D/10-12/02

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

Mr DAVID HUGHES

v

UNISON - The Public Service Union

Date of Decision: **28 February 2002**

DECISION

Upon application by the Applicant under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for declarations that UNISON ("the Union") acted in breach of the rules of the Union:

1. I refuse to make the declaration sought that on 16 May 2001 the Union acted in breach of paragraph 17 of Schedule D of the rules of the Union by its Appeals Committee ruling that the Applicant was not permitted to call further witnesses at the hearing of his appeal.

2. I declare that on 16 May 2001 the Union acted in breach of paragraph 20 of Schedule D of the rules of the Union by its Appeals Committee treating the Applicant's appeal as having been abandoned by his representative and not determining the Applicant's appeal on the basis of its consideration in private whether the charges were proved to its satisfaction and on the evidence presented before it.

3. I refuse to make the declaration sought that on 16 May 2001 the Union acted in breach of paragraph 22 of Schedule D of the rules of the Union by its Appeals Committee failing to consider what, if any, action to take against the Applicant and by having failed to

consider anything that the Applicant wished to submit in mitigation.

4. Pursuant to my powers under section 108B(3) of the 1992 Act I make the following enforcement order:

> *"UNISON shall appoint a differently constituted Appeals Committee which will rehear the Applicant's appeal against the decision of the disciplinary hearing of 10 April 2000 to expel the Applicant from the Union. The rehearing of the appeal shall commence no later than Monday 27 May, unless a later commencement date is agreed between the Union and the Applicant."*

REASONS

5. By an application dated 17 August 2001 Mr Hughes made three complaints against his former union, UNISON. The three complaints are that UNISON breached its rules in respect of disciplinary proceedings. These are matters within the jurisdiction of the Certification Officer by virtue of section 108A(2)(b) of the 1992 Act. The alleged breaches are that:-

5.1 In breach of paragraph 17 of Schedule D of the rules of the Union the Appeals Committee ruled at a hearing on 16 May 2001 that the Applicant was not permitted to call further witnesses.

5.2 In breach of paragraph 20 of Schedule D of the rules of the Union the Appeals Committee failed to determine the Applicant's appeal on the basis of their consideration in private whether the charges were proved to their satisfaction and on the evidence presented before them.

5.3 In breach of paragraph 22 of Schedule D of the rules of the Union the Appeals Committee failed to consider the appropriate action to be taken against the Applicant and failed to consider anything that the Applicant may have wished to submit in mitigation.

6. I investigated these matters in correspondence. As required by section 108B(2) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 11 January 2002. The Union was represented by Mr Anthony White QC. Mr J McDougall, Chair of the Appeals Committee, and Mr M Thorpe, a Union Officer and Secretary to the Appeals Committee, attended as witnesses. Mr Hughes acted in person and gave evidence. Mr C Neil and Ms S Green also gave evidence on behalf of the Applicant. A bundle of documents was prepared for the hearing by my Office which consisted of relevant exchanges of correspondence with the parties, together with their enclosures. This decision has been reached on the basis of the representations made by the Applicant and the Union, together with such documents as were provided by them.

Findings of Fact

7. Having considered the representations made to me and the relevant documents I make the following findings of fact:-

8. UNISON came into existence in 1993 by the amalgamation of three other unions, COHSE, NALGO and NUPE. The administrative reorganisation consequent upon the amalgamation was a huge task and not without difficulty. One particular difficulty concerned the merger of the branches of the former unions in the Birmingham area. It was decided that a single branch should be created to be known as the Birmingham Local Government Branch. This branch was founded on 1 October 1996 and its inaugural general meeting was held on 11 November 1996.

9. This new branch was beset from the beginning by internal disputes which proved difficult to resolve. It is not necessary for the purposes of this decision to examine the nature of these disputes. By 1999 there was still no solution and so the National Executive Council initiated an investigation into complaints regarding the conduct of various members of the branch. The branch itself was suspended between March 1999 and April 2000. The investigation involved interviews with 34 individuals and subsequent disciplinary proceedings resulted in the expulsion from the Union of seven members of the branch,

including the Applicant. By a letter dated 17 December 1999 the Applicant was charged with acting in a manner prejudicial or detrimental to the Union by:-

(i) Instigating unauthorised industrial action between September 1996 - June 1998.

