D/1-12/11-12

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

Mr J McDermott

V

UNISON – The Public Service Union (No 2)

Date of Decisions **8 April 2011**

DECISIONS

Upon application by Mr McDermott ("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 the claimant's application for a declaration that UNISON – The Public Service Union ("the Union") breached rule I 5.1 of its rules on or around 10 July 2009 by instigating an investigation into alleged misuse of equipment by the claimant without having reasonable grounds to consider that he might be guilty of a disciplinary offence.

2. I refuse to make the declaration sought by the claimant that the Union breached rule I 5.1 of its rules on or around 10 July 2009 by instigating an investigation into alleged misbehaviour by the claimant at the NEC meeting on 19 June 2009 without having reasonable grounds to consider that he might be guilty of a disciplinary offence.

3. I refuse to make the declaration sought by the claimant that the Union breached paragraph 1 of schedule D of its rules by calling the claimant to a disciplinary hearing by its letter of 8 December 2009 without explaining how the rules had been breached.

4. I refuse to make the declaration sought by the claimant that the Union breached paragraph 2 of schedule D of its rules on 16 March 2010 by not accepting the written evidence provided by the claimant as being admissible in his disciplinary proceedings.

5. I refuse to make the declaration sought by the claimant that the Union breached paragraph 6 of schedule D of its rules on 24 March 2010 by reason of the disciplinary panel not asking the claimant if he admitted or denied the charges.

6. I refuse to make the declaration sought by the claimant that the Union breached paragraph 7 of schedule D of its rules on 24 March 2010 by the disciplinary panel not stating the charges against the claimant in his presence and also not calling any witnesses in his or his representative's presence.

7. I refuse to make the declaration sought by the claimant that the Union breached paragraph 8 of schedule D of its rules on 24 March 2010 by not allowing the claimant or his representative the opportunity to ask questions of the union representative and any witnesses.

8. I refuse to make the declaration sought by the claimant that the Union breached paragraph 11 of schedule D of its rules on 24 March 2010 by not allowing the claimant or his representative to produce documents that were relevant to the charge at his disciplinary hearing.

9. Upon withdrawal by the claimant, I dismiss the claimant's application for a declaration that the Union breached paragraph 22 of schedule D of its rules on 24 March 2010 by its disciplinary panel allegedly not considering his request not to impose a sanction.

10. I refuse to make the declaration sought by the claimant that the Union breached paragraph 25 of schedule D of its rules on 24 March 2010 by allowing his disciplinary panel to be composed of persons who were also witnesses to the events on 19 June 2009.

11. I refuse to make the declaration sought by the claimant that the Union breached paragraph 26 (4) of schedule D of its rules on or around 9 September 2010 by making a decision on the claimant's appeal under paragraph 26(3) (a) of schedule D without allowing the claimant or his representative to present his case.

12. I refuse to make the declaration sought by the claimant that the Union breached paragraph 26(5) of schedule D of its rules on or around 9 September 2010 by not allowing the claimant to submit additional material for his appeal hearing, the additional material being the decision of the Certification Officer in McDermott v Unison (No.1) (D/1-8/10-11).

REASONS

1. Mr McDermott is a member of UNISON – The Public Service Union ("the Union" or "UNISON"). By an application received at the Certification Office on 27 September 2010, Mr McDermott alleged a number of breaches of the rules of the Union in relation to disciplinary proceedings that had been taken against him by the Union. Following correspondence with the claimant the complaints were confirmed by him in the following terms:

> **Complaint 1**
> The union had no reasonable grounds to consider Mr McDermott might be guilty of a disciplinary offence and therefore breached Rule I.5.1 on or

around 10th July 2009 when the National Executive Committee appointed Mr Short to investigate allegations of misuse of equipment.

Complaint 2
The union had no reasonable grounds to consider Mr McDermott might be guilty of a disciplinary offence and therefore breached Rule I.5.1 on or around 10th July 2009 when the National Executive Committee appointed Mr Short to investigate alleged misbehaviour at the NEC meeting 19th June 2009.

Complaint 3
On or around 8th December 2009 the union sent a letter to Mr McDermott calling him to a disciplinary hearing. The letter did not explain how the rules had been breached by Mr McDermott. The union therefore breached paragraph 1 of Schedule D on 8th December 2009.

Complaint 4
On or around 24 March 2010 the union breached paragraph 2 of Schedule D because it did not accept the written evidence provided by Mr McDermott on 16th March 2010.

Complaint 5
On 24 March 2010 the union breached paragraph 6 of Schedule D because the disciplinary panel did not ask Mr McDermott if he admitted or denied the charges.

Complaint 6
On 24 March 2010 the union breached paragraph 7 of Schedule D because the disciplinary panel did not state the charges against Mr McDermott in his presence and also did not call any witnesses in his or his representative's presence.

Complaint 7
On 24 March 2010 the union breached paragraph 8 of Schedule D by not allowing Mr McDermott or his representative the opportunity to ask questions of the union representative and any witnesses.

Complaint 8
On 24 March 2010, the union breached paragraph 11 of Schedule D because Mr McDermott or his representative could not produce documents that were relevant to the charge at his disciplinary hearing.

Complaint 9
On 24 March 2010, the union breached paragraph 22 of Schedule D because the disciplinary panel did not consider Mr McDermott's request not to impose a sanction.

Complaint 10
Jane Carolan, Paul Glover and Lucia McKeever were on the disciplinary panel on 24 March 2010 and were also witnesses to the events on 19 June 2009 in breach of paragraph 25 of Schedule D on 24 March 2010.

Complaint 11
On or around 9 September 2010, the union breached paragraph 26 (4) of Schedule D by making a decision on Mr McDermott's appeal under Schedule D 26 (3)(a) without allowing Mr McDermott or his representative to present his case.

Complaint 12
On or around 9 September 2010 the union breached paragraph 26(5) of Schedule D by not allowing Mr McDermott to submit additional material for his appeal hearing. The additional material was the Certification Officer decision D/1-8/10-11 that was not available at the initial hearing on 24 March 2010.

2. I investigated the alleged breaches in correspondence. A hearing took place on 22 March 2011. At the hearing, the claimant represented himself and produced a witness statement. The Union was represented by Mr Oliver Segal of counsel instructed by Mr Chris Benson of Leigh Day, solicitors. The Union submitted two witness statements; from Mr Kevan Nelson, Head of Democratic Services and Ms Jane Carolan, NEC member and chair of the disciplinary panel. Mr McDermott and Mr Nelson gave oral evidence and were cross examined. Mr McDermott and the Union each provided skeleton arguments. There was in evidence the rules of the Union as at 2009 and a 295 page bundle of documents consisting of letters and other documentation supplied by the parties for use at the hearing.

Findings of Fact

3. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follow:

4. Mr McDermott has been a member of the Union and its predecessors since 1982. He has held office in his branch, the Leeds Local Government Branch, on the Service Group Executive and on the National Executive Council ("NEC"). He was elected to the NEC in 2005 and 2007 at its biennial elections.

5. Mr McDermott stood for election to the NEC in 2009 but was declared ineligible for election in circumstances which proved controversial. Mr McDermott was dismissed from his job and became unemployed between being nominated as a candidate and the declaration of the result of the election. The Union considered that in these circumstances Mr McDermott was no longer eligible for election. Nevertheless, his name still appeared on the ballot paper and he secured 93 more votes than the only other candidate in his constituency. The result of the election was reported to the Union by its scrutineers, Electoral Reform Services ("ERS"), on 4 June 2009. In reporting upon Mr McDermott's constituency, it gave the voting figures but inserted against Mr McDermott's name the word "WITHDRAWN" and against his opponent's name it inserted "ELECTED". Mr McDermott complained to the Union about having

been declared ineligible by virtue of being reclassified as an unemployed member but his complaint was rejected. He also brought eight complaints to the Certification Office. I determined these complaints on 27 April 2010 and rejected each of them. I found that under the rules of the Union Mr McDermott was ineligible for election to the NEC at the time of the 2009 elections (**McDermott v Union (No.1) (D/1-8/10/11)**).

