

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

**Mr N Kelly**

**v**

**Union of Construction Allied Trades and Technicians  
(No 3)**

**Date of Decision**

**15 July 2014**

**DECISION**

Upon an application by Mr Noel Kelly ("the claimant") under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

1. I refuse Mr Kelly's application for a declaration that on or around 24 October 2013 the Union of Construction, Allied Trades and Technicians breached rule 24.3 of its rules by instigating an investigation of allegations made against Mr Kelly without the authority of either the Executive Council or General Council.
2. I refuse Mr Kelly's application for a declaration that on or around 24 October 2013 the Union of Construction, Allied Trades and Technicians breached rules 25 and 26 of its rules by instigating an investigation of allegations made against Mr Kelly without following the disciplinary procedures which are contained in those rules.
3. I refuse Mr Kelly's application for a declaration that on or around 24 October 2013 the Union of Construction, Allied Trades and Technicians breached rule 26.17 of its rules by accepting a grievance or grievances raised by a member despite the grievance(s) being allegedly raised outside the procedures of this rule.

**REASONS**

1. Mr Kelly brought this application as a member of the Union of Construction, Allied Trades and Technicians ("the Union" or "UCATT"). He made his complaints by a registration of complaints form that was received at my office on 19 November 2013.

2. Following correspondence, Mr Kelly confirmed the complaints he sought to pursue in the following terms:

**Complaint 1:**

*"On or around 24 October 2013 the Union breached rule 24.3 of its rules by the General Secretary instigating an investigation of allegations made against Mr Noel Kelly without the authority of either the Executive Council or General Council."*

**Complaint 2:**

*"On or around 24 October 2013 the Union breached rules 25 and 26 of its rules by instigating an investigation of allegations made against Mr Kelly without following the disciplinary procedures which are provided in these rules."*

**Complaint 3**

*"On or around 24 October 2013 the Union breached rule 26.17 of its rules by accepting a grievance, or grievances, raised by a member of the Union, Mr Flavin, although the grievance(s) were raised by Mr Flavin outside the procedures in the Union's rules. In instigating an investigation of Mr Kelly, arising directly from the allegations made by Mr Flavin, the Union ignored rule 26.17."*

3. I investigated the alleged breaches in correspondence and a hearing took place on 25 June 2014. At the hearing, Mr Kelly represented himself. He produced a written witness statement and gave oral evidence. The Union was represented by Mr Simon Cheetham of counsel, instructed by Mr Spencer Wood of O H Parsons, solicitors. The Union submitted a written witness statement from Mr Neil Vernon, President of the UCATT Executive Council, who also gave oral evidence. Mr Kelly and Mr Cheetham each provided skeleton arguments. There was originally in evidence a 140 page bundle of documents consisting of letters and other documentation supplied by the parties, together with the rules of the Union. Mr Kelly made a late application for the inclusion of additional documents which I allowed by consent. They became pages 141 to 160.

**Findings of Fact**

4. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follows:
5. Mr Kelly is 77 years of age. He is a retired painter and decorator. He has been a member of the Union since 1958 and has served as a lay officer in virtually every capacity. He has been a Branch Secretary in three branches for a total of about 30 years. He is currently the President of the Brixton branch and was elected to the Union's Executive Council ("EC") in the summer of 2013 as the member for London and the South East. He attended his first EC meeting in August 2013.
6. Mr Kelly's complaints relate to certain issues that were raised with the Union in August 2013 by a Mr Flavin. Mr Flavin is also a longstanding member of the Union. He described himself as being a scaffolder in the late 1960s but is now said to be working as a senior industrial relations adviser for a large construction company. He was a member of the EC in the early 1990s when such positions were full time. In 2002 the EC decided it should have no more to do with him, which decision was not rescinded until 2005. I was informed that Mr Flavin had threatened legal action against the Union on a number of occasions over his pension entitlement as a former full time member of the EC but has not pursued his complaints to court. I was also told that in

August 2013 the Pensions Ombudsman upheld the Union's position with regard to Mr Flavin's pension.