(ii) Wilfully disregarding or disobeying an instruction to cease the above industrial action from October 1996 - June 1998.

(iii) Engaging in continuing acts of bullying, intimidation and unacceptable conduct towards members of the Neighbourhood Telephone Team between September 1996 - June 1998.

(iv) Engaging in bullying, intimidation and unacceptable behaviour towards one delegate attending the National Delegate Conference 10 June 1997.

10. By a letter dated 5 January 2000 the Applicant was notified that the disciplinary hearing into these charges had been arranged for 15 March. However, by a letter dated 2 March, the Applicant was notified that the Union would not permit him to be represented at this hearing by the representative of his choice, Faith Ryan, on account of Ms Ryan's earlier alleged disruptive behaviour. Having unsuccessfully applied for a postponement, the Applicant chose not to attend the disciplinary hearing on 15 March. The hearing proceeded in his absence and each of the charges was found to have been proved. The hearing adjourned to give the Applicant an opportunity to make submissions by way of mitigation. He chose not do so and on 10 April the Disciplinary Committee reconvened to consider the appropriate penalty. It decided that the Applicant should be expelled from the Union.

11. The Applicant appealed. Such appeals are heard by an Appeals Committee composed of three lay members of the Union selected from an Appeals Panel, which panel is in turn composed of members nominated by each of the Union's Service Group Executives. No member of the Appeals Committee chosen to hear an appeal is to be from the same service group or the same region as the Appellant. By paragraph 26(3) of Schedule D of the rules of the Union the appeal is to take the form of a rehearing using the same procedures applicable to hearings at first instance. Paragraph 26(3) goes on to state:-

> *"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."

Mr Jim McDougall was chosen to chair the Appeals Committee to hear the appeals of not only the Applicant but also the other members of the Birmingham Local Government Branch who had been disciplined.

12. The Union agreed that the Applicant could be represented at the appeal hearing by Faith Ryan and she indicated that the Applicant wanted to call 22 witnesses. However, relying on paragraph 26(3) of Schedule D, the Union informed Ms Ryan that the Applicant could not call any witnesses or give evidence on his own behalf, as this was not material which was before the initial hearing. The Union later resiled from this position and Ms Ryan indicated that the Applicant wished to call 16 witnesses. In the event, the Applicant proposed calling a total of 14 witnesses, excluding himself, and the Union called five witnesses.

13. The hearing of the appeal extended over six days. The first two days were on 17 and 18 August 2000. The second two days were on 18 and 19 October 2000 and the final two days were on 15 and 16 May 2001. However, at the hearing on 19 October 2000 it had been envisaged that a further three days would be required and three days were duly set aside in December that year. The Applicant requested an adjournment of these dates due to the unavailability of his representative and this request was granted. On 16 February 2001 the appeal was re-listed for three days in June but on 25 April the Union wrote to the Applicant informing him that his appeal had been brought forward and would take place on 15 and 16 May. The Union explained at the hearing before me that this was because the Appeals Committee had put these dates aside for another matter which was now ineffective and it was thought appropriate to use the dates for the Applicant's appeal. Mr McDougall gave evidence that there was never any intention to restrict the appeal to only two further days. Whilst the Union may have hoped that the appeal could be concluded on the 15 and 16 May, Mr McDougall said that if further days were required they would have been arranged.

14. On 3 May 2001 the Applicant requested a postponement of the appeal from the 15 and 16 May on the basis that not only would he be unable to attend on those days but that Ms

Ryan could no longer represent him and he needed to find a new representative. This request was rejected by a letter dated 8 May. On 10 May the Applicant informed the Appeals Committee that his new representative was Mr Clive Neil and that he wished to call the remaining seven witnesses, one of whom required the assistance of a "signer". Mr Neil had been present on the earlier four days of the appeal but only in the capacity of a note taker. He is a legal executive employed in the legal services department of Birmingham City Council.

