

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

**Mr Alec McFadden**

**v**

**Unite the Union**

**Date of Decision**

**3 October 2017**

**REASONS FOR DECISION ON PRELIMINARY ISSUES**

**INTRODUCTION**

1. On 26 October 2016 the Certification Officer of Trade Unions and Employers' Associations received a complaint made under section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 made on behalf of Mr Alec McFadden ("AM") that, to put it broadly for the present, the decision of his trade union, Unite the Union ("Unite") to remove him from office within Unite, to bar him from holding office within Unite and to require him to attend one of Unite's Dignity and Respect Training Courses was made in breach of Unite's rules. Unite maintains that it acted within its rules. Following correspondence with the office of the Certification Officer, AM confirmed his complaints and these are appended to this decision.
2. I have been appointed as an Assistant Certification Officer ("ACO") and have been asked to hear and resolve AM's complaints.
3. I was provided with a bundle of documents containing 309 pages. Further documents have since been added. Having read those documents, I decided that a hearing for directions was necessary to identify the issues between the parties and to consider whether there were any issues which could and should be determined as preliminary issues. The hearing for directions took place on 4 July 2017; and the outcome was set out in a document entitled "*Preliminary Hearing Decision and Directions Order*" (PH/1/17-18) dated 24 July 2017. As that document records, it was agreed between the parties after discussion, that I should determine three issues as preliminary issue. Those issues were:-

- i. whether the alleged misconduct occurred at a location or in the circumstances set out in the relevant part of the policy
  - ii. whether on the proper construction of rule 27.1.7 of Unite's rules the words "in the workplace" should be eliminated or treated as having no meaning
  - iii. whether the applicant was charged with misconduct only under rule 27.1.7 or under rule 27 generally and, if the latter, could he be found guilty of breach of the rules although the alleged misconduct did not occur in the workplace.
4. In respect of those issues I gave the following directions: –
- (a) It is directed that the preliminary issues above shall be resolved by the ACO without any further hearing
  - (b) the parties shall provide to the ACO written submissions as to those issues, together with all authorities on which they propose to rely, with relevant passages properly identified, by 4pm on 4 August 2017
  - (c) The ACO shall then proceed to make his decision on the preliminary issues and provide it to the parties

## **THE DISCIPLINARY PROCEEDINGS**

5. The first notification to AM of any investigation relating to his conduct is to be found in the letter from Ms Hutchinson, Regional Women's and Equalities Officer of Unite, dated 13 November 2015 at page 42 of the bundle. The letter said:

*"I regret to inform you that I have received a formal complaint from one of our members about your action during the March against Austerity from Thurs 1st October to Sunday 4th October.*

*Given the fact that the complaint was in breach of Unite's Dignity and Harassment Policy it has been referred to the Regional Secretary and as such is in need of investigation.*

*You will hear from the investigating officer in due course and informed about this process and I am sure will cooperate as necessary."*

6. On 25 November 2015 Mr McIntosh, Deputy Regional Secretary of Unite, wrote to AM (p53) saying that the Regional Secretary had received correspondence regarding a formal complaint against AM for breach of Unite's Dignity and Harassment Policy and that the complaint would be subject to a Rule 27 investigation. On 17 December Mr McIntosh again wrote to AM (p59) informing him that an investigation under Rule 27 had been arranged as a result of a formal complaint against him for alleged breach of that policy and requesting him to attend an interview on 6 January 2016. The letter enclosed a copy of the policy.