7. Mr Flavin wrote to the General Secretary of the Union, Mr Steve Murphy, on 19 August 2013. His letter makes a claim against the Union for compensation for damage allegedly caused to his family and himself. The letter is fairly described by counsel for the Union as being a letter before claim or letter before action. It accuses the Union, together with UNITE and the GMB, of blackening his name with intent to prevent him from becoming employed in the industry. The letter had about 15 enclosures which were claimed to show that UCATT officials were conspiring with the press, the employers and the police to blacken Mr Flavin's name. Those officials were said to include *'the General Secretary, National Officer and officials including the present EC member for London'* (i.e. Mr Kelly). The enclosures included short extracts from the pleadings of a High Court case brought by the Union against Mr Kelly and others in 1992 and from a High Court case brought by Mr Flavin against the EEPTU, AEEU and Mr Eric Hammond in 1994. Most significantly, however, they included a one page document which appears to be an extract from a statement made by someone on 9 February 1994 for the purposes of legal proceedings. The identity of the person making the statement is unknown and the matter in connection with which the statement was made is also unknown. The extract is described by Mr Kelly as being a 'cut and paste' job, being what appears to be the bottom of page 9 of the statement, with an illegible signature and a date, and the top of page 10. On its face, the document contains paragraph 27 of that statement and the first five lines of paragraph 28. Paragraph 27 is in the following terms:

*"27. Around this time, Noel Kelly told me that he had been contacted by a Special Branch officer at Scotland Yard named Peter Chalkley. He suggested that I should contact him using the code name 'Butterflies'. Mr Chalkley had been investigating the activities of Mr Flavin and the hard left-wing of the Union. He was therefore anxious to discover what information I had found. I met him on a fortnightly basis over a period of two or three months. I passed on what information I had and said I would let him know what further information I gleaned."*

8. The first Mr Kelly knew of this document was when the General Secretary mentioned it to him informally at the unveiling of a commemorative bench at the Union's head office on 29 August 2013. Mr Murphy said that Mr Flavin had made all sorts of allegations but they would talk about it later.
9. The EC met on 19 September 2013. The minutes of that meeting record the General Secretary as having reported that the Union had received *'a sort of warning letter from Mr Flavin .... indicating that he intended to take legal action against UNITE, GMB and UCAAT'*. Mr Murphy is recorded as saying that he would keep the EC advised of developments.
10. There is a dispute of evidence as to what occurred at the next EC meeting on the 17 October 2013. I find that during the morning session of that meeting, the minutes of the meeting of 19 September were gone through page by page. When the minute to which I have referred above was reached, the General Secretary stated that he had received no further communication from Mr Flavin on the matter of his claim for compensation for alleged blacklisting by the Union. This was subsequently reported as Minute 588/2013 under "Matters Arising" in those minutes. During the lunch break,

Mr Kelly was called into a meeting with the General Secretary and the President of the EC, Mr Vernon, in the General Secretary's office. Mr Kelly was shown the enclosures with Mr Flavin's letter and expressed his concern at the document which stated that he had had contact with a Special Branch officer. Mr Kelly described this document as pure taradiddle, or a petty lie, and understood the General Secretary as saying he would request more details of the document from Mr Flavin. It is common ground that Mr Kelly agreed to give whatever assistance he could in any claim Mr Flavin might make against the Union, given his long involvement with the Union and his knowledge of the events in question. The meeting in the General Secretary's office lasted between 4 and 15 minutes. After this meeting, the Union maintains that the EC resumed for the afternoon session and Mr Kelly was there throughout. Mr Kelly maintains that he was asked not to go into the meeting at the outset but was called in after about 3 minutes. Upon being called into the meeting, Mr Kelly says that he was congratulated by members of the EC for agreeing to give his assistance in defending any claim brought by Mr Flavin.