15. On Tuesday 15 May 2001 the appeal reconvened. Mr Neil made a further request for a postponement and there was some discussion as to the precise reason why the Applicant was not present. Mr Neil did not volunteer any explanation for the Applicant's absence beyond that he was taking booked leave and was out of Birmingham. The request for a postponement was rejected. A further three witnesses were heard on behalf of the Applicant on the 15 May.

16. On the morning of Wednesday 16 May 2001 the Appeals Committee heard a further witness on behalf of the Applicant before taking a coffee break at about 11.30am. During this coffee break the three members of the Appeals Committee commented on the repetitive nature of the Applicant's evidence and questioned the need to hear further witnesses if they were to give no new evidence. The members of the Appeals Committee agreed that if the further witnesses were not to give new evidence the Applicant's representative would be told that no further witnesses would be allowed and that both representatives should make their closing submissions.

17. The appeal resumed at about 12.00 noon. Mr Neil came into the hearing room accompanied by his next witness, Ms S Green. Mr McDougall asked Ms Green to leave and then outlined to Mr Neil the concerns of the Appeals Committee about the repetitive nature of the evidence. He asked what new evidence would be given by them. Mr Neil's response was in general terms. He said only that the remaining witnesses would give evidence relating to the four charges against the Applicant insofar as they had personal knowledge of one or more of the charges and that one witness would give character

evidence. Mr Neil did not inform the Appeals Committee of any specific evidence to be given by the further witnesses which had not already been given by one or more of the preceding eleven witnesses. The members of the Appeals Committee conferred briefly, after which the chair ruled that the Appeals Committee would not hear any more witnesses on behalf of the Applicant, that the hearing would adjourn immediately for lunch and that after lunch both representatives would be invited to make their closing submissions.

18. During the luncheon adjournment Mr Neil contacted the Applicant on his mobile telephone and told him of developments. Neither Mr Neil nor the Applicant had a clear and detailed recollection of this conversation but they were both adamant that at no time did the Applicant instruct Mr Neil to formally abandon or withdraw the appeal. They both agreed that the ruling by the Appeals Committee was unreasonable and a breach of the union rules and that Mr Neil was not in a position to sum up when not all the evidence had been adduced. Mr Neil told the Applicant that in these circumstances he could not see any further role for himself. The conversation concluded with the Applicant in effect authorising Mr Neil to walk out of the hearing and play no further part in it if Mr Neil considered this to be the most appropriate course of action to take.

19. The hearing resumed at about 1.45 pm. Mr Neil did not bring his papers back into the room. He immediately made a short statement to the Appeals Committee in which he was extremely critical of the way the appeal had been conducted, stating that he considered that the members of the Appeals Committee were biased against the Applicant and that he was unable to make any final submissions as he had been refused the opportunity to call all his evidence. Mr Neil said that in these circumstances he could play no further part and that he would leave. It is unclear whether Mr Neil used the word "withdrawal", but on the balance of probabilities I find that he did say that he was withdrawing. He left the room at approximately 1.48 pm.

20. The Appeals Committee was caught unprepared by this development but very quickly

afterwards Mr McDougall asked the secretary to the panel, Mr Thorpe, to find Mr Neil and persuade him to return so that there could be further discussion of his position. Mr Thorpe gave evidence that he looked in all the places he might expect to find Mr Neil but that he was unable to find him. Mr Thorpe returned to the hearing room and told the Appeals Committee that Mr Neil must have left the building.

21. The Appeals Committee then asked Mr Lenton, the person presenting the case for the Union, to leave the room, after which they discussed for about thirty minutes how they should proceed. They were keen to ensure that they were as fully informed as possible about the case and had regard to paragraph 17 of Schedule D which provides for the person presenting the charges to sum up the case. They decided that this is what they should do next. Mr Lenton was called back into the hearing and asked to sum up the case for the Union.