6. Mr McDermott was informed by the Union on 15 April 2009, in person and by letter, that he was no longer eligible to hold office as an NEC member for the remainder of the 2007/2009 electoral period. He was accordingly excluded from the NEC meeting on 15 April. The Union's position on Mr McDermott's status was confirmed to him on a number of occasions. On 27 April 2009, the Union wrote to him requiring the return of certain IT equipment... "now that you are no longer a member of the NEC". On 22 May 2009, the Union's appeal sub-committee rejected his appeal about being classed as an unemployed member. On 4 June 2009, ERS wrote two letters to Mr McDermott informing him that he was not eligible to stand in the 2009 NEC election. By a letter dated 10 June 2009, Mr Sonnet, the Deputy General Secretary, informed Mr McDermott that he was not eligible to resume his NEC position in the 2007-2009 period nor eligible to attend conference in 2009 as an NEC member, nor eligible to stand in the 2009 NEC election.

7. On 15 June 2009 Mr McDermott commenced his earlier complaint to the Certification Officer, which I determined on 27 April 2010.

8. The Union's Annual Delegate Conference in 2009 took place in Brighton between 15 and 19 June. Mr McDermott attended as an observer. The new NEC took up office at the conclusion of conference. A meeting of the new NEC was arranged to take place at the conclusion of conference, as is traditional. That meeting was to elect the new President and Vice Presidents. It was usually quite a short meeting and amongst the best attended. The NEC has 68 members. Members of the NEC receive an invitation to attend each meeting.

9. Mr McDermott attended the meeting of the NEC on 19 June 2009 without an invitation. He was asked by Mr Gilby, a senior official, why he was there and said that it was because he had received the most votes in the election. Mr Gilby consulted with the General Secretary, Mr Prentice, and others. With the members of the NEC assembled, but before the meeting was called to order, the General Secretary said that the meeting could not begin because Mr McDermott was in the room. He twice asked Mr McDermott to leave. On both occasions Mr McDermott refused to do so. Mr Sonnet then adjourned the meeting until 8-9 July. The election of the President and Vice President did not take place until this later meeting.

10. On 25 June 2009 a member of the NEC, Mr Thompson, wrote to the General Secretary complaining about the events at the NEC meeting of 19 June. He complained about the activities of those lobbying outside the meeting and those assisting Mr McDermott. He also commented that the behaviour of some individuals, including Mr McDermott, was unacceptable and could be seen as bringing the Union into disrepute.

11. On 10 July 2009 Ms Highton, the Chair of the Development and Organisation Committee of the NEC, authorised a disciplinary investigation of Mr McDermott under rule I 5 in respect of alleged conduct prejudicial to the Union and misappropriation of Union resources. The Union resources in question were the IT equipment that Mr McDermott had been loaned as an NEC member and which he had not yet returned.

12. On 15 July 2009 Mr Nelson wrote to Mr McDermott informing him that there was to be an investigation of his conduct to determine whether there was a prima facie case to answer and that the investigating officer would be in contact with him shortly to arrange a meeting. The investigating office was Mr Short and he wrote to Mr McDermott asking for an early meeting. In an email dated 22 July to Mr Nelson and others, Mr McDermott stated that he would not be available to meet Mr Short for at least a month because of other commitments but that if Mr Short wrote to him again after one month, he would attempt to arrange to be available. The meeting between Mr Short and Mr McDermott took place on 24 September.

13. Mr Short prepared a report following his investigation, having interviewed Mr McDermott and four others. At a meeting on 7 October 2009 the NEC considered this report and agreed for charges to be brought against Mr McDermott for his conduct at the NEC meeting on 19 June. It decided not to bring charges against him in relation to the alleged misappropriation of Union resources.

14. By a letter dated 16 October 2009 Mr Nelson informed Mr McDermott that he was to face a disciplinary hearing. On 25 October Mr McDermott sent an email to Mr Nelson in which, amongst other things, he asked that no date be set for a hearing without prior consultation with him. He stated that he had to discuss any absence with his manager and would have to book annual leave or arrange for his rota to be changed. He went on to comment that this could prove difficult, given current staffing levels, and that he had to arrange representation. By a letter, probably of 25 November, Mr Nelson informed Mr McDermott that the hearing would take place on 6 and 7 January 2010. There had been no prior consultation.

15. By an email dated 7 December 2009 Mr McDermott stated that he was not available on the dates that he had been given but he did not provide any further explanation. He also complained about the small amount of time to prepare his defence. Noting his email, the Union wrote to Mr McDermott on 8 December giving formal notice of the hearing and the precise charges he was to face. These were:

- *Mr McDermott breached rule I.2.1 by disobeying, and/or, disregarding rules applicable to him; namely B1.3; B2.1: B2.2; B2.4; B2.5; B4.6; D2.2.4; when he seated himself in the room assigned to the meeting of the NEC of UNISON, on the 19 June 2009, despite having been unambiguously advised that he was not an NEC member and therefore not entitled to be present.*

- *Mr McDermott breached rule I.2.2 by acting in a manner prejudicial and detrimental to UNISON. On 19 June 2009, by failing to leave the room when asked (twice) to do so, he caused the NEC meeting to be abandoned without being commenced, thus directly causing UNISON to fail to follow its own Rules and Procedures for the annual election of a President and two Vice Presidents as stipulated by rule E.*

The Union included with this letter a 77 page bundle of documents and required Mr McDermott to submit any papers upon which he intended to rely by 30 December. The letter stated that Mr McDermott's earlier email had been treated

as a request for a postponement of the hearing, which the Disciplinary Sub-Committee had rejected, noting that he had given no explanation or reasons why he was not available on the given dates. The letter went on to state in bold *"Unless you have previously given sufficient notice and reasonable grounds for an adjournment which are acceptable to the Panel, the hearing may proceed as indicated with or without your attendance."*

16. On 10 December 2009 Mr McDermott sent an email to the Union in which he repeated that he was not available on the given dates, but he still offered no more detailed explanation. He stated that his shifts had not been set for March onwards and that he would be willing to see if he could book leave then if the Union suggested further dates. By a further email of 20 December, Mr McDermott informed the Union that his chosen representative, John Davis, was unavailable until mid March. It would appear that the Union responded on 22 December, confirming that the hearing would proceed on 6 and 7 January. By an email dated 22 December 2009, Mr McDermott informed the Union once again that he was not available on the given dates. He refused an offer of assistance from the Union to secure time off work from his employer on the basis that the last time UNISON contacted his employer, he had got the sack. He explained his unavailability as follows, "I am working and will not request time off from work to facilitate the hearing at such short notice. My shifts are set months in advance and I do not wish to inconvenience my colleagues by asking them to cover shifts I have been rota'ed to work".

17. Mr McDermott did not produce his bundle of documents for the disciplinary hearing by 30 December 2009 as he had been required to do.

18. By a letter dated 4 January 2010, Ms Robson, Secretary to the Disciplinary Sub-Committee, informed Mr McDermott that the Sub-Committee had agreed to reschedule his hearing and that it would now take place in Leeds on 16 and 17 February 2010. The letter stated that the Sub-Committee would not agree to any further postponement.

19. On 13 January 2010 Mr McDermott emailed the Union to state that he was unable to attend the hearing on 16 and 17 February as he was working and his chosen representative was on holiday. He also explained that he had not provided his paperwork by 30 December as he had previously notified the Union that he could not attend a hearing on 6 and 7 January. Between then and 16 February, Mr McDermott and the Union exchanged various correspondence in which each repeated its position.

