D/28/05

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

MR P MOORE

v

UNISON – The Public Service Union

Date of Decision: **28 April 2005**

DECISION

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

I refuse to make the declaration sought by the claimant that UNISON breached Paragraph 11 of Schedule D of its Rules by restricting the number of witnesses that the Claimant was entitled to call at a disciplinary hearing held over five days between 26 June 2003 and 9 January 2004.

REASONS

1. By an application dated 14 November 2003 the Claimant made complaints against his union, UNISON ("the Union"). His application alleged breaches of union rule relating to the number of witnesses he was allowed to call during the course of a disciplinary hearing against him held by the Union. This is a matter within the jurisdiction of the Certification Officer by virtue of section 108A(2)(b) of the 1992 Act. The alleged breaches, as clarified in subsequent correspondence, were put to the Union in the following terms:

Complaint 1 *"that at a union Disciplinary Hearing on 26 June 2003 the restriction of the number of Mr Moore's witnesses to four was a breach of rule 11 of Schedule D of the rules of the union in that the rule does not specify any restriction on the number of witnesses that may be called."*

Complaint 2 *"that at a union Disciplinary Hearing on 19 November 2003 the restriction of the number of Mr Moore's witnesses to four was a breach of rule 11 of Schedule D of the rules of the union in that the rule does not specify any restriction on the number of witnesses that may be called."*

2. On the first day of the hearing, these two complaints were amended by consent to a single complaint in the following terms:-

> *"that at a union disciplinary hearing held over five days between 26 June 2003 and 9 January 2004, the restriction of the number of Mr Moore's witnesses to four was a breach of rule 11 of Schedule D of the rules of the Union in that the rule does not specify any restriction on the number of witnesses that may be called."*

3. I investigated this alleged breach in correspondence. As required by section 108B(2)(b) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place over two days, on 10 December 2004 and 31 March 2005. The Union was represented by Mr J Laddie of counsel, instructed by Ms David of the Employment Rights Unit of UNISON. Evidence for the Union was given by Mr Freeman, Secretary to the Disciplinary Panel in question. The Claimant was represented by a colleague, Mr Harvey. Mr Moore gave evidence on his own behalf. A bundle of documents was prepared for the hearing by my office which contained relevant exchanges of correspondence. On the first day of the hearing I gave the Claimant leave to adduce additional documents, which were added as pages 261-275 of the bundle. The rules of the Union were also in evidence. Both parties submitted skeleton arguments. Mr Freeman submitted a witness statement.

Findings of Fact

4. Having considered the oral and documentary evidence, together with the representations made at the hearing, I find the facts to be as follows:

5. Mr Moore entered the employment of the Social Services Department of Derbyshire County Council in or about 1988. He joined NUPE and became a branch officer of that union in 1990. UNISON was formed in 1993 by the amalgamation of NUPE with two other unions. Since then, Mr Moore has been either the Chair or Secretary of the Social Services Stewards Committee of the Derbyshire County Council branch of UNISON. This branch has some 12,000 members. Of these about 4500 work in Social Services and they have about 70 UNISON stewards looking after their interests. These stewards come together in the Social Services Stewards Committee. Mr Moore has a reputation as an experienced and effective representative of his members, although he has had no previous experience of disciplinary hearings conducted under the rules of the Union.

6. The events which immediately precipitated Mr Moore's disciplinary hearing began in early 2001. Mr Moore had been the Secretary of the Social Services Stewards Committee but he failed to be re-elected in that year and was replaced by Mr Karl Reid with effect from 1 April. Mr Moore was elected as Chairperson. On 27 April 2001 there was a meeting of the officers of the Social Services Stewards Committee in Committee Room 5 of County Hall, Matlock, Derbyshire. The meeting started at about 1pm and lasted between 30 and 45 minutes. Mr Moore arrived about 10 or so minutes late and Ms Sandra Tilling arrived shortly afterwards. There were five officers present at the end of the meeting. They were Mr Moore, Karl Reid, Dave Wood, Ann Holland and

Sandra Tilling. The minutes record the meeting as having ended in disarray and Mr Moore was later disciplined for his conduct at this meeting. The case against him related to his conduct not only in the meeting but also in the foyer of County Hall and in the street.

7. On 1 May 2001 Karl Reid made a written complaint about Mr Moore's conduct to the Derbyshire County Council branch of the Union, which complaint was formally notified to Mr Moore on 19 July 2001. On 28 March 2002, following an investigation with which Mr Moore did not fully co-operate, the branch disciplinary committee recommended to the branch committee that:

> "*the case against Peter Moore is upheld and it is our recommendation that he be de-barred from attending any branch meeting for 24 months. Further it is our recommendation that Peter Moore be suspended from being a UNISON steward for the same period of time".*

8. Shortly afterwards, however, a serious irregularity with these proceedings was discovered. By rule I:7.1, disciplinary proceedings against a member of a branch committee must be heard by the disciplinary sub-committee of the National Executive Council ("NEC"). Accordingly, it was decided to abort the proceedings at branch level and proceed with the complaint against Mr Moore at national level.