11. When the minutes of the meeting of 17 October 2013 were produced, there was a further item under "Matters Arising", which appeared as item 589/2013. This is as follows:

*"589/2013 Mr Noel Kelly, EC Member Investigation into allegations made by Mr John Flavin*

*Following on from the above item (588/2013), the EC agreed that as the allegations made against Mr Kelly, EC Member, were highly serious, the Union would need to carry out an investigation into the allegations made by Mr John Flavin in readiness to meet any legal challenge that might come from Mr Flavin. It was agreed that Mr Harry Frew, a Scottish Regional Secretary, be commissioned to carry out the investigation. At the conclusion of the investigation Mr Frew would report to the Executive Council."*

Mr Kelly gave evidence that he was surprised and outraged at this minute. He stated firmly that he had not been present at the EC when it had agreed that there would be an investigation of Mr Flavin's allegations against him. He presumed that any such agreement must have occurred when he was out of the room during the initial part of the afternoon session. The Union maintains that Mr Kelly was present when the EC agreed to there being an investigation into the allegations against him made by Mr Flavin. On the balance of probabilities, I accept Mr Kelly's recollection. I do so having regard to three main factors. Firstly, I have regard to the consistency and firmness of Mr Kelly's rejection of the accuracy of minute 589/2013. Secondly, I consider that a resolution that a person is to be investigated over such an allegation is likely to be most memorable to the person accused. Thirdly, the Union stated in relation to a later EC meeting that it would not have been appropriate for Mr Kelly to have been present when his position was discussed. If this was the Union's general approach, it is likely that Mr Kelly would not have been asked to attend that part of the meeting of 17 October that discussed whether or not to have a formal investigation into his alleged activities.

12. There is a further reason why Mr Kelly would consider the initiation of such an investigation to be memorable. He has a strong belief that the Union might wish to remove him from the EC and possibly exclude him as a member of the Union. He considers himself to be an independently minded person who is a thorn in the side of certain people within UCATT. He has commenced two previous complaints to the

Certification Office against his Union and considers that there is a purge of dissenting views going on within the Union. Mr Kelly states in his skeleton argument, *"Knowing how easily it is to expel members, UCATT used John Flavin's empty threats and representation as a means to cause an investigation into me and then following this investigation I was to be charged under the disciplinary rules and removed from the EC and possibly the Union. John Flavin's documentation amounted to a clear catalogue of nonsense which any reasonably minded person would have ignored."*

13. On 24 October 2013 the General Secretary wrote to Mr Kelly, enclosing a copy of Mr Flavin's letter and its enclosures. The letter states that the EC would defend any action against itself and goes on as follows:

*"It (the EC) was highly concerned to note that Mr Flavin has made some serious allegations against your goodself. In readiness for the Union to meet any legal challenge that might come from Mr Flavin, the Executive Council has agreed to carry out an in depth investigation into the extent of your involvement in this affair. Harry Frew, Scottish Regional Secretary has been tasked with carrying out the investigation. He will contact you to make arrangements for an interview. As the allegations made against you are highly serious, you may want to be accompanied at the interview. Please notify Harry Frew of the identity of the person accompanying you, in advance of the meeting."*

The suggestion that Mr Kelly should be accompanied at the interview fuelled his concern that the Union was to use this matter as a pretext to get rid of him.

14. Also on 24 October 2013, the General Secretary wrote to Mr Frew asking him to carry out an investigation into the allegations made by Mr Flavin against Mr Kelly.
15. On 29 October 2013 Mr Kelly replied to the General Secretary. He stated that he would not be meeting Mr Frew, although he would be willing to assist the Union without hesitation in connection with any legal action Mr Flavin might bring against the Union. He stated that the EC had not agreed to an investigation of himself. His letter continued,

*"I must add from the tone of your letter it may appear that you are making an attempt to subject me to a bogus investigation under the guise of assisting the Union in a claim that might be brought by John Flavin. It could be said that you are doing so in order to find some excuse to remove me either from the Union or from my position as an EC member ... In short this could look like a political witch hunt by Steve Murphy against a democratically elected EC member."*

The letter concluded with Mr Kelly hoping the Union would not press any further with its intention of investigating him.