20. On 16 February 2010 the Disciplinary Sub-Committee met at a Novotel in Leeds. The panel consists of three NEC members and was chaired by Ms Jane Carolan. Mr McDermott did not attend. The hearing proceeded in his absence. Mr Short presented the case against Mr McDermott and called Mr Gilby as a witness. At the end of the case against Mr McDermott, Ms Carolan commented that they would then normally hear the member's side of the case. The panel decided to adjourn to 24 or 31 March "to endeavour to have him attend on that occasion".

21. On 26 February 2010, Mr McDermott wrote to the Union thanking the panel... "for not completing the proceedings in my absence." He indicated that he may be able to attend on 24 March.

22. On 5 March 2010 Mr McDermott confirmed that he would attend a rearranged disciplinary hearing on 24 March; commenting that he presumed that it would be a full hearing with UNISON presenting its case and calling its witnesses. Ms Robson responded to Mr McDermott on 16 March. She stated that the panel had already heard the case against Mr McDermott and that the hearing would reconvene at the point in the procedure at which the member puts his or her case; paragraph 11 of schedule D of the Rules. Ms Robson also commented that Mr McDermott had now missed the deadline of 30 December to submit written material in support of his case.

23. On 16 March 2010 Mr McDermott submitted to the Regional Office of the Union in Leeds a bundle of the documents on which he sought to rely at the hearing on 24 March.

24. On 23 March 2010 I heard Mr McDermott's first complaint to the Certification Office regarding his eligibility to be elected in the 2009 NEC election.

25. On 24 March 2010 the Disciplinary Sub-Committee reconvened at the Novotel in Leeds. Mr McDermott was represented by Mr Davis, a retired solicitor, and called two witnesses. Mr Short was present, as the presenting officer, but Mr Gilby did not attend. The hearing began at about 9am and ended at about 2.45pm. For about 1½ hours the hearing dealt with procedural points raised by Mr Davis. He queried the exclusion of Mr McDermott's documents, queried whether members of the panel who had been present at the 19 June NEC meeting would be able to look at the evidence dispassionately and impartially, and objected to picking up the hearing at point 11 of the procedure without having heard the prosecution's case. Mr Davis also put forward an explanation for Mr McDermott having failed to attend the hearing on 16 February and argued that the entire disciplinary procedure should be postponed pending the outcome of my consideration of Mr McDermott's complaints regarding his eligibility to be elected at the 2009 NEC election. Each of these points was rejected by the Disciplinary Panel, which proceeded to hear the substantive case. It concluded that all but one of the charges against Mr McDermott was upheld. An element of the breach of rule I 2.1 (namely the breach of rule B1.3) was not upheld. The Panel reserved its decision on sanction.

26. By a letter dated 26 March 2010 Ms Robson confirmed the outcome of the disciplinary hearing. The sanction imposed by the Panel was that Mr McDermott was to be barred from holding any Union office for a period of 5 years.

27. Mr McDermott appealed the decision of the Disciplinary Sub-Committee within the Union's procedures by a letter dated 21 April 2010.

28. On 27 April 2010 I published my decision on Mr McDermott's complaint regarding his eligibility to be elected in the 2009 NEC election.

29. By a letter dated 29 April 2010 Mr Nelson asked Mr McDermott when he would be available for an appeal hearing in June or July. None of the four dates offered by Mr McDermott were consecutive and the appeal was eventually listed for 9 and 10 September. This was subsequently reduced to 9 September at the Novotel in Leeds.

30. By an email of 24 August 2010 Mr McDermott requested that the bundle he had submitted on 16 March, together with my decision of 27 April, be included in the documents for the appeal. The Secretary to the appeal panel, Mr Belfield, replied by a letter dated 2 September. He informed Mr McDermott that neither of these items would be before the Appeals Panel as his original bundle had been provided after the deadline and as my decision had not been presented in accordance with the Union rules. Mr Belfield went on, "You may of course raise the non-inclusion of these documents as a preliminary matter during the first stage of the appeal hearing under Schedule D 26(3)(a)."

31. The appeal panel met in Leeds on 9 September 2010. It sat from 9.45am to 5pm. Mr McDermott was again represented by Mr Davis and he called one of Mr McDermott's previous witnesses. Mr Short again presented the charges and called Mr Gilby as a witness. Such appeals are conducted by UNISON in a very structured manner in accordance with a two page procedure. Paragraph 26(3) of Schedule D provides that a member may appeal on any of three grounds. These can be summarised as being on procedural grounds, on liability and on sanction. A procedural point is brought under paragraph 26(3)(a) and is one in which it is alleged that the provisions of rule I and Schedule D have not been complied with. Such an appeal is to be dealt with in accordance with paragraph 26(4) and may result in the case being sent back to the body which brought the charge. An appeal against liability is brought under paragraph 26(3)(b) on the grounds that the decision to find a charge proven was unreasonable. Such appeals are dealt with in accordance with paragraph 26(5) and involve a complete rehearing. Mr McDermott had constructed his letter of appeal in accordance with this structure so as to deal sequentially with procedural matters, liability and sanctions. The section of his appeal letter dealing with procedural matters raised 11 issues, which are similar to those raised in this complaint.

32. The appeal panel heard argument on Mr McDermott's procedural points for approximately 2 hours. These included argument on the admissibility of both his original bundle of documents and my decision of 27 April 2010. The appeal panel retired to consider its decision on this aspect of the appeal and decided that rule I and Schedule D had been complied with. The Panel then went on to consider Mr McDermott's substantive appeal under paragraph 26(3)(b) of Schedule D. It upheld each of the two charges but found that a further element of the breach of rule I 2.1 (namely the breach of rule D 2.2.4) was not proven. It finally considered sanction, having heard representations on mitigation. The Panel decided that Mr McDermott be barred from Union office for 3 years.

33. Mr McDermott commenced this application to the Certification Office by a registration of complaint form received at my office on 27 September 2010.

34. Mr McDermott has also made an application to the Employment Tribunal, alleging a breach of his right not to be unjustifiably disciplined, contrary to chapter V of Part I of the 1992 Act. These proceedings were outstanding at the time of this decision.

The Relevant Statutory Provisions

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

> **Section 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)
> (b) disciplinary proceedings by the union (including expulsion
> (d)-(e)

The Relevant Rules

36. The rules of the Union which are relevant for the purposes of this application are as follows:-

> **Rule I Disciplinary action**
>
> 2. Disciplinary action may be taken against any member who:
>
> 1 disregards, disobeys or breaks any of the Rules or regulations of the Union applicable to her or him, or any instruction issued in accordance with the Rules;
>
> 2 acts in a manner prejudicial or detrimental to the Union, her/his branch, Region or Service Group;
>
> 5.1. Where there appear to be reasonable grounds to think that a member might be guilty of a disciplinary offence,
>
> .1 the member's Branch Committee or Service Group Executive will investigate whether the charges are justified;
>
> 2 the National Executive Council may appoint any of its number, or the General Secretary, to investigate whether the charges are justified.
>
> **Schedule D: disciplinary procedures**
>
> 1 No later than 21 days before the disciplinary hearing the member shall be sent a written notice of the charge, stating the sub-paragraph(s) of Rule I.2 under which she/he is charged and stating briefly how and when the member is said to have broken the sub-paragraph(s) concerned. At the same time the member shall be sent copies of any written material and correspondence to be considered in relation to the charge, together with the report of any investigation, and shall be told the date, time and place at which the charge against her or him is to be heard.
>
> 2 The member shall be allowed to submit, not later than 7 days prior to the hearing, any written material in support of her/his case.

6 At the hearing, the member shall be asked whether she/he admits or denies the charge. If she/he admits it, the Committee hearing the charge shall then consider whether and to what extent they should exercise any of the disciplinary powers conferred by Rule.

7 If she/he denies the charge, the representative of the Branch, Regional Committee, Service Group Committee, National Executive Council or General Secretary as appropriate (who is called "Union Representative" in this Schedule) shall state the case against the member in the presence of the member and any representative of the member, and may call witnesses. She/he will produce any documents which she/he claims support the charge.

