D/13-17/03

DECISION OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE UNDER SECTIONS 31(1) AND 108A(1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

Mr R O M FOSTER

v

MUSICIANS' UNION

Date of Decision: **22 May 2003**

DECISION

Upon applications by the Applicant under section 31(1) and section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):-

1. I dismiss the Applicant's complaint that the Musicians' Union ("the Union") breached section 30 of the 1992 Act in failing to comply with the Applicant's request of 20 September 2002 for access to accounting records of the Union.

2. I refuse to make the declaration sought by the Applicant that the Union breached rule XXI section B.7 of its rules and/or Article 6 of the European Convention of Human Rights by denying the Applicant access to material that he sought from the Union in connection with internal disciplinary proceedings brought against him by another member of the Union.

3. I refuse to make the declaration sought by the Applicant that the Union breached rule XXI section B.7 of its rules and/or Article 6 of the European Convention of Human Rights by failing to hear within a reasonable time a complaint brought against him by another member under the Union's internal disciplinary procedures.

4. I reject, as having been brought out of time, the application made by the Applicant that the Union breached paragraph 5 of appendix B of its rules by reconvening and hearing on 19 December 2001 a further appeal arising out of a disciplinary penalty imposed upon Mr Richards under rule XXI of the rules of the Union.

5. I reject, as having been brought out of time, the application made by the Applicant that the Union breached rule XXI section B.3 of its rules by not giving effect to a decision to impose a disciplinary penalty on Mr Richards between 19 September and 18 December 2001.

REASONS

1. By applications dated 20 October 2002 the Applicant made a number of complaints against his Union, the Musicians' Union ("the Union"). Following correspondence with my Office the complaints were identified in the following terms:-

1.1 *"In breach of section 30(2)(a) of the 1992 Act the Union has failed to comply with Mr Foster's request of 20 September 2002 for access to the accounting records of the Union. The accounting records to which Mr Foster has sought access are those concerning all legal expenditure made pursuant to Derek Kay's High Court action against the Union, details of total salary paid to Mr Kay whilst he was in post as General Secretary, the total amount of his personal legal costs paid by the Union, and the total amount of the Union's own legal costs."*

1.2 *In that by denying Mr Foster access to identifiable financial transactions the Union has breached Article 6 of the European Convention on Human Rights (by denying Mr Foster access to evidence and thus access to a fair hearing of a complaint brought against Mr Foster by Mr Kay) and that the Union's actions have breached its rule XXI Section B.7.*

1.3 *In that by failing to hear the complaint against Mr Foster (made by Mr Kay and notified to Mr Foster on 15 February 2002) the Union has failed to guarantee Mr Foster a fair hearing within a reasonable time in breach of Article 6 of the European Convention on Human Rights and that the Union's actions have breached its rule XXI Section B.7.*

1.4 *That on 19 December 2001 by an Appeals Committee of the Union reconvening and hearing an appeal by Mr Richards the Union has breached its rule XXI Appendix B "Standing Orders for the Hearing of Appeals" section B.5.*

1.5 *That by not giving effect to a decision of the Disciplinary Committee to penalise Mr Richards (between 19 September 2001 and 18 December 2001) the Union has breached its rule XXI Section B.3.*

2. These matters were investigated in correspondence. As required by section 31(2A)(b) and 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 on 2 April 2003. The Union was represented by Mr Westgate of Counsel. Mr S Mehta of Messrs H W Fishers & Co, Chartered Accountants, gave evidence for the Union. The Applicant acted in person and gave evidence on his own behalf. Both the Applicant and Mr Mehta provided witness statements. Skeleton arguments were provided by both parties. There were two agreed bundles. One bundle contained the documents upon which the parties relied. The other bundle, which was in two parts, contained authorities and other source material. 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

3. Having considered the representations made to me and the documents to which I was referred I make the following findings of fact. I will set out the facts relating to the first three complaints separately from the facts relating to complaints four and five.

Complaints One, Two and Three

4. In November 2000, Mr Derek Kay was elected General Secretary of the Musicians' Union. In January 2001, following internal disciplinary procedures, Mr Kay was suspended from holding office by the London District Disciplinary Committee ("the LDDC"), which was then chaired by the Applicant. Mr Kay commenced High Court proceedings against the Union which were settled in October 2001, in what I shall describe as the compromise agreement. The terms of this agreement were and remain

confidential. It was, however, reported in a national newspaper on 24 October 2001 that Mr Kay had agreed to resign as General Secretary and not contest the post again in return for the full payment of his wages and legal costs.

5. The Applicant was at all material times the Vice-Chairperson of the South London Branch of the Union. On 17 January 2002 the Applicant successfully moved a motion at a meeting of his branch which expressed, with reservations, the branch's support for the actions of the Executive Committee ("the EC") in reaching an out of court settlement with Mr Kay. The motion described Mr Kay as, *"...no longer following the profession of music"* and as having engaged in a, *"...transparent publicity stunt,"* which resulted in the article in the national newspaper. It further stated, *"From this article MU members and the public at large would think Mr Kay was a poor, innocent victim instead of being a deceitful, discredited and second rate politician who has extracted a large pay packet plus all his legal costs out of the union at the expense of providing ordinary members with the services they deserve"*. This motion went forward for consideration by the London District Council ("the LDC") on 4 February 2002. It was again moved by the Applicant and was carried.