7. Unite formed an investigation panel pursuant to rule 27. 8 of its rules. That panel produced what is described as an “Investigation Report... Rule 27 Investigation”; the panel decided that there was a case to answer in relation to the misconduct of which AM was accused and that they considered that the alleged misconduct “*is a breach of Unite’s Policy on Harassment, Dignity and Respect*” and recommended that the matter should be referred to a disciplinary hearing under rule 27 (pp70-74).
8. AM was informed that the panel had so concluded on 14 March 2016 (p85)
9. Unite then formed a Disciplinary Panel, described as a Rule 27 panel (p96). The panel interviewed witnesses; the nature of the evidence before the panel is not relevant for present purposes. In its report, dated 15 April 2016, the panel concluded that in all probability AM had committed the misconduct complained of. The panel decided that it should impose the penalties described in paragraph 1 above. It did not make any statement in its report as to under which sub-rule of rule 27 it was purporting to act.
10. AM appealed, as he was entitled to do under the rules, against the Disciplinary Panel’s ‘conclusions’. The Appeal Panel upheld the previous decision with written reasons dated 30 August 2016 (pp124-125). The appeal panel too did not make any statement as to under which sub-rule of rule 27 it was purporting to act.
11. Despite the references throughout the decision chain to rule 27, there was no express statement of the particular sub-rule or sub-rules under which AM was charged or was found guilty. However it was made clear throughout that AM was being subjected to the disciplinary procedures on the grounds that he had acted in breach of the policy.
12. It should be noted that, when Unite provided to the Certification Office its first response to AM’s complaint which instituted the present proceedings, their response said (pp265-8): –

*“3. Mr McFadden was advised that a complaint had been received concerning a breach of Unites Dignity and Harassment policy by Sharon Hutchison, Regional Women’s and Equalities Officer on 13 November 2015.*

*4. Unite’s dignity and harassment policy is expressly incorporated into the Union rulebook pursuant to rule 27.1.7 which states therein*

*“A member may be charged with:  
27.1.7 Breach of the Union policies on diversity bullying and harassment in the workplace, which will include cyber bullying and harassment”*

and, at paragraph 23h of its response the union said:-

*“The panel found that the Claimant had committed an act of misconduct which breached the Union’s policy on dignity and harassment. This is expressly incorporated into the Rule Book pursuant to Rule 27.1.7”*

## THE FACTS

13. It is not necessary for present purposes to set out the history which led to the disciplinary proceedings against AM in detail; a short summary should suffice.
14. AM has for many years been an active and well-known trade unionist and an active member of the trade union now known as Unite. What office or offices he held within Unite is not clear from the papers before me. Since 1996 he has been the manager of the Salford Unemployed and Community Resource Centre. He is also a senior officer in the Merseyside County Trade Union Council. On 3 October 2015 he was involved with others in the organisation of an anti-austerity March which, he claims – and for present purposes it is not in dispute – was supported by various Trade Union Councils and other organisations, including trade unions. It was not a Unite event. After the March was over, AM and others had arranged for participants who wished to do so to meet for a meal at a restaurant in Eccles. AM was, he says, compere for the evening which was attended by the Member of Parliament for Salford, the Mayor of Salford, the branch secretary of Unison and other local councillors, union representatives and the press.
15. On 26 October 2015 a member of Unite, “MG”, made a formal complaint to Ms Coleman of Unite that, as she was moving from the table at which she and AM had been sitting, AM slapped her on the bottom. AM has always denied this allegation. The disciplinary proceedings, described above, were based on MG’s complaint.
16. In these proceedings, AM makes many complaints that the investigatory panel, the disciplinary panel and the appeal panel dealt with the issues before them in an unjust and unfair manner, showed bias and acted in breach of the principles of natural justice which, he submits, are implied into Rule 27. Unite does not accept those criticisms. A two-day hearing before me had been fixed for the issues raised by AM’s criticisms of the disciplinary process to be resolved, with the help of such witness evidence as the parties wished to call; but before such a hearing took place, I was required, as agreed between the parties, to determine the three preliminary issues described in paragraph 3 above, on the basis of the documents provided to me and the written arguments of Mr Bakhsh on behalf of AM and Mr Potter on behalf of Unite, provided to me together with the authorities which have helpfully accompanied them. Mr Bakhsh’s argument is, curiously, dated 22 June 2017; having caused enquiries to be made as to that, I have been assured that that date is in error and that the document is the written argument which AM and Mr Bakhsh wish me to have for the purpose of the preliminary issues.
17. By 3 October 2017 I had reached clear conclusions on each of the three preliminary issues. My conclusions are that the preliminary issues must be resolved in favour of AM. It follows from those conclusions that the two-day hearing, fixed for 9 and 10 October, was unnecessary and should be vacated. So that the parties would know that as soon as possible, my decision was published to the parties on that day, with reasons to follow.