9. In June 2002 Mr Steve Torrance was appointed by the NEC to conduct an investigation into Mr Moore's conduct. Mr Moore was formally advised of the investigation on or about 25 July. During the course of this investigation Mr Torrance interviewed the four other officers of the committee who had been present at the meeting on 27 April 2001 and the three branch officers who had been involved in the earlier proceedings. Mr Moore was offered eight different opportunities to meet with Mr Torrance but none of the proposed dates was convenient to him. He eventually provided a written response to the complaint, which was not in the bundle before me. Mr Torrance also received e-mails from 13 members expressing their general support for Mr Moore. It is these e-mails which were added to the bundle before me on the first day of the hearing. Mr Torrance completed his investigation on or about 20 January 2003 and published a lengthy report with numerous attachments. He concluded that Mr Moore had acted in breach of UNISON rules on 27 April 2001 and went on to comment that, "*it would have been plainly wrong not take into account what are Peter Moore's normal standard of behaviour ....It is my findings that Peter Moore's normal standard of conduct* [is] *of a very confrontational manner….it is my finding that the events on 27 April 2001 was not an isolated incident, although it may well have been the worst example of his unreasonableness…I have formed the view that this type of behaviour is not untypical for Peter Moore, but that it was the worst of its kind on the particular day in question"*. Mr Torrance recommended that the NEC take formal disciplinary action against Mr Moore and that, should the charges be upheld, the NEC should "*give active consideration to expelling him, or at the very least barring him from holding any UNISON office at any time in the future"*.

10. In February 2003 the NEC resolved to bring charges against Mr Moore, based on the report of Mr Torrance. On 27 March the Union wrote to him by recorded

delivery, informing him of the disciplinary charge and the four specific rules that were allegedly breached. The charge was expressed as follows,

> *"It is alleged that the behaviour of Peter Moore, Derbyshire County Branch, on 27 April 2001 was aggressive, intimidating, threatening and out with the aims and objectives of UNISON."*

11. The letter of 27 March also gave notice that a hearing of this charge would take place at the Sandpiper Hotel Chesterfield on the 8 and 9 May 2003. Enclosed with the letter were copies of *"the written material and correspondence to be considered in relation to the charges"*. Mr Moore was informed that under the rules any written material upon which he wished to rely must be submitted no later than seven days prior to the hearing. There is a dispute as to when Mr Moore received the Union's letter of 27 March but I find that, regardless of the precise date of receipt, he was aware of the proposed disciplinary hearing by 1 May at the latest, when he sought a postponement. The hearing was postponed until 26 and 27 June. The Union granted this postponement by a letter of 2 May in which it repeated the requirement under the rules to submit any written material seven days before the hearing.

12. The secretary to the Disciplinary sub-committee of the NEC (the "Disciplinary Panel" or "the Panel") was Mr John Freeman, head of organisation and negotiations in the East Midland Regional Office of the Union. Mr Freeman's main practical concern was to ensure that the administration of the hearing went smoothly. He had to prepare the documentation for the three members of the panel and to make such arrangements as he could for the attendance of the witnesses. He also acted as advisor to the panel.

13. In the two weeks before the hearing was due to commence there was an exchange of e-mails between Mr Moore and Mr Freeman on various matters, including the provision of documents and witnesses. This was initiated by an e-mail from one of Mr Moore's potential witnesses, Mr Appleby-Simpkin. During this exchange, Mr Moore set out his position on witnesses in an e-mail of 13 June 2003, as follows:

> *"Now under the guise of fairness you advise what I consider to be key witnesses that they are really not important to the hearing and the panel may not be interested as they did not see the event and statements on my general behaviour are not central. This is despite the fact that my prosecutor steve torrance your close colleague who i believe you manage has made a key plank of his case for my expulsion my general as opposed to specific behaviour".*

In his response, Mr Freeman set out his position on witnesses. He stated,

> *"It is for you initially to decide what witnesses you wish to call. You should call those witnesses you believe can support the case you wish to make in response to the Investigator's report. You are entitled to call both witnesses to the event and also character witnesses if you wish.…… you should be assured that the Panel will wish to hear witnesses relevant to the case. However, if you are considering calling a significant number of witnesses each of whom would give broadly the same testimony, and this will be evident from the witnesses statements you should include in your Statement of Case, then you should be aware that the Panel may reserve the right not to hear each witness. The written statements will be held in sufficient regard in these circumstances, and*

the Panel will be grateful for your cooperation……If, nonetheless, you have witnesses who fear that they will lose pay through attending as your witness, I should be grateful if you would send to be appropriate details so that representations can be made to the employer to secure paid release…Until I have seen your list of witnesses it is impossible for me to advise upon".