8 The member or the member's representative shall have the opportunity to ask questions of the Union Representative and the witnesses.

11 The member or her/his representative shall put her/his case in the presence of the Union Representative, may call witnesses, and may produce any document she/he wishes that is relevant to the charge.

15 No written material or documents shall be submitted which do not comply with the provisions of existing rule numbers D.1, D.2, D.5 and D.9 of this schedule

19 The Committee hearing the charge has an absolute discretion to adjourn the hearing to allow either party to produce further evidence, or for any other reason.

22 If the Committee decides that the charge is proved, they shall then decide what, if any, action to take. Before determining its decision, the Committee may consider anything that the member wishes to submit in mitigation.

25 No person who is a witness, or who has investigated the charge prior to its being brought, shall sit on the Committee hearing the charge or any appeal.

26 (3) A member may appeal upon any or all of the following grounds:

(a) that the provisions of Rule I and Schedule D were not complied with at or before the original hearing, and/or;
(b) that the Committee's decision to find a charge or charges proven was unreasonable, and/ or;
(c) the sanction imposed by the Committee was unreasonable.

26 (4) Where an appeal is submitted in accordance with Schedule D26(3)(a), whether or not it is also submitted on other grounds, the Appeal Committee shall consider this ground of appeal first of all. The member or her/his representative shall present their case on this point in accordance with Schedule D.11, D.12, D.13 and D.14. The union representative shall then put forward their case on this point in the same way. The Appeal Committee shall then deliberate on this point in private. If the Appeal Committee finds that Rule I and Schedule D were complied with they shall dismiss this ground of appeal and proceed to hear any other grounds of appeal. If the Appeal Committee finds that Rule I and/or Schedule D were not complied with they shall refer the charge(s) back to the body which brought the disciplinary charge.

26 (5) Where an appeal is submitted in accordance with Schedule D26(3)(b), whether or not it is also submitted in accordance with Schedule D26(3)(c), the appeal shall take the form of a rehearing of the charge, in accordance with the procedure set out above for the initial hearing. No material that was not before the initial hearing may be introduced, unless it is material evidence which could not reasonably have been available to either party at the time of the initial hearing. The appeal hearing shall not reopen consideration of any charge(s) which were dismissed at the initial hearing. If the Appeal Committee decides that a charge is not proved they shall dismiss that charge. If the Appeal Committee decides that one or more charges are proved, they shall then decide whether to uphold the sanction imposed at the initial hearing, or to substitute a lesser sanction.

> 26 (6) Where an appeal is submitted in accordance with Schedule D26(3)(c), the Committee shall consider anything that the member or her/his representative wishes to submit in mitigation. The Appeal Committee shall then decide whether to uphold the sanction imposed at the initial hearing, or to substitute a lesser sanction.

Consideration and Conclusions

COMPLAINT ONE

37. Mr McDermott's first complaint is as follows:

> "The union had no reasonable grounds to consider Mr McDermott might be guilty of a disciplinary offence and therefore breached Rule I.5.1 on or around 10th July 2009 when the National Executive Committee appointed Mr Short to investigate allegations of misuse of equipment".

38. Mr McDermott stated at the hearing that he wished to withdraw this complaint. Accordingly, I dismiss this complaint upon withdrawal by the Claimant.

COMPLAINT TWO

39. Mr McDermott's second complaint is as follows:

> "The union had no reasonable grounds to consider Mr McDermott might be guilty of a disciplinary offence and therefore breached Rule I.5.1 on or around 10th July 2009 when the National Executive Committee appointed Mr Short to investigate alleged misbehaviour at the NEC meeting 19th June 2009".

40. Rule I 5.1 of the rules of the Union provide as follows:

> 5.1 Where there appear to be reasonable grounds to think that a member might be guilty of a disciplinary offence,
>
> .1 the member's Branch Committee or Service Group Executive will investigate whether the charges are justified;
>
> .2 the National Executive Council may appoint any of its number, or the General Secretary, to investigate whether the charges are justified.

41. Mr McDermott submitted that the issue of his behaviour at the meeting of the NEC of 19 June 2009 should not have been made the subject of an investigation as there were no reasonable grounds to consider that he might be guilty of a disciplinary offence for that behaviour. Mr McDermott argued that it was not reasonable to investigate him as he had acted peacefully and had genuinely believed that he had been wrongfully withdrawn from the election that he had won. He considered that the complaint made by Mr Thompson did not justify an investigation into his behaviour as the complaint related mainly to those lobbying the NEC meeting and as none of the others who were criticised by Mr Thompson were investigated. Mr McDermott pointed out that although he had been requested to leave the meeting, he had not been instructed to do so and that the postponement of the meeting to 8-9 July was unnecessary. He commented that the meeting could have

been relocated that day to another room to be continued without him. Mr McDermott argued that merely sitting in a room was not a disciplinary offence. He also rejected the assertion in his first disciplinary charge, that he had been unambiguously advised that he was not an NEC member and thereby not entitled to attend the meeting. Further, Mr McDermott relied on the rejection of a breach of rule D2.2.4 by the Disciplinary Sub-Committee in support of his view that there were no grounds for an investigation. He considered that rule I 5.1 required some sort of process to establish whether there were reasonable grounds to think that a specific rule had been broken and that no such process had been undertaken in his case.

42. Mr Segal, for the Union, submitted that Mr McDermott's conduct in attending the meeting of the NEC of 19 June 2009, when neither qualified to do so nor invited, together with Mr McDermott's repeated refusal to leave when asked is clearly conduct which constitutes "reasonable grounds to think that a member might be guilty of a disciplinary offence". Mr Segal rejected Mr McDermott's argument that rule I.5.1 cannot be invoked unless there had been a process which links the alleged misconduct to a particular rule. Mr Segal observed that the rule required only a consideration of whether there were grounds to think a person "might" be guilty of a disciplinary offence. He commented that the Union's task at this stage of the disciplinary procedure is to look mainly at the nature of the alleged conduct and to ask itself if that conduct might amount to a disciplinary offence, leaving it to any subsequent investigation to consider if there had been breaches of specific rules. Mr Segal commented that Mr Thompson's complaint was not the only reason the disciplinary action had been brought but observed that Mr Thompson had commented that Mr McDermott's conduct could be seen as bringing the Union into disrepute.

43. Rule I 5.1 deals with the beginning of a relatively detailed disciplinary procedure. The procedure involves an initial consideration of alleged misconduct, an investigation, a consideration of the results of the investigation, the laying of the charge(s), their consideration by a relevant body and an appeal. Looked at in this context, it is easy to understand why rule I.5.1 is expressed in wide language and sets a low hurdle. There must only *"appear"* to be reasonable grounds *"to think"* that a member *"might"* be guilty of a disciplinary offence. In my judgement, rule I.5.1 requires that a member's conduct to be looked at in the round, to assess whether there should be an investigation of a possible disciplinary offence. On this construction of rule I.5.1, I find that Mr McDermott's conduct on 19 June 2009 was such that the Union was entitled to find that there appeared to be reasonable grounds to think that he might be guilty of a disciplinary offence. I find as a fact that the Union and its independent scrutineer considered that he had not been elected to the NEC in the 2009 election and that Mr McDermott knew that to be the case. In deciding to attend the NEC that day, Mr McDermott knew he was uninvited and that his presence was likely to cause controversy. Indeed, the Union was entitled and had reasonable grounds to consider that this was or might have been his intention. In the circumstances, I find that the relatively low hurdle provided by rule I.5.1 was satisfied and that there appeared to be reasonable grounds to think that Mr McDermott might be guilty of a disciplinary offence.