16. On 13 November 2013, Mr Frew met with Mr Flavin to discuss the contents of his letter of 19 August. From Mr Frew's subsequent report, it appears that he did not ask Mr Flavin to give further details of the extract from the statement that appeared to link Mr Kelly with the Special Branch.
17. On 19 November 2013 there was a further meeting of the EC. The relevant minute of that meeting is as follows:

"643/2013 Mr Noel Kelly, Executive Council Member Investigation into allegations made by Mr John Flavin

Although Minutes of the Executive Council meeting held on Thursday 17<sup>th</sup> October 2013 were moved and seconded as a true record, Mr N. Kelly, Executive Council member, insisted that he could not approve the Minutes and would wish to record his objection to the accuracy of the Minutes, particularly minute No. 589/2013, in as much as he never agreed to him being investigated following the receipt of allegations against him from Mr Flavin. He stated that whilst he was willing to assist the Union, with the help of the Union's Solicitors, if Mr John Flavin ever took legal action against the Union for the alleged blacklisting, he was certainly not prepared to be the subject of any investigation based on unfounded allegations by Mr Flavin or for that matter anyone. He felt that there was a sinister move to expel him from the membership of the Union or from his position as an Executive Council Member but the Executive Council and General Secretary should bear in mind that he had recourse to the Certification Officer.

*The Chairman of the Executive Council and General Secretary reminded him of the discussions they had had with him on Mr Flavin's allegations and the importance of establishing the truth. Mr Kelly had been democratically elected to the position of the Executive Council and the Union would unquestionably respect the decision of the membership. Mr Kelly could rest assured that there was indeed no attempt to remove him either from the Union or from his position on the Executive Council. If anything, the main purpose of carrying out the investigation was to give him the opportunity of clearing his name."*

18. Also on 19 November 2013 my office received from Mr Kelly his registration of complaint form in this matter.
19. On 3 December 2013 Mr Frew attempted to set up a meeting with Mr Kelly on 17 December. Mr Kelly replied on 11 December refusing to meet with Mr Frew on the suggested date, requiring the answer to certain questions and requiring further documents before considering whether to see him on another date.
20. On the 7 January 2014 my office sent Mr Kelly's complaints to the Union for its written response.
21. The EC next met on 16 January 2014. Mr Kelly was asked to leave the meeting whilst the General Secretary gave a report of the correspondence received from the Certification Office. The EC agreed that Mr Frew's investigation should continue.
22. On 21 January 2014 Mr Frew wrote to Mr Kelly and informed him, amongst other things, that there were no further papers that he could provide him with.
23. Mr Frew presented his report to the Union under cover of a letter dated 3 February 2014. In his covering letter, Mr Frew stated that he had refrained from making any recommendations but did have certain observations. The letter continues "*I would suggest that if you find that Bro. Kelly acted against the interests of the Union, then he would be in a precarious position, as he could now be subject to charges under General rule; to date, this has not been the case. But, any actions of this nature could involve the Union in being embroiled in a legal case. The question that must be asked is, if Bro. Kelly broke the rules of the Union in 1992 why was he not charged at that time when the Union were aware of his actions?"* As to the substance of the report, there is no evidence that Mr Frew asked Mr Flavin any questions aimed at elucidating or testing the extract from the anonymous statement in which the allegation in question

was made against Mr Kelly. However, the report does record that Mr Flavin had said that his allegations would go away if a deal could be agreed regarding his pension issue and the shortfall that had arisen from his broken service.

24. The EC next met on 20 February 2014. Mr Kelly was again asked to leave the room whilst his situation was discussed. The minutes of that meeting record that, having considered Mr Frew's report into the allegations against Mr Kelly, the EC decided to take no further action on this matter as there was no evidence to prove that Mr Kelly was involved in the blacklisting of Mr Flavin.
25. On 28 February 2014 the General Secretary wrote to Mr Kelly confirming that the EC had decided to take no further action on the matter of the allegations made by Mr Flavin against him. The General Secretary asserted that the decision to hold an investigation was not only to safeguard the interests of the Union but also to provide Mr Kelly with some form of protection should Mr Flavin take legal action against him.
26. The EC met again on 20 March 2014. Mr Kelly observed that he did not consider that the General Secretary's letter to him of 28 February was satisfactory. Accordingly, later that same day, the General Secretary wrote again to Mr Kelly. In this letter, the General Secretary stated that the decision to take no further action following Mr Frew's investigation was made on the basis that the investigation had found no evidence to prove either that Mr Kelly was involved in blacklisting or any collusion with the Secret Service or the Police.
27. It was only during the course of these proceedings, on 3 June 2014, that the Union sent Mr Kelly a copy of Mr Frew's report.