14. Mr Moore responded by an e-mail dated 19 June in which he stated, amongst other things, that he was endeavouring to contact his potential witnesses and would provide a list of witnesses as soon as possible. Mr Moore had also made a number of requests including a request to be provided with the services of a full-time officer, with access to independent legal advice and for the Union to pay him in respect of at least two weeks unpaid leave to enable him to prepare his case.

15. The seven day period for presenting written material at the disciplinary hearing expired on 19 June 2003. On that day Mr Freeman sent an e-mail to Mr Moore confirming that this was the case and commenting that, as an experienced representative, Mr Moore would no doubt appreciate the value of setting out his case in writing and providing witness statements. Mr Moore responded at about 3pm the same day stating that he had had no time or resources to prepare statements and that he would be totally unprepared for the hearing. Later that afternoon Mr Moore e-mailed to Mr Freeman 130 pages of unorganised material, including witness statements prepared by Mr Harvey and Ms Liz Elvin.

16. On what was probably 20 June 2003 Mr Freeman sent a further e-mail to Mr Moore to *"remind you to let me know who your witnesses will be"*. Mr Freeman said he needed this for two reasons. First, as a matter of courtesy to the panel to assist in managing the order of business and, secondly, because this would assist the Union in requesting paid release from the employer for any of the witnesses. On Saturday, 21 June Mr Moore sent an e-mail to Mr Freeman informing him that one of his key witnesses was Colum Walsh.

17. On Monday, 23 June 2003 Mr Moore sent an e-mail in identical terms to 23 potential witnesses. He stated that he needed the recipient, *"to attend in person as a witness to how I represent act and behave"*. He went on, "*It now appears im being arraigned for general misconduct 2 years and more ago abusing and frightening off members and stewards. I believe it has more to do with my support of home help dispute etc"*. He predicted that he would need his witnesses on Friday, 27 June and concluded that he was seeking the recipient's support.

18. On the same day, 23 June 2003, Mr Moore e-mailed Mr Freeman in the following terms, *"seeing as the case against me is now being presented as a general complaint about my behaviour not about a specific event i am intending to call the attached witnesses in order to cover the breadth of the accusations"*. The attached list contained the names of the same 23 potential witnesses, including that of his representative Mr Harvey and those of the four witnesses who actually gave evidence for him. By a second e-mail of the same date Mr Moore requested that a further two individuals give evidence for him, Mr Nixon and Ms Murphy; a total of 25 witnesses.

19. I find that, prior to the first day of the disciplinary hearing, 26 June 2003, Mr Moore had not ascertained from any of his potential witnesses any detail as to what they might say in evidence, let alone obtained witness statements. To the extent that Mr Moore had discussed his case with any of his potential witnesses, he had done so with a view to them giving evidence about his general conduct, his ability to represent members and how, in their opinion, it would have been out of character for him to have behaved as alleged at the meeting on 27 April 2001 or on any other of the occasions to which Mr Torrance referred in his report.

20. The hearing of the disciplinary case against Mr Moore took place over 5 days. It began on 26/27 June 2003. It was adjourned to 19/20 November 2003 and concluded on 9 January 2004. The hearing took place at the Sandpiper Hotel Chesterfield before the Panel of three members, chaired by Ms Sue Highton. Mr Torrance presented the case against Mr Moore. Mr Moore had asked to be represented by Mr Harvey but, as events unfolded, Mr Moore in fact represented himself with Mr Harvey making occasional comments. Mr Freeman took a detailed longhand note of the proceedings which was later transcribed. Mr Moore does not accept the note as being wholly accurate.

21. At an early stage in the morning of the first day of the hearing, 26 June 2003, Mr Moore complained that no request had been made by the Union for his witnesses to be released by their employers. Mr Moore said that his witnesses were needed because the case against him had been broadened out to his general behaviour over a two-year period. He said that his witnesses were all people who knew him and who could testify about his general conduct. Mr Harvey was of the same opinion and said that the breadth of the allegations against Mr Moore justified a range of witnesses being called. In light of these comments the Chair of the Panel, Ms Highton, ruled that the case against Mr Moore was to be put on the basis of the alleged events of 27 April 2001 only, not on any of the other alleged misconduct. Mr Moore reacted to this by stating that he had been misled about the nature of the case against him and that he now needed to reconsider his case as some of his prepared questioning and witnesses related to the allegations about his general conduct. There followed a brief discussion of the witnesses in which Mr Freeman referred to the Certification Officer's decision ***Hughes v Unison*** **(D/10-12/02)**, a case I had decided and which concerned the ability of a union to restrict the number of witnesses an accused may call at a union disciplinary hearing. The Chair confirmed that the witnesses should be relevant only to the allegations of what occurred on 27 April 2001 and noted that there were two witness statements in the bundle. She stated that she needed to know the purpose of Mr Moore's witnesses and required him "*to indicate how many witnesses he intended to call and the purpose or objective in calling each witness"*. Mr Moore referred to his list of 23 potential witnesses and admitted that he had not discussed with them what they would say. Mr Harvey stated that none of them were witnesses to the events of 27 April. The case proceeded on the basis that Mr Moore would reconsider the "*availability and desirability*" of his witnesses. As each of Mr Torrance's witnesses gave evidence the paragraphs in their statements relating to earlier alleged misconduct were identified in order that they might be disregarded by the Panel.