6. On 11 February 2002 Mr Kay commenced internal disciplinary proceedings against the Applicant and Mr Jones, the seconder of the branch motion, under rule XXI of the rules of the Union. He alleged that the motion which they had moved at the LDC on 4 February had, amongst other things, brought his name into disrepute. The complaint against Mr Jones was subsequently withdrawn. On 15 February Mr Knight, the then Deputy General Secretary of the Union, wrote to the Applicant informing him that the complaint had been received and that it would, *"...be heard by the London District Disciplinary Committee as soon as practicable"*.

7. No steps were taken to process Mr Kay's complaint between February and September 2002. The explanations given by the Union for this inaction were twofold. First, the Union contended that there was difficulty in constituting a Disciplinary Committee whose members would be sufficiently removed from

the events in question to be regarded as impartial. Secondly, on 14 June 2002, I decided the case of *Saunders v Musicians' Union*, which declared void and ineffective a number of proposed rule changes. The Union contended that, following this decision, its administration was heavily committed in sorting out the consequences of that decision.

8. On 3 September 2002, Mr Knight wrote to Mr Kay asking if, given the passage of time, he still wished to pursue his complaint. By a letter dated 10 September Mr Kay confirmed that he did wish to do so. On 11 September Mr Knight wrote to the Applicant informing him that the complaint would, *"...be heard by the London District Disciplinary Committee as soon as practicable"*.

9. On 20 September 2002, the Applicant wrote to his full-time Branch Secretary, Mr Hyde, making a request to examine the accounting records of the Union under section 30 of the 1992 Act. The Applicant expressed his request in the following terms:-

> *"In order to present a defence of statements in the allegedly defamatory motion which has led to Derek Kay charging South London Branch Committee members under rule XXI, I wish to examine the accounts with regard to all legal expenditure made pursuant to Derek Kay's High Court action against the union. I shall require details of total salary paid to Mr Kay whilst he was in post as General Secretary and the total amount of his personal legal costs which the union paid as well as the total amount of the union's own legal costs."*

10. The Union responded to this request by a letter dated 7 October 2002. Mr Knight had then left the Union's employment. Mr Mick Miller, the Interim Assistant General Secretary (Admin) wrote:-

> *"In particular you have sought access to those accounting records that would identify:*
>
> - *Legal expenditure paid by the Union in relation to Mr Kay's High Court action against the Union.*
> - *Details of Mr Kay's total salary when General Secretary.*
> - *Details of his personal legal costs.*
>
> *It is our view (as advised by our lawyers) that the right of access does not extend to invoices (such as copy legal bills) or the terms of the Compromise Agreement between the Union and Mr Kay, which deals with his claim against the Union (and which in any event is confidential).*

We do not anticipate that all the information you require will be evident from the accounting records to which you have a right of access. For instance, though the accounting records would show payments made to our solicitors, you do not have a right of access to the invoices to which they relate and would not therefore be able to determine the sums paid in relation to the Kay action rather than other cases in which they were involved.

As stated above, the terms of the Compromise Agreement reached between Mr Kay and the Union are confidential. Whereas you have a right of access to the accounting records of the Union, you do not have a right of access to the Compromise Agreement. Furthermore, as the details of the Compromise Agreement are confidential, the Union is not in a position to be able to provide that information to you. You would need to make your own assessment after having considered the accounting records for the period in question.

Insofar as the salary of Mr Kay is concerned when General Secretary, that is a matter of public record. It is contained in the annual return filed by the Union with the Certification Officer. The information is also set out in the Statement to Members, which is sent to every member by inclusion within Musician magazine. I enclose a copy of the relevant page in case you cannot locate your copy.

In the circumstances in the light of my comments above, you may wish to reconsider your request for access and as to whether or not you wish to process this further."

11. On 18 October 2002 Mr Foster responded to Mr Miller's letter. He repeated that he needed the financial information in order to defend himself against the charges brought by Mr Kay and went on to state:-

> *"I agree with (you) that there is no point in me viewing the accounts unless invoices are available to isolate the figures I require."*

The Applicant has not sought to inspect any accounting records relating to his request to which the Union was prepared to give access.

12. The Applicant's current applications, dated 20 October 2002, were received by my Office on 24 October.

13. In early 2003 a new LDDC was elected which the Union believes to be sufficiently impartial to hear Mr Kay's complaint against the Applicant. The Union proposes to arrange for a hearing of Mr Kay's complaint against the Applicant by the new LDDC as soon as would be proper after the conclusion of this complaint to me.

Findings of Fact - Complaints Four and Five

14. It may be helpful to repeat that the Applicant chaired the hearings of the LDDC on 20 December 2000 and 11 January 2001, which resulted in Mr Kay being suspended from holding office within the Union.

15. On 11 February 2001, Mr Richards, a member of the EC, attended a meeting of the Midland District Council and allegedly made certain remarks which were critical of the way in which the LDDC had handled Mr Kay's disciplinary hearing. On 28 February the Applicant made a complaint against Mr Richards under rule XXI of the rules of the Union.

16. On 10 June 2001 the Applicant's complaint against Mr Richards was heard by the East District Disciplinary Committee ("the EDDC"), sitting in Cambridge. The complaint was upheld and the penalty imposed by the EDDC under section B.3 of rule XXI was that Mr Richards should be reprimanded by the EC.

17. Mr Richards appealed and his appeal was heard by the Appeals Committee under section C of rule XXI on 19 September 2001. The Appeals Committee upheld the decision of the EDDC and added a fine of £100.

18. The result of Mr Richards' appeal was reported to the EC at its meeting in November 2001, together with further information relating to the subject matter of the appeal and a legal opinion. The EC decided that the Appeal Committee should reconvene to give further consideration to the additional two matters.