22. The Appeals Committee then retired to consider its decision. It was unsure how to proceed and its deliberations took some 1¼ hours. No-one had any experience of a representative having walked out of a hearing and there was more than an element of confusion. Mr Thorpe was present throughout these discussions and at one stage he telephoned the Union's Head Office to seek advice. The members of the Appeals Committee considered that it was extremely significant that Mr Neil had walked out saying that he was withdrawing but they nevertheless discussed the merits of the case in outline. It was Mr Thorpe's view, confirmed by his telephone call to Head Office, that the appeal had been withdrawn by Mr Neil and that this was an end of the matter. The Appeals Committee eventually came to the same conclusion and it was left to Mr Thorpe to communicate this decision to the Applicant. In these circumstances it was considered that there was no need for the Appeals Committee to invite submissions on mitigation.

23. Mr Thorpe wrote to the Applicant on 17 May 2001, to advise him of the decision of the Appeals Committee:

Dear Mr Hughes

Rule I Disciplinary Appeal

I am writing to advise you that the panel hearing your appeal against the decision of the NEC to expel you from UNISON, reached on 10 April 2000 and conveyed to you on 13 April 2000, concluded its deliberations yesterday. The panel regretted deeply the fact that you had despite being invited to attend on the 15/16 May 2001, absented yourself from the hearing without explanation. Your representative refused to elaborate on your absence on more than two occasions. Additionally the panel was concerned that at approximately 1.48p.m. on Wednesday 16 May 2001, your representative, Mr Clive Neil, walked out of the hearing. Mr Neil said "I see no further point in continuing and I am going to withdraw". It was obvious that Mr Neil, by not even bringing his papers back into the reconvened appeal hearing, had no intention of continuing in accordance with the appeal procedure.

The Appeal Hearings were convened on;
17 & 18 August 2000
18 & 19 October 2000
12, 13, 14 December 2000 were postponed at your request
15 & 16 May 2001

On behalf of the panel, I have to express their deep concern that despite giving this matter their undivided attention over a period of 6 days, spread over 10 months and having listened to 11 of your witnesses, whose testimony lasted in excess of thirteen hours, your representative decided to withdraw. The decision by Mr Neil to take no further part in the appeal, frustrated the appeal, immediately prior to the hearing reaching the final submission stage.

On the basis that you had absented yourself on 15/16 May 2001 without explanation, and that your representative Mr Neil had walked out of the hearing, the Panel's unanimous view was that you and your representative had deliberately frustrated your right of appeal by your unreasonable actions.

In the light of these circumstances the unanimous decision of the Panel was that your appeal was not upheld and that the original penalty imposed by the NEC to expel you from UNISON membership stands and is final and binding.

Yours sincerely

Mike Thorpe
Secretary to the Panel

24. The basis upon which the appeal was rejected has been described by the Union in different words on different occasions:-

24.1 In a letter dated 4 July from Mr Thorpe to Mr Hughes it was said, *"It is the panel's view that once Mr Neil, your representative, had withdrawn from the appeal hearing of his own volition you effectively abandoned your rights to continue with the appeal".*

24.2 In a letter dated 19 September 2001 from Mr Remington of the Union to the Certification Office it was said, *"The panel determined the following. Mr Hughes*

and/or his representative had been given the opportunity to call witnesses and present his bundle. Mr Hughes refused to attend the hearing. Mr Neil walked out of the hearing, so abandoning the procedure. Mr Neil was advised that if he walked out and abandoned the proceedings, then the panel would decide on how to progress matters. In the circumstances the panel considered that it had no option than to recognise that the original disciplinary panel penalty of expulsion remained in force. The panel were not bound by paragraphs 20 or 22 because the appeal had been abandoned by Mr Neil".