22. On the afternoon of the first day of the hearing Mr Moore was again asked about his witnesses. He read out a list of 15 names. The Chair asked if Mr Moore could identify from the list which names were substantial witnesses and which were character witnesses. Mr Moore did not accept this distinction, stating that Mr Torrance's witnesses were prejudiced against him and he had the right to call people favourable to him. After a 15 minute adjournment the panel again asked Mr Moore what his witnesses would be dealing with - the allegations or character? The notes record Mr Moore's response as being, "*Will not be character, but attest to my general conduct and therefore how likely I would have acted as alleged, the conduct of other witnesses and the dynamics of the Branch which would lead to these allegations being made"*. At this stage the Chair noted that two witness statements had been accepted which covered those areas and ruled that a further four witnesses would also be accepted. The Chair refused Mr Moore's request to submit written witness statements on behalf of the other witnesses as he had failed to comply with the requirement in paragraph 2 of Schedule D of the rules to present them no later than seven days before the hearing. She noted, however, that e-mails from 13 potential witnesses who supported Mr Moore were in the bundle. By the end of the day Mr Moore had identified two of his four witnesses, Davina Orme and Colum Walsh, and said that he would provide the two other names the next day. On the second day of the hearing there was no substantial discussion of witnesses, other than the Chair reminding Mr Moore to provide details of his witnesses by the following week. The hearing was adjourned part heard until 18/19 September, which had to be re-arranged for 19/20 November.

23. By an e-mail of 7 July 2003 Mr Moore informed Mr Freeman that his priority witnesses would be Ms Elvin and Ms Lesley Hudson and that he intended to register an appropriate complaint at the restriction of his witnesses. On 2August Mr Moore wrote to the General Secretary making five complaints about the fairness of his hearing. One of these complaints was that he had been restricted to four witnesses. The letter states that he needed to present more than four witnesses "*to indicate the actions alleged I was involved in by 3 antagonistic witnesses are highly out of character and improbable"*. By a letter from the Union dated 19 August, Mr Moore was informed that the Disciplinary Panel would address his concerns when it next reconvened. Also during this adjournment, on 14 November, Mr Moore presented his registration of complaint form to the Certification Office.

24. On the third day of the hearing, 19 November 2003, there was some discussion of the case of ***Hughes v UNISON***, which Mr Moore attempted to distinguish on the basis that the restriction on witnesses in that case was not imposed until 11 witnesses had been heard. Mr Moore stated that he had twenty people ready to testify as to his general behaviour and the unlikelihood of his behaviour being as alleged. Over the lunch period on the third day the Panel met to consider the complaint that Mr Moore had addressed to the General Secretary. A statement was prepared which was to be read out to the parties at the beginning of the afternoon session and then provided to them in writing. The statement is as follows:

> *"The Panel have discussed Mr Moore's complaint of 2 August 2003 addressed to the General Secretary. With regard to your complaint about the*

restriction placed on the number of witnesses, the Panel has looked at the full decision of the Certification Officer in the decision of Mr David Hughes v UNISON. We have also reviewed the correspondence between the Secretary to the Panel and Mr Moore, prior to the hearing. The Certification Officer confirms the right of a Panel to exclude witnesses if there are reasonable grounds. Mr Moore had the opportunity to produce a Statement of Case and witness statements in advance of the hearing, but declined to do so. The Panel Chair having ruled that the Disciplinary Hearing be restricted to the complaints relating to the alleged offence of 27.04.01, the Panel noted that none of the individuals Mr Moore intended to call were witnesses to those events. However, Mr Moore advised the Panel that all 20 witnesses will testify as to his general behaviour and that the allegations were therefore improbable. On this basis the Panel have determined that it is reasonable that Mr Moore be able to call such witnesses, but to avoid repetition and the unnecessary protraction of this hearing, that these be limited to four. The Panel accept that all 20 witnesses would testify equally in Mr Moore's favour, and Mr Moore was asked to select which four to be called. The Panel therefore stand by its decision. With regard to the other matters referred to in Mr Moore's complaint, they have already been addressed by the Panel and are matters which Mr Moore is entitled to refer to in any appeal against any decision made by the Panel if that is appropriate and it is Mr Moore's wish to do so".