### **The Relevant Statutory Provisions**

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

#### ***Section 108A Right to apply to Certification Officer***

*(1) A person who claims that there has been a breach or threatened breach of the rules of a trade Union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).*

*(2) The matters are -*

- (a) the appointment or election of a person to, or the removal of a person from, any office;*
- (b) disciplinary proceedings by the Union (including expulsion);*
- (c) the balloting of members on any issue other than industrial action;*
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;*
- (e) such other matters as may be specified in an order made by the Secretary of State.*

### **The Relevant rules of the Union**

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

**Rule 21 Duties and Powers of Executive Council**

1. The EC shall have full power to administer the whole of the rules. The EC shall ensure that minutes of all official meetings held shall be published to the Regional Council on a regular basis and therefore to the wider membership.

**Rule 24 Duties of the General Secretary**

3. The GS shall on the authority of the EC or GC bring or defend or cause to be brought to defend any action, suit, prosecution, complaint or other proceedings in any court or tribunal or before any administrative authority concerning the property, or any right, claim or interest of the Union.

**Rule 25 Disciplinary Powers**

1. The EC shall have power to impose a fine not exceeding £75, suspend from all or any benefits or from holding any office, or exclude from the Union, any member, who, in the opinion of the EC:

- (i) by his or her conduct acts against the interests of the Union; such conduct to include racist or sexist behaviour;
- (ii) refuses to carry out any decision of any governing body of the Union made in virtue of the rules, or disregards such decision, or acts against it;
- (iii) wilfully or otherwise breaks or evades any provision of the rules of the Union;
- (iv) wilfully or otherwise breaks the working rules and conditions of employment applicable to the industry in which s/he is working;
- (v) misappropriates or fraudulently receives any money, funds or other property of the Union, or make any false declaration in regard thereto.

2. The EC shall have power to take all or any of the measures specified in the preceding clause against all or any of the members of any Branch, council, or committee, who in the opinion of the EC is or are guilty of any offence specified in the preceding clause.

3. The powers specified in Clause 1, shall also be exercisable, within their jurisdiction, by any Regional Council or Branch at any specially summoned Branch meeting, acting against any member who, in its opinion, is guilty of any of the offences specified in Clause 1.

Provided always that no decision of a Regional Council or Branch involving the exclusion of any member under this or any other rule of the Union except rule 7, Clause 18, shall become operative until it has been confirmed by the EC, except in the case of full-time officials who shall be subject to discipline by the EC under rule 18, Clause 16.

4. No decision shall be taken by virtue of the provisions of Clauses 1, 2 or 3 of this rule unless and until the requirements as to procedure in rule 26 have been complied with.

**Rule 26 Procedure for Dealing with Charges**

1. The EC, any Regional Council, any Branch, Branch Committee or member of the Union may charge any member with any offence alleged to have been committed against rule 25 or against any other rule of the Union.

2. The EC shall be competent to deal with all charges made under the rules of the Union.

3. Any Regional Council or Branch shall be competent to deal with such charges made under the rules of the Union as come within its local jurisdiction.

4. Any such charges must be made and received by the appropriate council within 28 days of the discovery of the relevant facts.

5. The Secretary of the Union authority before whom the charge is made shall give to the member charged written notice of the charge, specifying the facts on which the charge is based and the rule or rules of the Union under which the charge is made. S/he shall notify in writing the complainant and the member charged of the date and place of the hearing and of their right to address the Union authority and to produce



evidence, including a witness or witnesses, in order to support or rebut the charge or charges. Such notice shall constitute a summons to the complainant and to the member charged to attend at the time and place stated in the notice.