24.3 In the written statement of Mr McDougall it was said, *"The panel adjourned to consider procedurally where we were. The panel decided that by Mr Hughes's unexplained absence and Mr Neil's walking out and clear indication that he did not intend continuing, that Mr Neil acting on Mr Hughes's behalf had abandoned Mr Hughes's appeal. In those circumstances, Schedule D paragraph 20 - the panel arriving at a decision and/or Schedule D paragraph 22 - the right of mitigation - did not apply".*

24.4 In the written statement of Mr Thorpe it was said, *"The panel deliberated at length the position that they were now facing and ... (decided) that the actions of Mr Neil amounted to his withdrawal and consequent abandonment of the appeal on behalf of Mr Hughes ... They concluded that Mr Hughes and his representative Mr Neil had deliberated frustrated their right to continue to appeal due to their unreasonable actions".*

25. Nevertheless, in evidence Mr McDougall said that the Appeals Committee had considered the merits of the appeal and that Mr Thorpe's letter to the Applicant of 17 May 2001 was incomplete. Mr McDougall said that if he had seen this letter before it had been sent he would have considered it appropriate to add a further paragraph stating that the appeal had been considered on its merits. Further, Mr McDougall commented that his written statement, in having omitted any reference to the appeal having been considered on its merits, did not present an entirely accurate picture.

The Relevant Statutory Provisions

26. The provisions of the 1992 Act which are relevant for the purpose of these applications are as follows:-

> *"108A.-(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) ...*
> *(d) ...*
> *(e) ... "*

27. Section 108B(2)of the 1992 Act empowers me to make such enquiries as I think fit and, after giving the applicant and the union an opportunity to be heard, to make or refuse to make the declarations asked for. I am required, whether I make or refuse the declaration sought, to give reasons for my decision in writing.

28. Section 108B(3) of the 1992 Act requires that where I make a declaration I shall also, unless I consider that to do so would be inappropriate, make an enforcement order requiring, inter alia, the union to take such steps to remedy the breach as may be specified in the order.

The Relevant Union Rules

29. The union rules relevant to the Applicant's complaint are as follows:-

> **Part I: rule 11** "The procedure to be adopted for disciplinary hearings and appeals shall be as set out in Schedule D."
>
> **Schedule D: disciplinary procedures**
>
> 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"

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

17 After all witnesses have been heard and documents produced, the Committee hearing the charge (i) may ask the person presenting the charge to sum up the case; and (whether she/he does so or not) (ii) must then permit the member charged, or her/his representative, to address them. The member or her/his representative shall have the right to speak last. In summing up, no new matters may be introduced.

18 At any time during the procedure set out above, members of the Committee hearing the charge may seek clarification of any statement made, and may enquire of either party as to the evidence that is to be called.

20 The Committee hearing the charge shall then consider in private whether the charge is proved to their satisfaction, or not, on the evidence presented before them. All members of the Committee taking part in the discussion must have been present throughout the entirety of the hearing. No new matter can be raised against the member concerned. If any point of uncertainty arises, the Committee may recall both parties to clear the point. In such a case, both parties shall return notwithstanding that only one is concerned with the point giving rise to doubt.

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.

26(3) The appeal will take the form of a re-hearing 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 Complaints

The Schedule D Paragraph 17 Complaint

The Applicant's Submission

30. The Applicant submitted that the decision of the Appeals Committee to refuse the Applicant permission to call any further witness on 16 May 2001 was a breach of paragraph 17 of Schedule D. He argued that the reference in paragraph 17 to *"After all witnesses have been heard ..."* indicated that an appeal can only be concluded after the Appeals Committee has heard all the witnesses that the Appellant wishes to call. He further argued that whilst the Appeals Committee does have a discretion to exclude irrelevant evidence, it does not have any discretion to exclude relevant evidence, no matter

how repetitive this may be. He maintained that the number of witnesses called by the Appellant may help resolve a disputed issue of fact, giving more weight to the Appellant's version of events. He further argued that the fact that the Union had unsuccessfully attempted to amend its disciplinary rules to introduce a guillotine on the number of witnesses who can be called in disciplinary proceedings is an indication that such a guillotine is not permitted under the present rules.