25. Mr Torrance completed the presentation of his case during the afternoon of the third day. The witnesses he had called were Mr Dave Wood, Mr Karl Reid and Ms Sandra Tilling, who had each been present at the meeting on 27 April 2001, together with Mr Graham Skinner who gave evidence about the branch investigation.

26. Mr Moore began his evidence on the afternoon of the third day and concluded his case in the morning of the fifth day of the hearing. The witnesses he called were Ms Lesley Hudson, Ms Liz Elvin, Mr Colum Walsh and Ms Davina Orme. In asking questions of Ms Elvin, Mr Moore stated that his defence was that the conduct of which he was accused was not his normal character.

27. On the fifth day of the hearing, 9 January 2004, Mr Moore gave his own account of the events in question and summed up. During his summing up Mr Moore stated that he had brought four character witnesses to give an account of how he treated people and that he had intended to bring forward 20 such witnesses but had not been allowed to. He later stated that, "*My defence is that what I am accused of is not consistent with my normal conduct. I question the evidence against me. I don't accept it happened as described, but if it did then it was because I was ill, stressed or for countless other reasons."*

28. During the afternoon of the fifth day of the hearing the Panel reached its decision, which it confirmed by a letter to Mr Moore of 14 January 2004. The Panel upheld two of the four charges, finding breaches of rule I:2.2 and rule B:2.4. Having considered mitigation the Panel barred Mr Moore from holding any Union office for a period of three years.

29. In February 2004 Mr Moore appealed to the Appeals Committee of the Union. With consent, the hearing before me was not listed until after the conclusion of Mr Moore's internal appeal. This appeal was held in November 2004 and was dismissed.

The Relevant Statutory Provisions

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

> ***S.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);*
> *(c)-(e)-*
>
> ***S.108B Declarations and orders***
> *(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.*
>
> *(2) …*
>
> *(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements –*
> *(a) to take such steps to remedy the breach, or withdraw the threat of a breach as may be specified in the order;*
> *(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.*

The Union Rules

31. The rules of the Union relevant to this application are as follows:

> ### *Rule I: Disciplinary action*
>
> 7.1*"a disciplinary charge brought by a branch shall first be heard by its Disciplinary Sub-Committee unless the member belongs to the Branch committee in which case it shall first be heard by a Disciplinary Sub-Committee of the National Executive Council"*;
>
> 7.2*"a disciplinary charge brought by a Service Group Executive or the National Executive Council (or the General Secretary acting on its behalf) shall be heard first before a Disciplinary Sub-Committee of the National Executive Council; provided always that the Disciplinary Sub-Committees referred to at I.7.1 and I. 7.2 above shall consist of no less than three members"*.
>
> 9.1*"A member who is dissatisfied with the decision of the branch or National Executive Council in respect of charges against her or him may exercise the following rights of appeal, whichever is appropriate:*
> *.1 from a decision of a branch to a Disciplinary Sub-Committee of the National Executive Council*

.2 from a decision of the National Executive Council to the Union Appeals Committee".

11 *"The procedure to be adopted for disciplinary hearings and appeals shall be as set out in Schedule D"*.

Schedule D: disciplinary procedures

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"*.

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"*.

A Brief Summary of the Submissions

32. Mr Harvey, on behalf of the Claimant, submitted that the essence of Mr Moore's defence to the disciplinary charge required him to establish the following propositions: (i) Karl Reid was motivated by rivalry for power and he stood to gain by disempowering Mr Moore; (ii) there was a history of harassment of Mr Moore by Mr Reid; (iii) other senior office holders have misconducted themselves without complaints being pursued against them; (iv) Mr Reid was seen as *"cosying up to management"* whereas Mr Moore was seen for standing up for individual members; (v) Mr Moore was provoked at the meeting of 27 April 2001; and (vi) Mr Reid and his supporters took advantage of the small number of members at that meeting. Mr Harvey argued that Mr Moore had available over 20 witnesses who between them were prepared to give evidence to the above effect. Mr Harvey argued that he and Mr Moore had prepared their case on the basis that they had to defend Mr Moore's conduct generally, not just his actions on 27 April and that they were taken by surprise when the Panel restricted its consideration to the events at the meeting of 27 April. He accepted that they had not prepared a statement of case and were not aware of precisely what their witnesses would say but he contended that there was no procedural requirement for them to have taken either of these steps. Mr Harvey was critical of Mr Torrance for not having interviewed any of Mr Moore's potential witnesses and for having prepared a case for the prosecution rather than a factual report. He argued that much of the prejudicial material in Mr Torrance's report was available to the Panel, even though the disciplinary charges had been restricted to the events of 27 April. Mr Harvey submitted that the Panel made an early decision on the breadth of the case and that it was then reluctant to engage on the relevance of Mr Moore's witnesses. He submitted that the Panel did not examine the issue of relevance closely enough to reach a decision which was either safe or reasonable. As to the proper interpretation of paragraph 11 of Schedule D of the rules of the Union, Mr Harvey accepted that there was only a right to call witnesses who could give relevant evidence but maintained that each of the witnesses that Mr Moore proposed to call would give relevant evidence. In conclusion, Mr Harvey admitted that Mr Moore's proposed witnesses were fundamental to his case and that the arbitrary restriction of his