19. The Appeal Committee reconvened on 19 December 2001 and on this occasion Mr Richards' appeal was upheld. The disciplinary charges were effectively dismissed. Mr Watson, the Vice-Chairperson of the EC, telephoned the Applicant on 1 January 2002 to advise him what had occurred. The Applicant told Mr Watson that the EC could not do this and that he would

complain to the Certification Officer if necessary. By a letter to the Applicant of 7 January, Mr Knight confirmed the outcome of the reconvened Appeal Committee.

20. The Applicant wrote to Mr Knight on three occasions protesting about the events which lead to Mr Richards' appeal being upheld. On 16 January 2002 the Applicant sought answers to six specific questions and described the second sitting of the Appeal Committee as, *"unconstitutional"* and *"an affront to natural justice"*. On 4 February the Applicant repeated his request for answers to the same six questions and his belief that the second sitting of the Appeal Committee was unconstitutional. He noted that paragraph 5 of Appendix B of the rules states that, *"The decision of the Appeals Committee ... shall be final and conclusive as to that appeal"*. On 12 February, the Applicant wrote a four page letter to Mr Knight. He began the substantive part of that letter by stating, *"It is perfectly appropriate for union members to seek an explanation if their Executive Committee authorises actions contrary to the published standing orders of the union"*. He went on to explain in detail why he considered that it was wrong for the Appeal Committee to be reconvened and, in the pre-penultimate paragraph states, *"To conclude, you say my line of inquiry is quite inappropriate but you do not advise what other course in available"*. The only action the Applicant asked Mr Knight to take was to circulate his letter to relevant members of the EC. The Applicant concluded with the words, *"If there are any matters which I have touched upon which you do feel able to clarify or correct in the meantime, I would be pleased to hear"*. Mr Knight responded to each of these three letters; on 29 January, 6 February and 4 March respectively. Mr Knight refused to answer the questions the Applicant had posed and indicated that he would not be circulating the Applicant's letter of 12 February to the EC. In his final letter, Mr Knight commented, *"I am appealing to you Bob to let this matter drop and allow us to get on with the business of serving the membership as a whole..."*. There followed a meeting between Mr Knight and the Applicant at which the Applicant alleges that Mr Knight told him that certain information was to be circulated nationally in the next day or so which would help him with Mr

Kay's complaints against him and get Mr Kay off his back. Mr Knight also renewed his appeal to the Applicant to let the issue of Mr Richards' appeal drop. By a letter to Mr Knight of 14 March 2002, the Applicant reiterated his fundamental disagreement with the second Richards appeal but concluded, *"As you have requested, the matter is now closed"*.

21. At the same time as the Applicant was engaged in this exchange of correspondence, he pursued similar concerns through the committee structure of the Union. On 17 January 2002 the Applicant successfully moved a motion at the South London Branch which wished the EC to note the branch's concern over the EC's actions and requested an urgent investigation and explanation of the actions of both the EC and the Appeals Committee. This motion came before the LDC on 4 February and was approved. The Applicant left the LDC whilst this motion was being debated and took no part in its moving or discussion. Mr Knight responded to this motion by a letter to the Secretary/Organiser of the LDC, Mr Trubridge, dated 4 March in which he explained the circumstances which had given rise to the reconvened Appeal Committee. Mr Trubridge read out Mr Knight's letter to the LDC at its meeting of 28 April and the LDC resolved, *"That the Organiser's report be accepted"*.

22. On 2 May 2002 the Applicant wrote to Mr Knight thanking him for his very clear report to the LDC and stated, *"From my personal viewpoint I am satisfied that there has been a proper exposition of Mr Richards' behaviour which can have left none of the impartial delegates in any doubt as to his true character"*.

23. The Applicant's complaints to my Office, including his fourth and fifth complaints, were received by my Office on 24 October 2002.

The Relevant Statutory Provisions

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

The Right of Access to Accounting Records

S28(1) "A trade union shall -

(a) cause to be kept proper accounting records with respect to its transactions and its assets and liabilities, and
(b) establish and maintain a satisfactory system of control of its accounting records, its cash holdings and all its receipts and remittances.

(2) Proper accounting records shall not be taken to be kept with respect to the matters mentioned in subsection (1)(a) unless there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions."

S29(1) "A trade union shall keep available for inspection from their creation until the end of the period of six years beginning with 1 January following the end of the period to which they relate such of the records of the union, or of any branch or section of the union, as are, or purport to be, records required to be kept by the union under section 28 ..."

S29(2) "In section 30 (right of member to access to accounting records) -

(a) references to a union's accounting records are to any such records as are mentioned in subsection (1) above, and
(b) references to records available for inspection are to records which the union is required by that subsection to keep available for inspection."

S30(1) "A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union ..."

S31(1) "A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer."

S31(2B) "Where the Certification Officer is satisfied that the claim is well-founded he shall make such order as he considers appropriate for ensuring that the applicant -

(a) is allowed to inspect the records requested,
(b) is allowed to be accompanied by an accountant when making the inspection of those records, and
(c) is allowed to take, or is supplied with, such copies of, or of extracts from, the records as he may require."

The Human Rights Act 1998

S6(1) "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The European Convention on Human Rights 1950

Article 6(1) "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Section 108A of the 1992 Act:

"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) …

(6) An application must be made -

(a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or
(b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).

(7) Those days are -

(a) the day on which the procedure is concluded, and
(b) the last day of the period of one year beginning with the day on which the procedure is invoked.

