingly, I find that the NAC also came to a decision within the proper exercise of its discretion in not dismissing Mr and Mrs Tollervey's complaint by an application of paragraph 1(f)(i) of Appendix III to the rules of the Union.
54. For the above reason I refuse Mr Conway's application for a declaration that on or about 22 May 2013 the Union breached paragraph 1(f)(i) of Appendix III to the rules of the Union by processing a disciplinary case against him on the basis of complaints made by Mr and Mrs Tollervey of continued unprofessional conduct and bullying.



David Cockburn
The Certification Officer