witnesses to four was not only a breach of paragraph 11 of Schedule D to the rules, but also deprived him of due process and natural justice.

33. Mr Laddie, on behalf of the Union, submitted that the Panel must, as a matter of necessary implication, have a right to regulate its own proceedings and that the right to restrict evidence may be exercised where the evidence to be given is irrelevant to the issues to be decided. He argued that the right of a person to call witnesses in paragraph 11 of Schedule D of the rules of the Union could only relate to relevant witnesses. Mr Laddie submitted that the appropriate test to be applied by a Panel's exercising its discretion to exclude witnesses was *"whether in all the circumstances of the case, no reasonable disciplinary body could conclude…"* and that the burden of proof lies upon the complainant to prove unreasonableness. In summary, Mr Laddie submitted that the question in this case is whether the Panel acted unreasonably in determining that Mr Moore's witnesses were not relevant. He submitted that on the facts, none of Mr Moore's proposed witnesses was relevant. None had witnessed the events of 27 April 2001. Insofar as Mr Moore suggested that the witnesses went to propensity, counsel argued that he was saying no more than that they were character witnesses. As to Mr Harvey's explanation as to how he now alleges that the twenty or so witnesses were relevant, Mr Laddie commented that this was retrospective justification. He noted that similar representations were not made to the Panel and that the witnesses actually called on Mr Moore's behalf were clearly called to establish his good character rather than the points that were now being made by Mr Harvey.

Conclusion

34. Mr Moore alleges that the decision of the Disciplinary Panel to restrict his witnesses to four was a breach of paragraph 11 of Schedule D of the rules of the Union. This provides:

> *"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."*

35. Although, as a matter of strict grammar, the clause *"that is relevant to the charge"* only applies to the word *"document"*, I find that a similar qualification attaches to the word *"witnesses"*. Not only did Mr Moore's representative concede that this was the case but such an implication satisfies the 'officious bystander' test for the implication of terms.

36. In the case of ***Hughes v UNISON*** I decided a similar issue in relation to the rules of the same Union. Paragraph 34 of that decision is as follows:

> *"In any disciplinary procedure the right of an accused person to call witnesses in his or her defence is fundamental to there being a fair hearing. Accordingly, any right of a disciplinary body to refuse permission for an accused person to call witnesses must be extremely circumscribed. Such a right might exceptionally be exercised where the evidence to be given is irrelevant to the issues to be decided or where the disciplinary body has already accepted the accused's point on the issues upon which the witness will give evidence. The broad similarity of the evidence of earlier witnesses is not in my judgment sufficient in itself for the latter evidence to be excluded. I accept the Applicant's*

> *argument that where there is a disputed issue of fact the recollection of a number of witnesses is not only admissible but highly desirable. On the other hand, I do not accept the Applicant's submission that an accused person can call limitless witnesses regardless of the circumstances, each giving broadly similar evidence. At the extreme, this could involve an abuse of process calculated to postpone the conclusion of a hearing or to cause unnecessary expenditure of time and money by the Union. Even where the accused has no such intention, however, I find that there are circumstances in which a disciplinary body in exercising the implied power to regulate its own procedure can limit the number of witnesses on the grounds only that the evidence they would give will be repetitive. However, such a power will always be subject to close scrutiny. As to the test to be applied, I accept the submission of leading counsel that the appropriate test for a decision-making body exercising a discretion of this nature is whether, in all the circumstances of the case, "no reasonable disciplinary body could so conclude".*

37. In this case, Mr Laddie has brought to my attention the decision of the Divisional Court in ***R v Hull Prison Board of Visitors, ex parte St Germain & Others (No. 2)*** **(1979) 3 All ER 545**. This case concerned the rights of prisoners to call witnesses to a prison disciplinary hearing following a prison riot. In his judgment, Lord Justice Geoffrey Lane stated:

> *"There was some suggestion that the chairman should have no discretion to disallow the calling of a witness whose attendance is requested by the prisoner. This suggestion was largely withdrawn in the course of argument and we do not think it had any validity…However, that discretion has to be exercised reasonably, in good faith and on proper grounds. It would clearly be wrong if, as has been alleged in one instance before us, the basis for refusal to allow a prisoner to call witnesses was that the chairman considered that there was ample evidence against the accused. It would equally be an improper exercise of the discretion if the refusal was based on an erroneous understanding of the prisoner's defence, for example, that an alibi did not cover the material time or day, whereas in truth and in fact it did. A more serious question was raised whether the discretion could be validly exercised where it was based on considerable administrative inconvenience being caused if the request to call a witness or witnesses was permitted. Clearly in the proper exercise of his discretion a chairman may limit the number of witnesses, either on the basis that he has good reason for considering that the total number sought to be called is an attempt by the prisoner to render the hearing of the charge virtually impracticable or where quite simply it would be quite unnecessary to call so many witnesses to establish the point at issue. But mere administrative difficulties, simpliciter, are not in our view enough. Convenience and justice are often not on speaking terms."*

38. I of course adopt the reasoning of the Divisional Court in the ***Hull Prison Board of Visitors*** case which, I am informed by Mr Laddie, is the most recent authoritative judicial guidance on this point. To limit the number of witnesses an accused person may call in his or her defence is a most serious matter. However, an internal disciplinary panel may do so in the exercise of its express or implied discretion to regulate its own procedure if it exercises that discretion lawfully. In the words of the Divisional Court, the discretion must be exercised "*reasonably, in good faith and on proper grounds"*. The precise application of the discretion will depend upon the facts of the particular case.

39. In this case, the Disciplinary Panel exercised its discretion to limit to four the number of Mr Moore's witnesses. This decision must be put in context. Mr Torrance had prepared a report on which emphasis had been put on

unparticularised allegations of Mr Moore's past behaviour. In such circumstances, Mr Moore asked a number of colleagues to give evidence on his behalf at the disciplinary hearing. This evidence was to serve two purposes. It was to refute Mr Torrance's generalised allegations of bad behaviour in the past and it was to establish that Mr Moore was unlikely to have behaved as alleged at the meeting of 27 April; the propensity argument. Mr Moore had no actual witnesses as to what had occurred at this meeting and thus wished to call evidence as to whether it was likely that he would have behaved as alleged. UNISON has no procedural rules requiring that an accused person must disclose the number or names of witnesses prior to a disciplinary hearing, but it is not unnatural that those administrating such a hearing would wish to know, as a matter of effective case management, about any circumstances which might impact on the length of the hearing. On Monday, 23 June 2003, only two clear days before the hearing was to commence, Mr Moore informed Mr Freeman that he wished to call 25 witnesses. Mr Moore had not discussed the facts of his case in any detail with them. He had circulated an e-mail to 23 named individuals, not knowing whether all or any of them would be able to attend the hearing and not knowing precisely what those who did attend would say. Two of the witnesses, Mr Harvey and Ms Elvin, had produced witness statements which were incorporated into the bundle. Mr Moore explained his long list of witnesses to Mr Freeman on the grounds that the case against him was being presented as a general complaint about his behaviour and not about a specific event. He stated that the witnesses were necessary *"to cover the breadth of the accusations"*.

40. On the first day of the hearing, Thursday, 26 June 2003, the Panel restricted the ambit of its enquiry to the events of 27 April 2001, excluding any consideration of alleged bad behaviour by Mr Moore prior to that date. This decision had a serious impact on the way Mr Moore intended to present his case. The main reason for him wishing to call so many witnesses had been removed. He was given time to reconsider his position and was specifically asked by the Chair to state the number of witnesses he wished to call and *"the purpose or objective in calling each witness"*. During the afternoon of the first day of the hearing Mr Moore reduced his witness list to 15, but he did not inform the Panel of the general nature of the evidence to be given by each of them, other than asserting that he had a right to call people favourable to him. The nearest Mr Moore came to providing a reason for calling the 15 was the propensity argument. He was of course unable to give the gist of the evidence of each witness as he did not know what each would say. Against this background, the Panel ruled that Mr Moore would be restricted to four witnesses, in addition to the two statements in the bundle. There appears to have been no logic to the admission of four witnesses, other than the fact that four witnesses were to be called against Mr Moore.

41. In his submissions to me, Mr Harvey advanced other reasons why Mr Moore wished to call 15 or so witnesses. For instance, he asserted that Mr Moore wished to establish that Karl Reid's complaints against him were motivated by his 'rivalry for power' and that the evidence of all but one of those present at the meeting of 27 April was suspect as they were political opponents of Mr Moore and had been party to a history of harassment against him. Nevertheless, Mr Moore expressly denied that he had been the victim of a conspiracy and

carefully chose his words to describe the evidence against him as being a *"distortion bordering on a lie"*. The credibility of the witnesses against Mr Moore is clearly a relevant issue in the disciplinary proceedings and in my judgment Mr Moore would have been entitled to call witnesses to cast doubt on the case being made against him. This would have been relevant evidence to be weighed by the Panel when deciding whether Mr Moore had misconducted himself on 27 April and, if so, to what degree.