6. The date of the hearing shall be fixed so as to give the member charged a reasonable time to prepare his/her defence.

7. The complainant and the member charged shall notify the secretary of the Union authority before whom the charge is made of the names and addresses of the witnesses they wish to be in attendance. At the request of the complainant or the member charged and in so far as it is reasonable and practicable to do so, the secretary shall summon such witnesses. In so far as he rejects the request, he shall notify the party who has made it accordingly, well in time before the hearing.

8. The Union authority before whom the charge is made shall give to the complainant and to the member charged a full and fair hearing of their case at the time and place stated in the notice. It shall consider such documentary and, in so far as it is reasonably practicable, oral evidence as is produced by both sides.

9. If the complainant or the member charged satisfies the competent authority that s/he has a good reason for not attending, the competent authority may, at his/her request, accept his/her statement or answer to the charge in writing.

10. Alternatively the competent authority may, in the event specified in Clause 9 postpone or adjourn the hearing to a date when the complainant and the member charged can attend. The competent authority may also postpone or adjourn the hearing for any other valid reason, and especially if additional evidence is required. In each case of postponement or adjournment the secretary of the competent authority shall notify the complainant and the member charged in writing of the date to which the hearing has been postponed or adjourned.

11. If the complainant fails without reasonable excuse to attend the hearing the charge may, in the discretion of the competent authority, be dismissed, or the hearing may be adjourned to a subsequent date, to be notified in writing to the complainant. If the member charged fails without reasonable excuse to attend the hearing, the charge may, in the discretion of the competent authority, be proceeded with or the hearing may be adjourned to a subsequent date to be notified in writing to the member charged.

12. Clauses 9, 10 and 11 of this rule shall apply to any postponed or adjourned hearing.

13. If the charge is not proved to the satisfaction of the competent authority, a minute to that effect shall be made, and the charge shall be dismissed.

14. If the charge is proved to the satisfaction of the competent authority, a minute to that effect shall be made and the penalty shall be determined.

15. Whether the charge is dismissed or a penalty is fixed, the decision shall be notified to the complainant and to the member charged in writing through their Branch or Branches. Where the charge is regarded as proved and a penalty has been fixed this written notification shall include a statement of the findings resulting from the hearing, and a notification to the member charged of his/her right to appeal in conformity with rule 27. If the charge is dismissed, the complainant shall be notified in writing of his/her right to appeal in conformity with rule 27.

16. No fines or penalties imposed shall be rescinded except on appeal in conformity with rule 27.

17. Any member seeking to redress a grievance in any manner other than that provided for in these rules before having exhausted the procedure laid down therein shall be liable to be excluded from the Union but nothing in this or any other rule shall be

*construed as placing on any member any restriction in respect of his/her instituting, prosecuting or defending proceedings.*

*18. Nor shall anything in these rules preclude the EC from exercising the Union's legal rights under the civil or criminal law against any officer, member or any other person.*

## **Consideration and Conclusions**

### **Complaint One**

30. Mr Kelly's first complaint is in the following terms,  
*"On or around 24 October 2013 the Union breached rule 24.3 of its rules by the General Secretary instigating an investigation of allegations made against Mr Noel Kelly without the authority of either the Executive Council or General Council."*
31. Rule 24.3 of the rules of the Union provides as follows:

#### ***Duties of the General Secretary***

*24.3. The GS shall on the authority of the EC or GC bring or defend or cause to be brought to defend any action, suit, prosecution, complaint or other proceedings in any court or tribunal or before any administrative authority concerning the property, or any right, claim or interest of the Union.*