108B.-(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."

25. 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, provides that I may make or refuse to make the declaration asked for. I am required, whether I make or refuse the declaration sought, to give reasons for my decision in writing.

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The Union Rules

26. The Union rules most relevant to the Applicant's complaints are:-

Rule XXI: DISCIPLINARY PROCEDURES AND AUTOMATIC PENALTIES

"Section A - Offences

1. Any member shall have the right to invoke the Union's disciplinary procedures against any other member held to have committed any of the following actions:

(a) committed a breach of any of these Rules;
(b) .....
(c) .....
.....
.....
(k) ....."

"Section B - Disciplinary Committee

1. To facilitate the hearing of disputes between members amongst themselves which cannot be dealt with by any procedure provided elsewhere in these Rules as agreed by them, or when it appears that any member may be guilty of any offence under section A above, the matter shall be reported within four weeks of the offence to the General Secretary who will place the allegation before the relevant District Disciplinary Committee established under 2 below for consideration in accordance with the procedures set out for conducting Disciplinary Hearings (Appendix A to these Rules)."

3. The EC shall give effect to a decision of the Disciplinary Committee to penalise a member subject to a member's right of appeal to the Appeals Committee established under Rule XXI.C by imposing any of the following penalties as is held appropriate by the Disciplinary Committee as follows:

(a) the member shall be reprimanded or admonished
(b) the member shall be required to pay a fine….
(c) - (e)

7. Any issue of fact or of Law determined by the Courts in any civil or criminal proceedings shall be treated as conclusively decided for the purpose of any subsequent Disciplinary proceedings."

APPENDIX A

STANDING ORDERS FOR DISCIPINARY HEARINGS

1. "Upon receipt of a complaint the General Secretary will determine the District at which the complaint shall be heard. In order to determine the relevant District the following procedure will apply:

(a) if both parties to the complaint are members of Branches within the same District then the complaint shall be heard by that District's Disciplinary Committee.
(b) -

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APPENDIX B

STANDING ORDERS FOR THE HEARING OF APPEALS

1-4…..

5. "The decision of the Appeals Committee shall be announced by its Chairperson within fourteen days of the hearing, and shall be final and conclusive as to that appeal. The Appeals Committee shall communicate its decision in writing to the appellant by recorded delivery."

6-7……

Complaint One

In breach of section 30(2)(a) of the 1992 Act the Union has failed to comply with Mr Foster's request of 20 September 2002 for access to the accounting records of the Union. The accounting records to which Mr Foster has sought access are those concerning all legal expenditure made pursuant to Derek Kay's High Court action against the Union, details of total salary paid to Mr Kay whilst he was in post as General Secretary, the total amount of his personal legal costs paid by the Union and the total amount of the Union's own legal costs.

The Submissions

27. The Applicant submitted that the purpose of section 30 of the 1992 Act was to allow members to test their union's accounts to ensure transparency and probity. He argued that this could only be achieved by the term, *'accounting records'* being interpreted so as to include invoices and other source documents of a similar nature. The Applicant acknowledged that my decision in *Mortimer v Amicus* (D/1/03) rejected such an interpretation but nevertheless sought to persuade me that I should revisit my conclusion in that case. The Applicant argued that there were some very small unions which did not create intermediate accounting records between their source documents and their annual accounts. It was suggested that such unions would give their auditors the source documents with instructions to prepare the annual accounts from them. In such circumstances the Applicant submitted that the source documents must be accounting records for the purposes of section 30, as otherwise the members would have nothing to inspect. In the Applicant's opinion the source documents would not be accounting records if they were kept in a disorderly manner but they would be if they were collated and filed. He argued that the documents would thereby have been *'created'*, as is required by section 29(1). The Applicant further submitted that any

interpretation which applied a different standard to small unions must be wrong as the only permissible different treatment under the 1992 Act for small unions was provided for in section 34, in relation to the formalities of auditing. He also argued that for him to be treated less favourably than a member of a small union would be discriminatory, contrary to Article 14 of the European Convention on Human Rights ("the ECHR"). The Applicant also relied upon the decision of the High Court of Ireland in *Mehigan v Duignan (1996) 1 EHC 18*, which involved a consideration of section 202(1) of the (Irish) Companies Act 1990. This provides that, *"Every company shall cause to be kept proper books of account, whether in the form of documents or otherwise…"* In the Applicant's submission, there would be little or no point in giving a right of access to accounting records which did not include source documents, although he did not consider that the right of access extended to a person's individual payroll details.

28. For the Union, Mr Westgate submitted that the right of access of members to accounting records is not a right to conduct an audit of a Union's finances or even less, to audit the auditors. He adopted the reasoning and conclusions in the Mortimer case, to the effect that accounting records normally exclude primary or source material, such as invoices and receipts. Counsel made a distinction between three stages in the accounting process. In his submission, the first stage is data collection, the assembly of such documents as invoices and receipts. The second stage involves the creation of accounting records from those source documents and the third stage involves the creation of accounts from those records, to provide an overview of the union's affairs. Counsel submitted that it is the task of the auditor to verify that the accounting records are consistent with the source documents before certifying that the accounts give a true and fair view of the matters to which they relate. He argued that, if the Applicant was correct, there would be no distinction between the right of access of members and the right of access of the auditors or the Certification Officer. Mr Westgate argued that where a member is dissatisfied with the accounting records he or she has a right to pursue questions through the normal democratic processes of the union or, where

appropriate, to raise questions with the auditor or the Certification Officer or even the police. He noted that the statement that a Union is required to give by section 32A(6) of the 1992 Act refers to these avenues of complaint but does not refer to the right to seek access to the accounting records. Counsel observed that where a union fails to keep proper accounting records an offence is committed but that this is a separate matter to the right of access. He argued that it is not likely that Parliament intended that every receipt, for no matter how small a sum, would have to be retained by a union for six years, which could cause considerable practical problems for large unions. He stated that where a union does no more than keep invoices which it gives its auditors those invoices may be accounting records but he submitted that this would only be because they were kept as accounting records. He argued that the issue as to whether invoices are kept as accounting records will normally only arise in those few cases in which a union keeps no intermediate records and, in those cases, the issue would have to be determined as a question of fact on a case by case basis.