The Union's Response

31. For the Union, Mr White QC noted that there was no express rule which gives the Appeals Committee the discretion to refuse an Appellant permission to call as many witnesses he or she may wish but he argued that the right of the Appeals Committee to control its own proceedings must be implied and that this is evident from a textual examination of paragraphs 7, 11 and 18 of Schedule D. Counsel accepted that the discretion of the Appeals Committee could not be exercised perversely so as to, for example, refuse to allow the Appellant to call any witnesses. However, he maintained that there was nothing in the rules of the Union nor in the body of natural justice that prevented the Appeals Committee from excluding witnesses giving repetitive evidence. Taking an extreme case, he contended that an Appellant could properly be prevented from calling twenty, thirty or forty witnesses to give identical evidence. Accordingly, he argued that if the Appeals Committee had such a discretion the issue was whether on this occasion it had been exercised lawfully. The appropriate test, he submitted, was not whether the discretion was exercised reasonably but whether it was exercised in such a way that it could be said that no reasonable disciplinary panel could have exercised its discretion in that way.

32. Applying the law to the facts of this case, counsel noted that eleven witnesses had already been called by the Applicant and that it was the unanimous opinion of the Appeals Committee that they had given broadly similar or repetitive evidence. Counsel also pointed out that Mr Neil had not indicated any fresh evidence that the remaining three witnesses would give. In these circumstances he contended that the Appeals Committee could properly infer that the evidence to be given by the remaining three witnesses would

not add anything of substance to the evidence given by the eleven and that it could not be said that the decision to exclude those witnesses was one to which no reasonable disciplinary panel could come. Counsel further submitted that the failed attempt to amend the rules of the Union to provide an express right to exclude witnesses does not assist on this issue as rule changes are often proposed to make express that which is already implied.

Conclusion

33. I accept the Union's submission that the Appeals Committee must, as a matter of necessary implication, have a right to regulate its own proceedings, subject to any relevant express rules. As there are no express rules relating to the power to restrict the number of witnesses that an Appellant may call, I must consider the scope of the implied term by which the Appeals Committee can regulate this aspect of its own procedure and whether, on the facts of this case, the Appeals Committee exceeded its powers by restricting the number of witnesses the Applicant could call.

34. 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 judgement sufficient in itself for the later 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"*.

35. The relevant circumstances of this case include the number of witnesses who had already given evidence and the nature of their evidence. The case against the accused was set out in voluminous documentation which also contained material submitted by the Applicant. By the time the Appeals Committee excluded the final three witnesses it had sat for 5½ days over a period of 10 months. It had heard five witnesses for the Union over 1½ days and it had heard eleven witnesses for the Applicant over 4 days. The Appeals Committee had asked the Applicant's representative the nature of the evidence to be given by the final three witnesses but he had merely said that their evidence would relate to the charges. I find that the Appeals Committee could legitimately infer from that response, taken in context, that the evidence to be given would be broadly similar to the evidence given by the earlier eleven witnesses. On the above facts I find that the decision of the Appeals Committee cannot properly be described as one to which no reasonable disciplinary body could have come and that accordingly this is one of those exceptional cases in which the Appeals Committee acted within the scope of its implied power to regulate its own procedures by excluding further witnesses.

36. For the above reasons I refuse to make the declaration sought by the Applicant that on 16 May 2001 the Union acted in breach of paragraph 17 of Schedule D of the rules of the Union by its Appeals Committee ruling that the Applicant was not permitted to call further witnesses at the hearing of his appeal.

The Paragraph 20 of Schedule D Complaint

The Applicant's Submission

37. The Applicant maintained that having failed to hear all the evidence before it, the Appeals Committee also breached paragraph 20 of Schedule D of the rules of the Union. In

particular, it is alleged that the Union failed to comply with the requirement that *"The Committee hearing the charge shall then consider in private whether the charge is proved to their satisfaction, or not, on the evidence presented before them ..."* The Applicant contended that he had not withdrawn his appeal and that accordingly the Appeals Committee were obliged to consider his appeal on its merits, on the evidence that had already been presented.