### **Summary of submissions**

32. Mr Kelly submitted that the decision of the EC to hold an investigation into Mr Flavin's allegations against him was invalid as he was not present at the relevant time of the meeting that decided to hold the investigation on 17 October 2013. He argued that as he attended the EC that day, the EC could not reach a valid decision without him being present and that accordingly the investigation was not properly authorised within the requirements of rule 24.3. Mr Kelly submitted that the rule needs all the EC members recorded as being present who legally constitute the EC on that day to give authorisation.
33. Mr Cheetham, for the Union, submitted that rule 24.3 does not apply on the facts of this case. He argued that rule 24.3 only requires the authority of the EC or General Council ("GC") to be obtained in order to bring or defend a course of action before a court, tribunal or other administrative authority and the Union took none of these steps in the present case. If he were to be wrong about that, Mr Cheetham went on to submit that the EC had reached a valid decision in this matter with or without Mr Kelly's presence. He noted that no argument had been advanced that the EC had not been quorate. He further maintained that, in any event, Mr Kelly was present at the EC at the time it decided to appoint Mr Frew to investigate the allegations. He argued that I should accept the evidence of Mr Vernon on this point, supported by Mr Kelly's comment in his registration of complaint form that he had repeated his agreement to assist the Union "*in front of the EC when the matter was discussed*".

### **Conclusion Complaint One**

34. Rule 24.3 requires the authority of the EC or GC in certain restricted circumstances. Their authority is required if the General Secretary is to bring or defend any action, suit, prosecution, complaint or other proceedings in any court or tribunal or before any administrative authority. The thrust of this rule is that the EC or GC must authorise the Union's engagement with an outside body in relation to proceedings of a legal nature. On the facts of this case, the EC had before it a document which gave rise to certain

legitimate concerns. The EC did no more than authorise an internal investigation to find out if those concerns were well founded or not. The factual situation before the EC did not concern any action, suit, prosecution, complaint or other proceedings before a court, tribunal or other administrative authority. The word "complaint" in this context refers to a legal complaint. Further, the complaint must be one made to an adjudicatory body. Accordingly, I find that rule 24.3 is not engaged on the facts of this case and Mr Kelly's first complaint to me must be dismissed.

35. I have found in paragraph 11 above that Mr Kelly was not present at the time the EC decided to hold an investigation into the allegations that Mr Flavin had made against him. However, I do not accept Mr Kelly's submission that the effect of his absence from that part of the meeting is that the decision to conduct an investigation was invalid. I find that this decision was made by a quorate EC (the contrary not having been argued before me) and was a decision within the powers of the EC. When the EC has legitimate concerns about a matter, it would be curious if it were not able to investigate whether its concerns were well founded. There is no need for an express rule to this effect having regard in particular to the general administrative powers of the EC in rule 21.1.
36. For the above reasons I refuse Mr Kelly's application for a declaration that on around 24 October 2013 the Union breached rule 24.3 of its rules by instigating an investigation of allegations made against him without the authority of either the EC or GC.

## **Complaint 2**

37. Mr Kelly's second complaint is as follows  
*"On or around 24 October 2013 the Union breached rules 25 and 26 of its rules by instigating an investigation of allegations made against Mr Kelly without following the disciplinary procedures which are provided in these rules."*
38. Rules 25 and 26 are set out above. Rule 25 sets out the acts of misconduct which may result in a charge being made and the sanctions which may be imposed if a charge is upheld. Rule 26 sets out who may bring a disciplinary charge against a member and the disciplinary procedure.

## **Summary of Submissions**

39. Mr Kelly relied upon his skeleton argument in respect of this complaint. He argued that the Union had acted against its rules when it accepted Mr Flavin's grievance. He considered that Mr Flavin should have raised a charge against him if he had allegations. Mr Kelly noted that there is no express rule that allows the EC to hold an investigation and that, if it had wanted, the Union could have charged him and then adjourned the hearing to obtain further information under rule 26.10. Mr Kelly considered that the so called investigation agreed by the EC was in reality part of the disciplinary process with the intention of setting the scene for his removal from the EC or expulsion.
40. Mr Cheetham, for the Union, submitted that rules 25 and 26 do not apply on the facts of this case as they only come into play once a charge has been made against a member and no charge was ever made against Mr Kelly. He maintained that the decision of the EC to investigate Mr Flavin's allegation was no more than an initial

response to extremely serious allegations which, in the event, led to no action being taken against Mr Kelly.