Conclusion – Complaint One

29. The interpretation of the term, *'accounting records'* in section 30 of the 1992 Act was considered by me in February 2003 in *Mortimer v Amicus*. In paragraph 32 of that decision I found as follows:-

> *"Against this background, an accounting record for the purposes of section 30 of the 1992 Act is, in my judgement, a record which is created or kept principally for the purposes of accounting. The modern meaning of "accounting" in the Shorter Oxford Dictionary is "the process or art of keeping and verifying accounts". Accordingly, primary or source documents created for effecting or evidencing a transaction, such as a bill, an invoice or a receipt may be described as a record of financial information but they are not necessarily an accounting record. Union auditors or the Certification Officer have a statutory right to require access to such documents but not union members exercising their rights under section 30 of the 1992 Act. The right of access of union members is limited to the accounting records which will ordinarily have been created on the basis of information contained in such primary or source documents".*

30. I am grateful for the care that Mr Foster has taken in the presentation of his argument on this difficult point. He identified a factual situation which

demonstrates, in his submission, that my interpretation of the term, *'accounting records'* in the Mortimer case is wrong. The Applicant posited the case of a small union which does not create any secondary or intermediate accounting records but retains its invoices, receipts and other source material from which its auditors prepare its annual return. He submitted that in accordance with my findings in the Mortimer case, the members of such a union were effectively denied the right of access to accounting records. I do not accept that a consequence of my findings in the Mortimer case is to leave such a member without recourse.

31. If a union has no accounting records it commits a breach of section 28(1) of the 1992 Act, which requires all unions to keep proper accounting records. This is an offence for which a union can be prosecuted under section 45. Alternatively, in the exceptional case, it may be argued that source material constitutes accounting records when the principal purpose for the retention of such material is to create accounting records. Source material such as invoices and receipts may be retained for a number of purposes. They may be retained to evidence a transaction in the event of a later dispute about that transaction. Other items, such as taxi receipts, bus tickets and evidence of petty cash expenditure, may be kept for personnel purposes to ensure compliance with a relevant personnel policy. In most cases, however, the necessary accounting information on such source material will be transferred as soon as practicable to an accounting record, such as a day book, a sales or purchase ledger or a nominal ledger. It will be a question of fact in each case whether any particular document has been retained principally for the purposes of forming part of the accounting records of the union. Where a union has no other accounting records, and here I have in mind the type of small union suggested by the Applicant, there may be an inference that source material has been retained as an accounting record to enable the union to comply with its statutory obligations. However, where, as in this case, a union transfers all relevant financial information from source documents to a ledger or other accounting document or file, the natural inference will be that the ledger or other accounting document or file becomes the accounting record or one of the

accounting records for the purposes of the 1992 Act and that the source document is being retained for some other purpose, if indeed it is retained.

32. In my judgement the right of access to accounting records is not intended to be so broad as to give members a right of access to all documents containing financial information, much less all documents regarding financial transactions. As I observed in the Mortimer case, the 1992 Act provides not only for the financial affairs of Unions to be subject to scrutiny on a number of different levels but also requires unions to inform their members in writing that they may raise any concern they may have about the financial affairs of their union with its officials, its trustees, its auditors, the Certification Officer or the police. Members have been given a right to look beyond the annual accounts and to enquire, with the help of an accountant, should they so wish, whether the accounting records are being kept properly either generally or with regard to particular transactions. By section 28 of the 1992 Act proper accounting records are deemed not to be kept unless, *"...there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions"*. A member's right of access to the accounting records is linked closely to this provision and is intended to provide the member with an additional layer of information which may assist a member in deciding whether and with whom to take up any complaint. To give members an automatic right to source documents would not only impose an immediate practical burden on larger unions with regard to storage and retrieval but would potentially require unions to make available to members much of the same material as is available to their auditors. Members would effectively be given the ability to conduct their own audit of the union's finances and/or audit the auditors. I do not find that this is likely to have been the intention of Parliament.

33. I was not assisted in considering this complaint by the Irish case of *Mehigan v Duignan*. This case arose in a different jurisdiction, relates to a different statute and concerns the interpretation of different words. I was similarly not

assisted by Article 14 of the ECHR, which I find has no application on the facts of this case.

34. In the Applicant's letter of 18 October 2002, he stated that there was no point in him viewing the accounts unless invoices were available. He also failed to inspect those records to which the Union considered he was entitled to access. In these circumstances I find that, the Applicant's request for access to accounting records was for access to source documents that had been created for the purposes of effecting or evidencing a transaction. In my judgment, these are not accounting records of the Union within the meaning of section 30 of the 1992 Act.

35. For the above reasons I dismiss the Applicant's complaint that the Musicians' Union ("the Union") breached section 30 of the 1992 Act in failing to comply with the Applicant's request for access to accounting records of the Union.