The Union's Response

38. For the Union, Mr White QC submitted that Mr Neil had abandoned the Applicant's appeal and that there was accordingly no extant appeal to be considered by the Appeals Committee. In these circumstances it was submitted that the Appeals Committee was under no obligation to comply with paragraph 20 of Schedule D by considering the merits of the Applicant's appeal and there could therefore be no breach of that provision. Counsel accepted that the Appeals Committee was in some confusion when deliberating what to do after Mr Neil had left the hearing but submitted that I should have regard to the fact that neither the Appeals Committee nor Mr Thorpe are lawyers. He stated that the Appeals Committee is composed of ordinary union members and this Appeals Committee was doing its best in a difficult situation. Faced with a novel situation counsel submitted that it is not surprising that there was no clear analysis of what had occurred or what needed to be done. In counsel's words, the attitude of the members of the Appeals Committee council was that the proceedings had been aborted. He pointed out that shortly after Mr Neil walked out the members of the Appeals Committee thought the appeal had been abandoned but they were still struggling for further assistance. They therefore asked Mr Lenton to make his closing submission. They then retired and had more time for reflection. They undertook some consideration of the merits of the appeal but withdrew from this approach to conclude that the appeal had been abandoned. Counsel submitted that this was a conclusion to which the Appeals Committee could properly come having regard to the words and conduct of Mr Neil.

Conclusion

39. I accept counsel's submission that there was confusion amongst the members of the Appeals Committee after Mr Neil had walked out and I also accept his submission that the members of the Appeals Committee were lay members attempting to do their best in a difficult and novel situation. However, I do not accept the evidence of Mr McDougall that the Appeals Committee considered whether the charge was proved on the evidence

to the standard required by paragraph 20 of Schedule D. Mr Thorpe, who was present throughout the considerations of the Appeals Committee gave evidence that the consideration of the merits by the members of the Appeals Committee was cursory as they kept coming back to the conclusion that Mr Neil had abandoned the appeal. I further note that this late assertion by Mr McDougall was not made in any of the letters from the Union after the hearing or in Mr McDougall's written statement or in counsel's final submission.

40. I have therefore to consider whether the Appeals Committee was correct in disposing of the Applicant's appeal on the basis that it was withdrawn by Mr Neil. The abandonment or withdrawal of an appeal is a serious matter as it removes the last opportunity for a member to assert his or her rights based on the rule book. Accordingly, in my judgement the abandonment or withdrawal of an appeal should not be readily inferred in the absence of an express withdrawal. There is of course no requirement for an abandonment or withdrawal to be in writing but the difficulties of proof would obviously be avoided if it were. In this case, it is alleged that there was an express oral abandonment or withdrawal. Alternatively, it was suggested in evidence that if Mr Neil's words were ambiguous then I should consider his words together with his action in walking out and conclude that the Appeals Committee correctly concluded that the appeal had been abandoned.

41. As to the words used by Mr Neil immediately before he walked out, I find that there is no convincing evidence as to the precise words used. On the balance of probabilities I find that Mr Neil did use the word *"withdraw"* but that this was used in the context that he was withdrawing from the room, not withdrawing the Applicant's appeal. In reaching this conclusion, I accept the evidence of the Applicant and Mr Neil that in their telephone conversation on the lunchtime of 16 May 2001 the Applicant did not authorise Mr Neil to withdraw his appeal. The Applicant had been a union member since 1969 and a lay official for twenty five years. The Applicant had attended on the previous four days of the appeal and had indicated that he was available to attend the previously agreed June dates. He had sought to have the dates in May postponed to the original June dates to be able to attend. He had obtained at short notice the services of a new representative. I find it highly improbable that in these circumstances the Applicant would have accepted his expulsion from the Union by withdrawing his appeal on the sixth day of the hearing. I

also accept the evidence of Mr Neil that he did not intend to withdraw the appeal and that he does not believe he used words which could reasonably convey that meaning. Mr Neil is an experienced legal executive. He is aware of the significance of withdrawing a case and that he could only do so with express instructions. He is also a friend of the Applicant. In all the circumstances I find that Mr Neil did not use words which expressly abandoned or withdrew the Applicant's appeal or which were reasonably capable of bearing that meaning. I find that Mr Neil withdrew from the hearing room because he was angry at the ruling of the Appeals Committee with regard to his remaining witnesses and that he felt he was not in a position to continue.