44. For the above reasons, I refuse to make the declaration sought by the Claimant that the Union breached rule I 5.1 of its rules on or around 10 July 2009 by instigating an

investigation into alleged misbehaviour by the claimant at the NEC meeting on 19 June 2009 without having reasonable grounds to consider that he might be guilty of a disciplinary offence.

COMPLAINT THREE

45. Mr McDermott's third complaint is as follows:

> "On or around 8th December 2009 the union sent a letter to Mr McDermott calling him to a disciplinary hearing. The letter did not explain how the rules had been breached by Mr McDermott. The union therefore breached paragraph 1 of Schedule D on 8th December 2009".

46. Paragraph 1 of schedule D of the rules of the Union provides as follows:

> **Schedule D: disciplinary procedures**
>
> 1. No later than 21 days before the disciplinary hearing the member shall be sent a written notice of the charge, stating the sub-paragraph(s) of Rule I.2 under which she/he is charged and stating briefly how and when the member is said to have broken the sub-paragraph(s) concerned. At the same time the member shall be sent copies of any written material and correspondence to be considered in relation to the charge, together with the report of any investigation, and shall be told the date, time and place at which the charge against her or him is to be heard.

47. Mr McDermott submitted that Mr Nelson's letter of 8 December 2009 did not set out "how" he was said to have broken the various rules set out in the charges. He argued that paragraph 1 of schedule D requires a brief explanation of how the rules were allegedly breached and, without such an explanation, he was put to a disadvantage in preparing his defence.

48. Mr Segal, for the Union, submitted that the wording of the charges contained in Mr Nelson's letter of 8 December 2009 satisfied the requirements of paragraph 1 of schedule D. He commented that it was difficult to know what additional detail could have been included in the charges and that he knew of no civil or even criminal forum in which the sort of detailed application of the facts to the alleged breaches, as suggested by Mr McDermott, is required. Mr Segal argued that the word "how" in paragraph 1 of schedule D is satisfied by the brief statement of the facts which followed in the charges, as set out in Mr Nelson's letter.

49. Mr McDermott's complaint turns upon whether the charges that were set out in Mr Nelson's letter of 8 December 2009 satisfied the requirements of paragraph 1 of schedule D of the rules of the Union. Those charges were as follows:

- *Mr McDermott breached rule I.2.1 by disobeying, and/or, disregarding rules applicable to him; namely B1.3; B2.1: B2.2; B2.4; B2.5; B4.6; D2.2.4; when he seated himself in the room assigned to the meeting of the NEC of UNISON, on the 19 June 2009, despite having been unambiguously advised that he was not an NEC member and therefore not entitled to be present.*

- *Mr McDermott breached rule I.2.2 by acting in a manner prejudicial and detrimental to UNISON. On 19 June 2009, by failing to leave the room when asked (twice) to do so, he caused the NEC meeting to be abandoned without being commenced, thus directly causing UNISON to fail to follow its own Rules and Procedures for the annual election of a President and two Vice Presidents as stipulated by rule E.*

50. In my judgement, the charges notified by Mr Nelson not only set out the rules allegedly breached but also how and when Mr McDermott was said to have broken them. I find that Mr McDermott could have been in no doubt about what conduct was alleged to have been in breach of the stated rules. By setting out the charges in this way, the Union was pinning its colours to the mast. At any subsequent hearing it had to establish that the conduct set out in the charges was capable of constituting a breach of the stated rules. It was open to Mr McDermott to argue that he had not conducted himself as alleged and/or that the conduct did not constitute a breach of any or all of the stated rules. Accordingly, Mr McDermott was not placed at a disadvantage at the hearing. He knew "how" the Union was alleging the disciplinary offences had been committed.

51. For the above reasons, I refuse to make the declaration sought by the claimant that the Union breached paragraph 1 of schedule D of its rules by calling the claimant to a disciplinary hearing by its letter of 8 December 2009 without explaining how the rules had been breached.

COMPLAINT FOUR

52. Mr McDermott's fourth complaint is as follows:

> "On or around 24 March 2010 the union breached paragraph 2 of Schedule D because it did not accept the written evidence provided by Mr McDermott on 16th March 2010".

53. Paragraph 2 of schedule D of the rules of the Union provides as follows

> 2. The member shall be allowed to submit, not later than 7 days prior to the hearing, any written material in support of her/his case.

54. Mr McDermott submitted that his disciplinary hearing occurred on 24 March 2010 and that he had submitted a bundle of documents on 16 March, 8 days prior to the hearing. He argued that the exclusion of these documents from the hearing on 24 March was therefore in breach of rule. Mr McDermott did not accept that he should have submitted his documents by 30 December 2009 as the hearing set for 6/7 January 2010 did not go ahead. He further argued that the Union unreasonably went ahead with the hearing on 16 February 2010 in his absence, in the full knowledge that he could not attend.

55. Mr Segal, for the Union, observed that this was the first of a number of complaints relating to the outset of a disciplinary hearing and what the rules require at that stage. He commented that, whereas Mr McDermott argued that the hearing began on 24 March 2010, the Union maintained that it began on 16 February. Mr Segal submitted that I should find for the Union on each of these complaints on the basis that it is clear beyond doubt that the disciplinary hearing began on 16 February, albeit in the absence of Mr McDermott. He pointed out that Mr McDermott had brought no complaint to me against the Union's decision not to adjourn the hearing from 16 February. Mr Segal observed that Mr McDermott had been told in correspondence prior to 24 March that the hearing that day would pick up the proceedings at paragraph 11 of Schedule D, the previous stages having been

concluded on 16 February. He further observed that Mr McDermott's representative had commented at the hearing on 24 March that the admissibility of Mr McDermott's documents would depend on whether the hearing had started in February or was starting that day. Mr Segal also referred to paragraph 15 of schedule D which provides that *"No written material or documents shall be submitted which do not comply with the provisions of existing rule numbers D.1, D.2, D.5 and D.9 of this schedule"*. He commented that this paragraph, read together with paragraph 2 of schedule D, prevented the submission of material any later than 7 days prior to a hearing.

56. It was common ground between the parties that this complaint turned upon when the hearing had commenced. If it had commenced on 16 February 2010, Mr McDermott's claim would fail, but if it had commenced on 24 March, his claim would succeed. On the evidence before me, I conclude that Mr McDermott's disciplinary hearing commenced on 16 February. That is the date to which the hearing was postponed from 6/7 January. That is the date the Union refused to postpone. That is the date the Panel met in Leeds and heard evidence. That is the basis upon which the hearing on 24 March began at paragraph 11 of schedule D, with Mr McDermott presenting his defence. I further observe that Mr McDermott wrote to the Union on 26 February 2010 thanking the panel... *"for not completing the proceedings in my absence."* Mr McDermott may well have considered that it was unreasonable for the hearing to have gone ahead in his absence on 16 February but that is not the complaint before me. Paragraph 2 of schedule D allows a member to submit any written material in support of his case not later than 7 days prior to the hearing. I find that this is a reference to 7 days prior to the first day of the hearing. The first day of Mr McDermott's hearing was 16 February and accordingly his documents should have been submitted no later than 7 days prior to that date. I find that the Union's reference to 30 December 2009 as being the final date for receipt of the documents to be wrong, as the hearing did not commence on 6 January. Be this as it may, by submitting his documents on 16 March, Mr McDermott was submitting them after the time allowed by paragraph 2 of schedule D. The binding nature of paragraph 2 of Schedule D is emphasised by paragraph 15 of schedule D.

57. For the above reasons, I refuse to make the declaration sought by the claimant that the Union breached paragraph 2 of schedule D of its rules on 16 March 2010 by not accepting the written evidence provided by the claimant as being admissible in his disciplinary proceedings.

COMPLAINT FIVE

58. Mr McDermott's fifth complaint is as follows:

> "On 24 March 2010 the union breached paragraph 6 of Schedule D because the disciplinary panel did not ask Mr McDermott if he admitted or denied the charges".