Complaint 2

In that by denying Mr Foster access to identifiable financial transactions the Union has breached Article 6 of the European Convention on Human Rights (by denying Mr Foster access to evidence and thus access to a fair hearing of a complaint brought against Mr Foster by Mr Kay) and that the Union's actions have breached its rule XXI Section B.7.

The Submissions

36. The Applicant argued that by refusing to supply him with the information he had requested in his letter of 20 September 2002, the Union had acted not only in breach of section 30 of the 1992 Act but had also acted in breach of both rule XXI section B.7 and Article 6 of the ECHR. He contended that rule XXI section B.7 should be read as having a broad scope as it refers to, *"Any issue of fact"* and, *"...any subsequent disciplinary proceedings"* (my emphasis). Given its broad scope, the Applicant argued that the Union was bound by decisions of the European Court of Human Rights for the purposes of disciplinary proceedings and in particular by the cases of *Edwards v United Kingdom (79/1991/331/404), Rowe and Davis v United Kingdom (28901/95)* and *Atlan v United Kingdom (36533/97).* He maintained that these cases establish the general proposition that all proceedings must be conducted fairly

and the particular proposition that the withholding of evidence which would help the defence is only permissible if it is strictly necessary. The Applicant submitted that it was not strictly necessary for the information he had requested to be withheld and that he was prejudiced as it was information already in the possession of Mr Kay and the Union. He stated that he was the only person involved in the disciplinary procedure who did not have that information.

37. For the Union, Mr Westgate submitted that rule XXI section B.7 did not have the effect of incorporating the ECHR and should be read as meaning that if there are court proceedings which are followed by later internal disciplinary proceedings on the same facts, the Union must regard itself as bound by the findings of fact and law reached by the court. He further submitted that section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right but that the Union is not a public authority for these or any other purposes. In determining what is a public authority, counsel referred to *R v Leonard Cheshire Foundation and Another (2002) EWCA 366*. Mr Westgate also argued that a Union's internal disciplinary proceedings did not engage Article 6 of the ECHR as they do not concern a person's, *"...civil rights and obligations"*. In counsel's submission, Article 6 is only engaged if a person's pre-existing civil right, such as a right to follow a profession, is to be determined and potentially removed. On the related issue of fairness, counsel accepted that the Union had a duty to conduct its disciplinary procedures fairly but maintained that the Union had done so in this case. He submitted that those cases to which the Applicant had referred involved breaches of the criminal law, which involved different considerations, and that the interests of fairness in Union internal disciplinary proceedings do not oblige the Union to provide the Applicant with all the documents that he seeks. On the facts of this case, counsel argued that the documents sought by the Applicant were of doubtful relevance and that, in any event, this application was premature as the decision on whether they should be disclosed should be made by the Disciplinary Committee after having considered their potential relevance.

Conclusion – Complaint Two

38. The Applicant submits firstly that the Union's failure to provide him with the information he requested is a breach of rule XXI section B.7. This provides as follows:-

> "Any issue of fact or of Law determined by the Courts in any civil or criminal proceedings shall be treated as conclusively decided for the purposes of any subsequent Disciplinary proceedings."

39. On its face, this rule does not provide that the Union must provide the Applicant with documents for the purpose of a proposed disciplinary hearing. I accept the submission of counsel for the Union that on its correct interpretation, this rule does not have the broad meaning attributed to it by the Applicant. By this rule the Union is obliged to regard any issue of fact or law determined in civil or criminal proceedings as having been conclusively decided for the purposes of any subsequent disciplinary proceedings. The disciplinary proceedings will usually arise out of the same or similar facts as the legal proceedings but not necessarily so. For example, the legal proceedings may arise out of different facts but concern the interpretation of a union rule which is relevant to the disciplinary proceedings. In my judgement rule XXI section B.7 does not have the effect of incorporating into the rules of the Union the general legal principles enunciated by the European Court of Human Rights.

40. I further find that the Union is not a public authority within the meaning of section 6 of the Human Rights Act 1998. It is an unincorporated association formed by civil contract. Its purpose is to protect the interests of its members. Unions are not creatures of statute. They have no statutory underpinning and their purposes are not of a public nature. The Certification Officer, however, as a public authority within the meaning of the Human Rights Act, is required to act in a way compatible with Convention rights. This requirement is discharged primarily by providing the parties with a means whereby their disputes can be adjudicated in a manner compatible with Article 6.

41. In determining this complaint, I am required to consider the nature of the right allegedly breached by the Union. The rights of the Applicant as a Union member are contained in the rules of the Union, both express and implied, and in various statutes. The implied duties of a union include the duty to conduct its disciplinary processes in accordance with the judicially recognised principles of fairness, sometimes referred to as natural justice. This duty does not ordinarily give members a right to general or specific disclosure. On the facts of this case, the Applicant is seeking specific disclosure of information which is in part confidential and which is of doubtful relevance to the defence of the charges against him. Those charges do not revolve around the precise amount of Mr Kay's pay packet (whose former annual salary is in the public domain in any event) or the precise amount of Mr Kay's legal costs and do not directly concern the precise amount of the Union's own legal costs in its litigation with Mr Kay. In my judgement, the Union has not denied the Applicant a fair hearing by refusing him the information he has requested. The Applicant can of course renew his request to the Disciplinary Committee itself, as counsel for the Union suggested.