42. The issue before me, however, is not what these witnesses might or might not have said at the disciplinary hearing, but whether the Panel wrongfully restricted the number of Mr Moore's witnesses in breach of paragraph 11 of Schedule D of the rules of the Union. This requires an examination of whether the Panel's decision was one to which no reasonable panel would have come on the material before it, having properly directed itself on the facts and law.

43. In my judgment, the case advanced before me for adducing the 15 or so witnesses was not the case advanced before the Panel in any recognisable or distinct form. As I have already found, Mr Moore had no clear idea what evidence would be given by each potential witness. They were contacted by his circular e-mail of Monday, 23 June 2003 and invited to attend the hearing in order to rebut Mr Torrance's general criticism of Mr Moore's conduct. Mr Moore wrongly considered that he had a legal right to call however many witnesses he wished, based, he claimed, upon his experience in representing members before employers. When the Chair of the Panel confined the complaint to the events of 27 April 2001, the main justification for them giving evidence was removed. The Panel asked Mr Moore to indicate the purpose or objective in calling each witness, but he was unable to do so. As Mr Harvey candidly admitted in his closing submissions, Mr Moore and he were then left *"scrabbling around"* for a reason to call them. The reason advanced by Mr Moore to the Panel was that they would attest to his general conduct and therefore how likely it was that he would have acted as alleged; in other words, the propensity argument. That this was the case advanced by Mr Moore is supported by the terms of his e-mail complaint to the General Secretary of the 2 August 2003 and with the way he summed up his case on the final day of the hearing. I also find it significant that the questioning by Mr Moore of his four witnesses was directed principally at establishing his propensity case.

44. On the third day of the disciplinary hearing the Panel gave its considered response to Mr Moore's complaint to the General Secretary. It upheld its previous decision to restrict Mr Moore's witnesses to four, but went on to accept that all 20 of the proposed witnesses would testify equally in his favour. This is a further indication that the case advanced by Mr Moore to the Panel for calling the witnesses was based on his propensity not to act as alleged.

45. In his closing submissions, Mr Harvey placed emphasis on a particular passage in the notes of the disciplinary hearing. Having been asked what his witnesses would be dealing with, Mr Moore is recorded as having said, "*Will not be character, but attest to my general conduct and therefore how likely I would have acted as alleged, the conduct of other witnesses and the dynamics of the Branch which would lead to these allegations being made"*. Mr Harvey had

been alerted to this passage by a response to a question he had put to Mr Freeman in cross examination. He argued that it demonstrated that the case he was arguing before me had indeed been put to the Panel by Mr Moore. Whilst I accept that the above passage is capable of supporting Mr Harvey's main submission to me, I find that it is overwhelmingly outweighed by the evidence as a whole. In my judgment, a reasonable Panel would not have deduced from this passage the significant argument addressed to me by Mr Harvey. Mr Moore had been given ample opportunity to explain why he wished to call each witness. He failed to do so and cannot now seize upon isolated sentences in the voluminous notes of evidence to make good a case which he conspicuously failed to make in any discernable form before the Panel. I accept Mr Laddie's submission that the ingenious argument deployed before me by Mr Harvey was one of retrospective justification.

46. Accordingly, the Panel was faced with a situation in which Mr Moore had reduced his proposed witness list from 25 to 15. None of them had witnessed the events of 27 April 2001. Mr Moore did not know what any of them would say. The case advanced by Mr Moore for calling these witnesses went to his propensity for not acting as alleged. In my judgment the decision of the Panel to restrict the number of Mr Moore's witnesses to four in these circumstances was not one which no reasonable Panel could have reached. It was a decision made in good faith on proper grounds. I find therefore that it was a decision within the lawful discretion of the Panel and not in breach of paragraph 11 of Schedule D of the rules of the Union.

47. For the above reasons I refuse to make the declaration sought by the claimant that UNISON breached paragraph 11 of Schedule D of its rules by restricting the number of witnesses that the Claimant was entitled to call at a disciplinary hearing held over 5 days between 26 June 2003 and 9 January 2004.

Observation

As stated above, to limit the number of witnesses an accused person may call in his or her defence is a most serious matter. If such a decision is taken, on the grounds that the evidence would be repetitive and is not contested, consideration should be given to allowing written statements to be submitted by the witnesses who have been excluded. Whilst the accused may not have a right to submit such statements or have forfeited such a right, by not having submitted them at the correct time, the disciplinary panel should consider exercising its discretion to admit further written material out of time. An accused person who wishes to call a significant number of witnesses should be in a position to explain to the disciplinary panel in broad terms the relevance of the evidence to be given by each witness.

David Cockburn
The Certification Officer