59. Paragraph 6 of schedule D of the rules of the Union provides as follows:

> 6. At the hearing, the member shall be asked whether she/he admits or denies the charge. If she/he admits it, the Committee hearing the charge shall then consider whether and to what extent they should exercise any of the disciplinary powers conferred by Rule.

60. Mr McDermott submitted that he was not asked at the hearing on 24 March 2010 whether he admitted or denied the charges. He argued that whether or not he attended a hearing on 16 February, he should have been asked this question at the hearing on 24 March.

61. Mr Segal, for the Union, submitted that Mr McDermott would have been asked this question if he had attended the hearing on 16 February, but he had not done so and there was therefore no obligation on the Union to ask the question on 24 March. He argued that the provisions of schedule D are sequential and that the obligations in paragraphs 1 to 10 had been concluded by the end of the hearing on 16 February, with the result that there was no requirement on the Union to revisit paragraph 2 on 24 March.

62. Paragraph 6 of Schedule D requires that a member is asked if he/she admits or denies the charge "at the hearing". I find that, in context, this refers to the outset of the hearing. This is clear from the remainder of paragraph 6 which provides that, if the charge is admitted, there is no need for detailed evidence to be presented. On the facts of this case, the occasion on which the relevant question should have been asked was the hearing on 16 February 2010. If Mr McDermott had been present and had admitted the offence, there would then have been no need for the Union's case to be presented in such detail. As a matter of common sense, I find that, in the absence of the member, there is no obligation on the Union to ask the question. As a matter of discretion, the Disciplinary Panel may or may not have asked Mr McDermott the question on the second day of the hearing on 24 March. However, the fact they did not do so was not a breach of paragraph 6 of schedule D. The Disciplinary Panel had already proceeded on the basis that the charges were not admitted.

63. For the above reasons I refuse to make the declaration sought by the claimant that the Union breached paragraph 6 of schedule D of its rules on 24 March 2010 by reason of the disciplinary panel not asking the claimant if he admitted or denied the charges.

COMPLAINT SIX

64. Mr McDermott's sixth complaint is as follows:

> "On 24 March 2010 the union breached paragraph 7 of Schedule D because the disciplinary panel did not state the charges against Mr McDermott in his presence and also did not call any witnesses in his or his representative's presence"

65. Paragraph 7 of schedule D of the rules of the Union provides as follows:

> 7 If she/he denies the charge, the representative of the Branch, Regional Committee, Service Group Committee, National Executive Council or General Secretary as appropriate (who is called "Union Representative" in this Schedule) shall state the case against the member in the presence of the member and any representative of the member, and may call witnesses. She/he will produce any documents which she/he claims support the charge.

66. Mr McDermott submitted that, at the hearing on 24 March 2010, the Union representative did not state the case against him in his presence nor call any witnesses in his presence. He argued that if the hearing took place only on 24 March there was a clear breach of this provision. On the other hand, if the hearing commenced on 16 February, the Union was unreasonable to go ahead on that date as it knew he would not be present and there would not be a fair hearing.

67. Mr Segal, for the Union, repeated his earlier submissions. He argued that the hearing had commenced on 16 February 2010 and that paragraph 7 of schedule D did not have the effect of preventing the Union proceeding with a disciplinary hearing in the absence of the accused member.

68. I have already found that the disciplinary hearing against Mr McDermott commenced on 16 February 2010 and proceeded in his absence on that day. The rules themselves are silent on the question of whether the Union can proceed with a disciplinary hearing in the absence of the accused member. However, it would defeat the object of the rules if an accused member were able to avoid the disciplinary process by not attending a hearing. In my judgement, paragraph 7 does not have the effect of preventing a disciplinary hearing from proceeding in the absence of the accused member. Correctly interpreted, it only requires the Union representative to state the case against the member "in the presence of the member" if the member is indeed present at the hearing.

69. A member may not achieve a de facto postponement of a hearing by not attending on the first day and then requiring the whole proceedings to be repeated on a second day. A member who seeks an adjournment can have no reasonable expectation of one being granted by simply asserting that he or she will not attend on a given date. On the complaints brought by Mr McDermott I am not called upon to decide whether the Union was in breach of its rules by not granting a postponement of the hearing set for 16 February. I note, however, that Mr McDermott did not present any specific evidence to the Union to explain why he would not then be available, other than his assertion that he was required to work. There was no evidence that he had been refused time off by his employer or that his colleagues were unable or unwilling to swap swifts. On the other hand, there was evidence that he had refused an offer of assistance from the Union to obtain time off and he asserted in his email of 22 December 2009 that he would not request time off work to facilitate a hearing at such short notice. Be this as it may, I find that paragraph 7 of schedule D does not impose an absolute requirement on the Union to state the case against the member and call any witnesses in his/her presence, notwithstanding the absence of the member from the hearing.

70. For the above reasons, I refuse to make the declaration sought by the claimant that the Union breached paragraph 7 of schedule D of its rules on 24 March 2010 by the disciplinary panel not stating the charges against the claimant in his presence and also not calling any witnesses in his or his representative's presence.

COMPLAINT SEVEN

71. Mr McDermott's seventh complaint is as follows:

> "On 24 March 2010 the union breached paragraph 8 of Schedule D by not allowing Mr McDermott or his representative the opportunity to ask questions of the union representative and any witnesses".

72. Paragraph 8 of schedule D of the rules of the Union provides as follows:

> 8. The member or the member's representative shall have the opportunity to ask questions of the Union Representative and the witnesses.

73. Mr McDermott submitted that he was not given the opportunity to ask questions of the Union representative and the witnesses at the hearing on 24 March 2010. He maintained that even if the hearing had begun on 16 February, he should have been given that opportunity at the hearing on 24 March.

74. Mr Segal, for the Union, repeated his earlier submissions. He argued that Mr McDermott could have asked questions of the Union representative and the witnesses if he had attended the hearing on 16 February but that the procedure provided for in schedule D had moved on by the time of the hearing on 24 March.

75. I repeat and adopt the reasoning I have given for rejecting complaints four, five and six. I find that Mr McDermott's disciplinary hearing commenced on 16 February 2010 and that he would have had the opportunity to ask questions of the Union representative and the witnesses had he attended. Mr McDermott's real complaint in this regard is that the hearing started on 16 February but that is not a complaint before me.

76. For the above reasons I refuse to make the declaration sought by the claimant that the Union breached paragraph 8 of schedule D of its rules on 24 March 2010 by not allowing the claimant or his representative the opportunity to ask questions of the union representative and any witnesses.

COMPLAINT EIGHT

77. Mr McDermott's eighth complaint is as follows:

> "On 24 March 2010, the union breached paragraph 11 of Schedule D because Mr McDermott or his representative could not produce documents that were relevant to the charge at his disciplinary hearing".

78. Paragraph 11 of schedule D of the rules of the Union provides as follows:

> 11. The member or her/his representative shall put her/his case in the presence of the Union Representative, may call witnesses, and may produce any document she/he wishes that is relevant to the charge.

79. Mr McDermott submitted that this complaint succeeded or failed on the same grounds as his fourth complaint. He stated that both complaints concerned the Union's failure to accept the documents that he had submitted on 16 March as being admissible in the disciplinary proceedings on 24 March. Mr McDermott repeated the submissions he had made in respect of his fourth complaint.

80. Mr Segal, for the Union, also submitted that this complaint was to be considered with complaint four and that it stood or fell on the same arguments.

81. It was common ground between the parties that the right of the member to produce relevant documents in paragraph 11 of schedule D has to be read subject to the provisions of paragraph 2 and paragraph 15 of schedule D. I have already found that Mr McDermott's hearing commenced on 16 February 2010 and that, by paragraph 2, any document had to be submitted not later than 7 days prior to that date. Paragraph 15 provides that no written material shall be submitted which does not comply, inter alia, with paragraph 2. Accordingly, Mr McDermott was not entitled to produce at his hearing on 24 March the documents that he had presented on 16 March.