42. In my judgement, on the evidence before me, the Union's internal disciplinary process is not analogous to the process which certain professional organisations are required to follow if their disciplinary procedure can result in the removal of a person's qualification to follow his or her profession. I am therefore not persuaded that Article 6 is engaged at all by this disciplinary process, it being a process agreed between two private parties which does not put at risk a person's qualification to remain in professional practice. If I were to be wrong on this, I find that the Applicant derives no additional rights from Article 6 in relation to the Union's disciplinary process beyond those which arise from the express rules of the Union and the Union's general obligation to act in accordance with the principles of natural justice in the conduct of its disciplinary processes.

43. For the above reasons I refuse to make the declaration sought by the Applicant that the Union breached rule XXI section B.7 of its rules and/or Article 6 of the European Convention of Human Rights by denying the Applicant access to

material that he sought from the Union in connection with internal disciplinary proceedings brought against him by another member.

Complaint Three

In that by failing to hear the complaint against Mr Foster (made by Mr Kay and notified to Mr Foster on 15 February 2002) the Union has failed to guarantee Mr Foster a fair hearing within a reasonable time in breach of Article 6 of the European Convention on Human Rights and that the Union's actions have breached its rule XXI Section B.7.

The Submissions

44. The Applicant argued that he has been denied a fair hearing within a reasonable time in breach of rule XXI section B.7 and Article 6 of the ECHR. He bases his complaint on the same arguments that he advanced in relation to his second complaint. He submitted that he was notified of Mr Kay's charge against him in February 2002 and heard nothing more until September 2002, when he was told that the charges would be going ahead. He presented this complaint to me in October 2002.

45. For the Union, Mr Westgate repeated the arguments he had made with regard to the second complaint. He added that mere delay does not necessarily breach the principles of natural justice. The Applicant would have to establish that the delay was so prolonged as to have caused prejudice. Counsel submitted that on the facts of this case there was no prejudice.

Conclusion – Complaint Three

46. For the reasons set out in relation to the second complaint, I do not find that rule XXI section B.7 has any application to the facts of this case. I also find that the Union is not a public authority within the meaning of section 6 of the Human Rights Act 1998 and that Article 6 of the ECHR has nothing more to add to this complaint. I note that the disciplinary proceedings were commenced in February 2002 and that this complaint was made to my Office in October 2002. The Union gave two explanations of a practical nature for the failure to progress the charges between February and September 2002, which I

accept as genuine. The Applicant has not put forward any evidence of prejudice. I do not find in these circumstances that the Applicant has been denied the opportunity of a fair hearing.

47. For the above reasons I refuse to make the declaration sought by the Applicant that the Union breached rule XXI section B.7 of its rules and/or Article 6 of the European Convention of Human Rights by failing to hear within a reasonable time a complaint brought against the Applicant under the Union's internal disciplinary procedures by another member.

Complaint Four

That on 19 December 2001 by an Appeals Committee of the Union reconvening and hearing an appeal by Mr Richards the Union has breached its rule XXI Appendix B "Standing Orders for the Hearing of Appeals" section B.5.

Complaint Five

That by not giving effect to a decision of the Disciplinary Committee to penalise Mr Richards (between 19 September 2001 and 18 December 2001) the Union has breached its rule XXI section B.3.

The Submissions

48. The Union submitted that both these complaints had been made out of time and I agreed that this issue should be taken as a preliminary point.

49. Mr Foster submitted that the event giving rise to his fourth complaint could be taken as having occurred in November 2001 (when the EC decided to reconvene the Appeals Committee) or on 19 December (when the Appeals Committee reconvened) or on 1 January 2002 (when he was informed of the decision of the reconvened Appeals Committee). He accepted, however, that his application regarding these events was not received within six months of any of these dates, so as to bring it within section 108A(6)(a) of the 1992 Act. The Applicant also accepted that his fifth complaint had not been brought within six months of 18 December 2002, the final date of the alleged continuing breach. Both the Applicant's complaints were received by my Office on 24 October 2002. Nevertheless, the Applicant contended that both

these applications were within time by virtue of section 108A(6)(b). In the Applicant's submission, he had invoked an internal complaints procedure within six months of the date of the alleged breaches by writing to Mr Knight and by submitting a motion to his branch. The Applicant contended that the internal complaints procedure had not been concluded until either 28 April 2002 (the date of the relevant meeting of the London District Council ("the LDC")) or 2 May (the date the Applicant wrote to Mr Knight thanking him for his report to the LDC). He submitted that his letter to Mr Knight of 14 March 2002 did not conclude the complaints procedure as it had been written under the belief that Mr Knight would procure the withdrawal of Mr Kay's complaint, which turned out to be a misrepresentation. Alternatively he submitted that Mr Knight had exerted undue influence. The Applicant contended that his applications had been lodged within six months of both 28 April and 2 May, no matter which of these dates was chosen as being the conclusion of the procedure, and that they were therefore in time.

50. For the Union, Mr Westgate submitted that, even if the Applicant's letters to Mr Knight of 16 January, 4 February and 12 February 2002 were taken as initiating an internal complaints procedure, that procedure had been concluded on or about 14 March 2002 when the Applicant wrote to Mr Knight stating that, *"...the matter is now closed"*. Mr Westgate argued that the Applicant's complaints were accordingly out of time, as they had been made more than six months after 14 March. Mr Westgate did not accept that the motion approved by the Applicant's branch on 17 January 2002, which lead to the LDC's meeting on 28 April and the Applicant's letter to Mr Knight of 2 May, could properly be described as having invoked an internal complaints procedure for the purposes of section 108A(6)(b) of the 1992 Act. He argued that although a complaints procedure for the purpose of section 108A(6)(b) need not be an express procedure, it had to be one designed to deal with individual complaints and it had to be a procedure recognised by well established practice within the Union. Counsel submitted that the branch motion fell into neither of these categories. He further argued that some assistance could be gained from the reference to internal complaints procedure in section 108B(1),

which he submitted would need to be given a strained interpretation if it were to include motions submitted by branches. Accordingly, it was the Union's case that the latest date upon which any internal complaint by the Applicant was concluded was 14 March 2002 and that his application, received on 24 October 2002, was out of time.