### **Conclusion – Complaint Two**

41. Rule 25 sets out the acts of misconduct which may result in a charge being made against a member and the sanctions which may be imposed if a charge is upheld. Rule 26 sets out who may bring a charge under the disciplinary procedure. On the facts of this case, the EC had merely agreed to investigate a matter of concern to it. No charge was formulated. No disciplinary process was initiated. Accordingly, rules 25 and 26 were not engaged and this complaint is misconceived.
42. Although I find that this complaint is misconceived, I accept that Mr Kelly genuinely feared that the investigation was being used as part of a process for removing from the EC or expelling him. Mr Kelly stated that he believed this to be the case having regard to him being ‘a thorn in the side’ of those in power in the Union, the expulsion of other dissenting voices on allegedly dubious grounds and his view that Mr Flavin’s documentation was “*a clear catalogue of nonsense which any reasonably minded person would have ignored*”.
43. For the above reasons I refuse Mr Kelly’s application for a declaration that on or around 24 October 2013 the Union breached rules 25 and 26 of its rules by instigating an investigation of allegations made against him without following the disciplinary procedures which are contained in those rules.

### **Complaint Three**

44. Mr Kelly’s third complaint is as follows:  
*“On or around 24 October 2013 the Union breached rule 26.17 of its rules by accepting a grievance, or grievances, raised by a member of the Union, Mr Flavin, although the grievance(s) were raised by Mr Flavin outside the procedures in the Union’s rules. In instigating an investigation of Mr Kelly, arising directly from the allegations made by Mr Flavin, the Union ignored rule 26.17.”*
45. Rule 26.17 of the rules of the Union provides as follows:  
*26.17. Any member seeking to redress a grievance in any manner other than that provided for in these rules before having exhausted the procedure laid down therein shall be liable to be excluded from the Union but nothing in this or any other rule shall be construed as placing on any member any restriction in respect of his/her instituting, prosecuting or defending proceedings.*

### **Summary of submissions**

46. Mr Kelly submitted that Mr Flavin’s letter to the General Secretary of 19 August 2013 was in effect a grievance about him but that it had not been submitted correctly. He considered that, as the rules do not contain a grievance procedure, Mr Flavin should have made a charge against him under rule 26.1 if he were to raise such serious allegations. In Mr Kelly’s submission, the Union breached rule 26.17 by accepting Mr Flavin’s grievance and setting up an investigation into his conduct. Further, the Union did not charge Mr Flavin for acting outside the rules and, by omission, had broken rule 26.17.

47. Mr Cheetham, for the Union, submitted that it was irrelevant whether Mr Flavin's letter to the General Secretary of 19 August 2013 could be categorised as a grievance. In his view the letter was more appropriately categorised as a letter before action as it claimed compensation. Nevertheless, he argued that rule 26.17 gave the Union a discretion whether to exclude a member in certain circumstances and did not provide Mr Kelly with any basis upon which to make this complaint. Mr Cheetham observed that the discretion given the Union by rule 26.17 is whether or not to exclude a person who has allegedly brought a grievance wrongly and does not confer any rights on the person in Mr Kelly's position, namely the person who is the subject of the grievance.

**Conclusion- Complaint Three**

48. Rule 26.17 provides the Union with a discretion to exclude a member in certain circumstances. It is not a rule that is capable of being broken in the manner alleged by Mr Kelly. As there is no grievance procedure in the rules of the Union, it would seem odd if a member with a concern could not inform the General Secretary of that concern, which may or may not be taken further. On Mr Kelly's apparent interpretation of rule 26.17 such a member would have the option of charging another member under rule 26.1 or doing nothing. That is an interpretation which is not supported by either the words of the rule or commonsense. In my judgement rule 26.17 is not engaged on the facts of this case and Mr Kelly's complaint is misconceived.

49. For the above reasons I refuse Mr Kelly's application for a declaration that on or around 24 October 2013 the Union breached rule 26.17 of its rules by accepting a grievance raised by Mr Flavin despite the grievances being allegedly raised outside the procedures of this rule.



**David Cockburn**  
**The Certification Officer**