82. For the above reasons I refuse to make the declaration sought by the claimant that the Union breached paragraph 11 of schedule D of its rules on 24 March 2010 by not allowing the claimant or his representative to produce documents that were relevant to the charge at his disciplinary hearing.

83. Whilst I have found that Mr McDermott had no right to submit documents other than in accordance with paragraph 2 of schedule D of the rules of the Union, I would be concerned if it were to be considered that the adjudicating body did not have a discretion to admit documents at a later date on an exceptional basis. The possibility of this appears implicit from paragraph 19 and paragraph 26(5) of schedule D.

COMPLAINT NINE

84. Mr McDermott's ninth complaint is as follows:

> "On 24 March 2010, the union breached paragraph 22 of Schedule D because the disciplinary panel did not consider Mr McDermott's request not to impose a sanction".

85. Mr McDermott stated at the hearing that he wished to withdraw this complaint. Accordingly I dismiss this complaint upon withdrawal by the Claimant.

COMPLAINT TEN

86. Mr McDermott's tenth complaint is as follows:

> "Jane Carolan, Paul Glover and Lucia McKeever were on the disciplinary panel on 24 March 2010 and were also witnesses to the events on 19 June 2009 in breach of paragraph 25 of Schedule D on 24 March 2010".

87. Paragraph 25 of schedule D of the rules of the Union provides as follows:

> 25. No person who is a witness, or who has investigated the charge prior to its being brought, shall sit on the Committee hearing the charge or any appeal.

88. Mr McDermott submitted that the members of the Disciplinary Sub-Committee had been present at the meeting of the NEC on 19 June 2009 and were therefore witnesses within the meaning of paragraph 25 of schedule D. He argued that the Disciplinary Sub-Committee was therefore constituted in breach of the rules. Mr McDermott maintained that his interpretation of the word "witness" was supported grammatically by the reference in paragraph 25 to "a witness ... prior to the charge being brought". He also argued that his interpretation of the rule must have been the intended interpretation as it is the only one which enables there to be an independent and impartial judgement. He further observed that Mr Nelson had given evidence that he was unaware that any consideration had been given to whether it would have been possible to find any NEC members who had not been present at the meeting on 19 June when the Disciplinary Sub-Committee was constituted.

89. Mr Segal, for the Union, submitted that this complaint was based on a misunderstanding of the word "witness" in paragraph 25 of schedule D. He argued that as a matter of common sense and as an issue of proper construction, the word refers to a person called by either the Union representative or the member to give evidence at the hearing. Mr Segal relied upon the use of the word "witness" elsewhere in schedule D as an indication of its intended meaning in that schedule. He noted that paragraph 7 of schedule D refers to "... may call witnesses"; paragraph 8 refers to "... ask questions of the ... witnesses"; that paragraph 11 refers to "... may call witnesses"; that paragraph 14 refers to "... re-examine her/his witnesses" and that paragraph 17 refers to "... after all witnesses have been heard". Mr Segal further argued that, should a disciplinary offence take place in front of the whole NEC, it must be envisaged that a Disciplinary Sub-Committee can still be convened. He noted that there was evidence that this meeting of the NEC was amongst the best attended of any in the year. He further noted that there was no evidence that there were members of the NEC who had not been present on 19 June who could have sat on this particular Disciplinary Sub-Committee. Mr Segal supported his interpretation of the word "witness" by submitting that a member of the NEC who witnessed an offence which turned upon a disputed issue of fact would in any event be excluded on the grounds of natural justice and possible prejudice. In relation to the present case, Mr Segal submitted that there were no grounds to impugn the members of this particular Disciplinary Panel based either on the rules of the Union or on the principles of natural justice. He observed that there was no dispute on the facts; it being common ground that Mr McDermott had been asked twice by the General Secretary to leave the meeting of the NEC and had

twice refused whilst not being otherwise offensive or disruptive. Mr Segal submitted that the members of the Disciplinary Sub-Committee were not "witnesses" in accordance with paragraph 25 of schedule D nor was Mr McDermott prejudiced by them sitting on that sub-committee.

90. As a matter of general principle, a person who is a witness to an event should not ordinarily be asked to adjudicate on any dispute which subsequently arises from that event. I am, however, required to interpret and apply the provisions of schedule D of the rules of the Union to the facts of this case. In so doing, I must consider the meaning of the word "witness" in paragraph 25 of schedule D in the context of how it is used elsewhere in that schedule. I find Mr Segal's submission on this point to be persuasive. Elsewhere in schedule D, the word witness is used to refer to a person called by a party to give evidence at the disciplinary hearing. Notwithstanding the force of this argument, I would have found it difficult to accept if, as a consequence, a witness to a disputed fact could sit in judgement in a case which required a judgment to be made on that disputed fact. I agree with Mr McDermott that such an outcome is unlikely to have been the intention of the rules. Having heard Mr Segal, however, I am satisfied that, in this case there were no relevant facts in dispute and that Mr McDermott was not prejudiced by the members of the Disciplinary Sub-Committee having been present at the meeting of the NEC on 19 June. My more general concerns are met by the availability of other remedies to a member who is to be judged by such an inappropriate person. I note in passing that, in the context of trade union disciplinary procedures, members of an NEC may have tangential knowledge of issues touching upon a disciplinary process arising from their position on the NEC or other official position. Not all such knowledge will inevitably disqualify members of an NEC sitting on a disciplinary body. The degree of separation that is required is not that of the civil and criminal courts but one based on practicability, the facts of the case and possible prejudice. In this case, I find that the reference to "a witness" in paragraph 25 of schedule D is to be given a narrow interpretation as meaning a person called to give evidence at the disciplinary hearing. None of the members of the Disciplinary Sub-Committee in question gave evidence at the hearings on 16 February or 24 March and there was therefore no breach of paragraph 25 of schedule D of the rules of the Union.

91. For the above reasons, I refuse to make the declaration sought by the claimant that the Union breached paragraph 25 of schedule D of its rules on 24 March 2010 by allowing his disciplinary panel to be composed of persons who were also witnesses to the events on 19 June 2009.

COMPLAINT ELEVEN

92. Mr McDermott's eleventh complaint is as follows:

> "On or around 9 September 2010, the union breached paragraph 26 (4) of Schedule D by making a decision on Mr McDermott's appeal under Schedule D 26 (3)(a) without allowing Mr McDermott or his representative to present his case".

93. Paragraph 26(4) of schedule D of the rules of the Union provides as follows:

> 26 (4). Where an appeal is submitted in accordance with Schedule D26(3)(a), whether or not it is also submitted on other grounds, the Appeal Committee shall consider this ground of appeal first of all. The member or her/his representative shall present their case on this point in accordance with Schedule D.11, D.12, D.13 and D.14. The union representative shall then put forward their case on this point in the same way. The Appeal Committee shall then deliberate on this point in private. If the Appeal Committee finds that Rule I and Schedule D were complied with they shall dismiss this ground of appeal and proceed to hear any other grounds of appeal. If the Appeal Committee finds that Rule I and/or Schedule D were not complied with they shall refer the charge(s) back to the body which brought the disciplinary charge.

94. Mr McDermott submitted that the appeal panel had decided not to accept his documents as being admissible in the proceedings before his representative had presented his case that they were admissible. He accepted that his representative did present argument on this issue to the appeal panel on 9 September 2010 but he maintained that it was a charade, as the panel had already made up its mind. Mr McDermott argued that this was clear from Mr Belfield's letter of 2 September which informed him of the refusal to accept the documents and from Mr Belfield having repeated the Union's position on the morning of the appeal.