Conclusion – Complaints Four and Five

51. The provisions relating to whether an application is made in time are found in section 108A(6) and (7) of the 1992 Act. These provide as follows:-

> "108A.-(6) An application must be made -
>
> (a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or
> (b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).
>
> (7) Those days are -
>
> (a) the day on which the procedure is concluded, and
> (b) the last day of the period of one year beginning with the day on which the procedure is invoked."

52. For the purposes of complaint four I shall treat the day on which the breach is alleged to have taken place as being 1 January 2002 and for the purposes of complaint five I shall treat the equivalent date as including 18 December 2001, the last date of the alleged continuing breach. It is common ground that no complaint was made to my Office within six months of either of these events.

53. To bring the claim within time the Applicant must establish that within six months of the above dates he invoked an internal complaints procedure to resolve his claim. There is no dispute that the Applicant raised the issue of the reconvened Appeals Committee in two ways; by writing direct to the Deputy General Secretary and by moving a motion at his branch. I shall deal separately with each of these different approaches.

54. The Union does not have an express complaints procedure for members but I accept the Applicant's evidence that there is a well established and recognised practice within the Union that members may raise individual complaints by letter to the General Secretary or the person performing that function for the time being. There is, however, an issue as to whether the Applicant's letters of 16 January, 4 February and 12 February 2002 were written to invoke such a procedure to resolve the Applicant's claim. They are not expressed in the language to be expected of such letters. Rather they demand information and express the Applicant's indignation. This is perhaps understandable as the decision to which the Applicant objected was reached by the EC and there must have seemed little prospect of it reversing the decision of the Appeals Committee of 19 December or convening the Appeals Committee for a third time. A distinction can be drawn between letters of protest written to the Union and letters which invoke an established procedure to resolve a complaint involving a breach of rule. In my judgement, the letters of the Applicant fall into the former category and they therefore did not stop time running against him for the purposes of section 108A(6)(b). Should I be wrong about that, I find that the Applicant's letter of 14 March 2002, in which he informed the Union that, *"...the matter is now closed",* effectively withdrew any internal complaint he may have lodged, by his earlier letters. Accordingly, the application received at my Office on 24 October was out of time in any event. I do not accept the Applicant's submission that the effect of his letter of 14 March was vitiated by his earlier conversation with Mr Knight. On the Applicant's own evidence, Mr Knight expressed himself very carefully and in general terms. He did not enter into any specific agreement with the Applicant to procure the withdrawal of his protest and he did not make any false representation or exert undue influence.

55. Although section 108A(6)(b) and section 108B(1) are expressed in terms which most readily comprehend a member's complaint being made individually by that member, a union may have an express procedure or a well established practice whereby individual complaints by members are channelled through branch motions with a view to resolving the complaint. In

this case, however, I find that the motion adopted by the South London branch on 17 January 2002 was an expression of the branch's concern and not an attempt by the Applicant to invoke an internal complaints procedure. This is apparent from the terms of the motion itself which wished the EC to note its concern over the decision to reconvene the Appeals Committee and requested an urgent investigation and explanation of the EC's and Appeals Committee's actions. Such a finding is also consistent with the Applicant having neither moved the motion at the LDC nor having taken any part in its discussion. It is also consistent with the terms of the Applicant's letter to my Office of 9 November 2002. In this letter the Applicant explained his reason for moving the motion at his branch in the following terms, *"I thought I could force a public explanation for the breach by bringing pressure to bear from the membership. I knew the Union procedures would require a report from Mr Knight in answer to my questions"*. Accordingly, in my judgement, the motion that the Applicant moved at his branch was not the invocation of an internal complaints procedure to resolve his claim and it did not have the effect of stopping time running against him for the purposes of this application. Should the branch motion be considered as incorporating an internal complaint by the Applicant, contrary to my findings, I would find that the Applicant withdrew this complaint by his letter to Mr Knight of 14 March and that thereafter the motion had effect only as an ordinary branch motion.

56. For the above reasons I reject, as having been brought out of time, the application made by the Applicant that the Union breached paragraph 5 of Appendix B of its rules by reconvening and hearing on 19 December 2001 a further appeal arising out of a disciplinary penalty imposed upon Mr Richards under rule XXI of the rules of the Union.

57. I also reject, as having been brought out of time, the application made by the Applicant that the Union breached rule XXI section B.3 of its rules by not giving effect to a decision to impose a disciplinary penalty on Mr Richards between 19 September and 18 December 2001.

Observations

58. The Applicant failed to take up the Union's invitation to inspect those accounting records to which the Union was prepared to give him access. It may or may not be the case that much, or at least some, of the information that he was seeking could have been found in those records. Before making an application to the Certification Officer or the court alleging a breach of section 30 of the 1992 Act, union members should normally inspect those accounting records to which the union is prepared to grant access, with a view to narrowing or better defining the issues to be adjudicated, should this still be necessary.

D Cockburn
Certification Officer