42. My finding that there was no unambiguous abandonment or withdrawal is supported by the subsequent actions of the Appeals Committee. It is inconsistent with the appeal being withdrawn that Mr Lenton was asked to give the Union's closing submissions and it is also inconsistent with the appeal being withdrawn that there was any subsequent consideration by the Appeals Committee of the merits of the case. At best, the evidence demonstrates that the members of the Appeals Committee were uncertain as to whether or not the appeal had been abandoned or withdrawn. In my judgement however the Appeals Committee could only properly conclude that the appeal had been abandoned if there was unambiguous evidence that this was the case. The consequences of an appeal being ended in this way are so significant to the Appellant that the proper course for the Appeals Committee to have taken would have been to adjourn to ascertain the Applicant's wishes without ambiguity. Indeed, Paragraph 20 of Schedule D envisages a situation in which residual uncertainties which arise after a hearing can be clarified by recalling both parties "to clear the point". Instead, faced with a difficult and novel situation and having received advice from Head Office, the members of the Appeals Committee opted to conclude the appeal forthwith. In my judgement, the Applicant had not withdrawn his appeal and the members of the Appeals Committee remained under an obligation to consider in more than a cursory manner whether the charge was proved on the evidence in accordance with paragraph 20 of Schedule D, which they failed to do.

43. For the above reasons I make a declaration in the following terms:-

"I declare that on 16 May 2001 the Union acted in breach of paragraph 20 of Schedule D of the rules of the Union by its Appeals Committee treating the Applicant's appeal as having been abandoned by his representative and not determining the Applicant's appeal on the basis of its consideration in private whether the charges were proved to its satisfaction and on the evidence presented before it."

44. Pursuant to section 108B(3) I also make an enforcement order in the following terms:-

"UNISON shall appoint a differently constituted Appeals Committee which will rehear the Applicant's appeal against the decision of the disciplinary hearing of 10 April 2000 to expel the Applicant from the Union. The rehearing of the appeal shall commence no later than Monday 27 May, unless a later commencement date is agreed between the Union and the Applicant."

The Paragraph 22 of Schedule D Complaint

The Applicant's Submission

45. Paragraph 22 of Schedule D provides that *"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"*. The Applicant argued that the Appeals Committee, having determined to uphold the decision of the disciplinary hearing, did not consider any alternative sanction and did not give him the opportunity to make any submissions in mitigation. He pointed out that when the original Disciplinary Committee had decided in March 2000 that the charges against him were proved his case was adjourned to April 2000 for there to be a separate consideration of the sanction. The Applicant submitted that a similar procedure should have been used on this occasion. The Applicant contended that at no time had he or his representative indicated an intention to abandon or withdraw his appeal and that the failure of the Appeals Committee to consider any alternative sanction or to offer an opportunity to make submissions in mitigation was a clear breach of rule.

The Union's Response

46. The Union submitted that there was no breach of paragraph 22 of Schedule D as Mr Neil had abandoned or withdrawn the Applicant's appeal and that therefore there was no decision for the Appeals Committee to reach with regard to a sanction. The decision of

the original disciplinary hearing stood.

Conclusion

47. Paragraph 22 of Schedule D begins with the words *"If the Committee decides that the charge is proved…"* This is a condition precedent to any obligation being incurred by the Appeals Committee under paragraph 22 to consider mitigation and any action to be taken. I have already found in respect of the complaint under paragraph 20 of Schedule D that the Appeals Committee did not conclude this appeal by deciding whether the charges were proved. The condition precedent was not fulfilled and therefore the Union did not come under any obligation to comply with the provisions of paragraph 22 of Schedule D. It follows that the Union was not in breach of that provision.

48. For the above reasons I refuse to make the declaration sought that on 16 May 2001 the Union acted in breach of paragraph 22 of Schedule D of the rules of the Union by having failed to consider what, if any, action to take against the Applicant and by having failed to consider anything that the Applicant wished to submit in mitigation.

D COCKBURN
Certification Officer