95. Mr Segal, for the Union, stated that he just did not understand this complaint. He noted that paragraph 26(4) of schedule D provides that a member or his representative may present his or her case on relevant procedural matters. He further observed that the notes of the appeal hearing showed that Mr McDermott's representative had in fact presented his case on procedural matters, including the admissibility of documents. In Mr Segal's submission, Mr Belfield's letter of 2 September 2010 was irrelevant, except to the extent that it stated that Mr McDermott might wish to raise the non-inclusion of his documents as a preliminary matter during the first stage of the appeal hearing, under paragraph 26(3)(a) of schedule D.

96. Paragraph 26(4) of schedule D of the rules of the Union provides a procedure by which a member may pursue an appeal submitted in accordance with paragraph 26(3)(a). Paragraph 26(3)(a) provides for an appeal on procedural matters, namely on whether rule I and schedule D have been complied with at or before the original hearing. Mr McDermott's case appeared initially to be that he had not been allowed to present his case about the admissibility of his documents to the appeal panel. It was soon apparent, however, that his representative had made such submissions to the appeal panel. Indeed Mr McDermott accepted this at the hearing. Mr McDermott nevertheless pursued this complaint by arguing that the panel had predetermined its decision on this point, with the result that the case presented by his representative had not been considered by the appeal panel in good faith or at all. This is a very serious allegation and one that Mr McDermott advanced with no supporting evidence other than the letter from Mr Belfield of 2 September 2010 and his own evidence concerning Mr Belfield's alleged statement on the morning of the appeal. I have no hesitation in rejecting Mr McDermott's submission in this regard. The action of Mr Belfield falls a long way short of establishing that the appeal panel approached Mr Davis's arguments about the inclusion of documents with a closed mind. To the contrary, the implication from Mr Belfield's invitation to Mr McDermott to renew his application to the appeal panel is that his arguments would then be

given further consideration. I find that Mr McDermott has not established a breach of paragraph 26(4) of schedule D of the rules of the Union.

97. For the above reasons I refuse to make the declaration sought by the claimant that the Union breached paragraph 26 (4) of schedule D of its rules on or around 9 September 2010 by making a decision on the claimant's appeal under paragraph 26(3) (a) of schedule D without allowing the claimant or his representative to present his case.

COMPLAINT TWELVE

98. Mr McDermott's twelfth complaint is as follows:

> "On or around 9 September 2010 the union breached paragraph 26(5) of Schedule D by not allowing Mr McDermott to submit additional material for his appeal hearing. The additional material was the Certification Officer decision D/1-8/10-11 that was not available at the initial hearing on 24 March 2010".

99. Paragraph 26(5) of schedule D of the rules of the Union provide:

> 26 (5). Where an appeal is submitted in accordance with Schedule D26(3)(b), whether or not it is also submitted in accordance with Schedule D26(3)(c), the appeal shall take the form of a rehearing of the charge, in accordance with the procedure set out above for the initial hearing. No material that was not before the initial hearing may be introduced, unless it is material evidence which could not reasonably have been available to either party at the time of the initial hearing. The appeal hearing shall not reopen consideration of any charge(s) which were dismissed at the initial hearing. If the Appeal Committee decides that a charge is not proved they shall dismiss that charge. If the Appeal Committee decides that one or more charges are proved, they shall then decide whether to uphold the sanction imposed at the initial hearing, or to substitute a lesser sanction.

100. Mr McDermott submitted that paragraph 26(5) of schedule D allows for material that was not available at the disciplinary hearing to be submitted at the appeal. He argued that he had attempted to submit the decision that I published on 27 April 2010 regarding his entitlement to stand in the 2009 NEC election and that it was wrongly rejected by the appeal panel. He maintained that my earlier decision was admissible as it was not available at the time of the disciplinary hearing on 24 March and that it was material. He argued that my decision considered the issue of the NEC election result, which was central to his defence. Mr McDermott stated that he wanted to rely upon my decision in support of his argument that there was a good reason for him having acted as he did on 19 June 2009, that I had criticised the Union and ERS in certain passages and that I had commented that I had found it a difficult case to decide.

101. Mr Segal, for the Union, submitted that any new documentary evidence could not be introduced at the appeal stage unless it satisfied the two tests of not having been reasonably available at the time of the initial hearing and being material to the issues to be determined. Mr Segal accepted that my earlier decision had not been available at the time of the initial decision but submitted that it was plainly not material to the issues to be decided by the Disciplinary Sub-Committee. He argued that my decision shed no light on the propriety or otherwise of Mr McDermott's

conduct on 19 June, whilst it vindicated the position taken by the Union that Mr McDermott had not been eligible for election in the 2009 NEC elections. Mr Segal submitted that Mr McDermott could not now argue that my decision is relevant to mitigation as paragraph 26(5) of schedule D relates only to appeals under paragraph 26(3)(b) which concern liability. He noted that appeals relating to sanction are made under paragraph 26(3)(c) and paragraph 26(6), which are not the subject of this complaint.

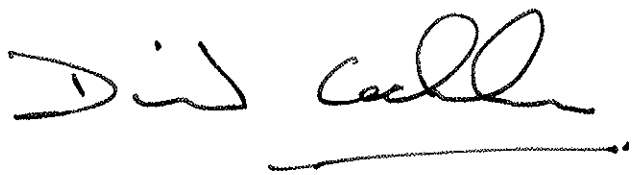
102. The issue to be determined by me in this matter is whether the Union breached paragraph 26(5) of schedule D of the rules of the Union on 9 September 2010 by its appeal panel having refused to accept in evidence the decision that I published on 27 April 2010. That decision was mainly concerned with Mr McDermott's eligibility in the 2009 NEC elections. The relevant part of paragraph 26(5) provides,

> *"No material that was not before the initial hearing may be introduced, unless it is material evidence which could not reasonably have been available to either party at the time of the initial hearing."*

It is common ground that my earlier decision could not reasonably have been available to either party at the time of the initial hearing. Accordingly, the issue for me to determine is whether my earlier decision was material to the issues to be determined in Mr McDermott's appeal. I accept Mr Segal's submission that paragraph 26(5) deals only with liability appeals under paragraph 26(3)(b). Paragraph 26(3)(b) refers to an appeal on the grounds that "the decision to find a charge or charges proven is unreasonable". Accordingly, the new evidence to which this complaint must relate is evidence on liability.

102 In considering the materiality of the disputed new evidence, I must consider the issues to be addressed by the appeals panel. The basic facts of what had occurred on 19 June 2009 were not in dispute. The Union had published election results in which Mr McDermott had not been elected to the NEC. Nevertheless, he had refused to leave the NEC meeting on 19 June after being asked to do so twice by the General Secretary. The appeal panel had to consider whether those refusals were misconduct under the rules. I must ask myself how my earlier decision might be material to those considerations. The effect of my earlier decision was that, on a correct analysis of the relevant events, Mr McDermott had not been elected to the NEC in 2009. The consequence of that finding was that he was not entitled to be present at the meeting of the NEC on 19 June. As the disciplinary action had been conducted on this basis in any event, it would not appear that my earlier decision would bring anything new to the considerations of the appeal panel. Mr McDermott raised with me two minor criticisms that I had made of the Union and ERS in my earlier decision. However, I am not satisfied that these were brought to the attention of the appeals panel in order to establish materiality, nor am I satisfied that, properly analysed, they are material to charges faced by Mr McDermott with regard to his unauthorised presence at a meeting of the NEC and his repeated refusal to leave when asked. In my judgement, my decision of 27 April 2010, was not material to the issues to be determined at the appeal that Mr McDermott had made pursuant to paragraph 26(3)(b) of schedule D and that it was therefore correctly excluded from evidence by the appeal panel.

103. For the above reasons I refuse to make the declaration sought by the claimant that the Union breached paragraph 26(5) of schedule D of its rules on or around 9 September 2010 by not allowing the claimant to submit additional material for his appeal hearing. The additional material was the Certification Officer decision D/1-8/10-11.



David Cockburn
The Certification Officer