18. My decision was in the following terms:

*“DECISION OF THE ASSISTANT CERTIFICATION OFFICER ON  
APPLICATION BY MR ALEC MCFADDEN MADE UNDER SECTION 108A OF  
THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT  
1992*

*Mr Alec McFadden  
v  
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*The Assistant Certification Officer, having considered the three preliminary issues set out in the decision in these proceedings dated 24 July 2017, has concluded that the disciplinary proceedings by Unite the Union against Mr McFadden and the consequent penalties imposed upon Mr McFadden were in breach of the rules of the union. He therefore makes a declaration to that effect, pursuant to sections 108A and 108B of the 1992 Act.*

*The Assistant Certification Officer will give his reasons for his decision in writing shortly; however this decision is provided in advance of those written reasons so as to make it clear to the parties that the hearings in these proceedings fixed for 9 and 10 October 2017 are now unnecessary; and he directs that those hearings be vacated.*

*It is not clear to the Assistant Certification Officer whether Mr McFadden seeks any remedy under section 108B of the 1992 Act other than the above declaration. If he does, he must set out what remedy or remedies he seeks in writing to the Assistant Certification Officer and to the union by 17 October 2017; and the union shall respond thereto in writing to the Assistant certification Officer and to Mr McFadden by 31 October 2017.*

*Jeffrey Burke QC 3 October 2017*

## **RULE 27 OF THE UNION’S RULES**

19. It is necessary to set out rule 27 of the rules of Unite in full. It is in the following terms:–

***“RULE 27: MEMBERSHIP DISCIPLINE***

*27.1 A member may be charged with:*

*27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.*

*27.1.2 Being a party to any fraud on the Union or any misappropriation or misuse of its funds or property.*

*27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.*

*27.1.4 Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, religion, age, gender, disability or sexual orientation.*

*27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers.*

*27.1.6 Obtaining membership of the Union by false statement material to their admission into the Union or any evasion in that regard.*

*27.1.7 Breach of the Union's policies on diversity, bullying and harassment in the workplace, which will include cyber bullying and harassment.*

*27.2 Disciplinary Hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice.*

*27.3 A charge under this rule may be heard by a Branch, Branch Committee (where so determined by the Branch), Regional Committee or the Executive Council. The Executive Council may delegate to a subcommittee of the Executive Council. It would be usual practice that disciplinary charges would be heard at branch level in the first instance. Disciplinary charges deemed to be of a serious nature may be initiated by the Regional committee or Executive Council.*

*27.3.1 Serious allegations of breach of Clauses 27.1 .1. to 27.1.7 may be referred directly to the General Secretary. The General Secretary will appoint a senior employee of the Union to conduct an investigation which may lead to disciplinary charges being laid on behalf of the Executive Council.*

*27.3.2 Allegations of serious breaches of clauses 27.1 .1 to 27.1.7 which are subsequently shown to be vexatious, malicious or defamatory may be considered a breach of Rule and liable to be referred to this disciplinary procedure.*

*27.4 The Executive Council or the relevant Regional Committee may suspend a member charged under this rule from holding any office or representing the Union in any capacity pending its decision. A member shall be given written notice (or, if the member was informed verbally confirmation in writing) of any such suspension as soon as is reasonably practicable. In cases of a serious nature, as a precautionary measure, a member under investigation prior to disciplinary charges being laid may be suspended from holding office or representing the union in any capacity.*

*27.4.1 A member under disciplinary investigation or charged with a disciplinary offence, including workplace representatives or branch officers suspended from holding office, may not attend:*

*Meetings of his/her own branch;*

*Meetings of other branches of the Union; or,*

*Constitutional committee meetings of the Union Other than as part of the disciplinary process as set out in this Rule.*

*27.4.2 If allegations against a member are proven to be unfounded they will be restored in good standing. If appropriate, their credentials will be restored*

*27.5 The range of disciplinary sanctions shall include the following:*

*27.5.1 censure;*

*27.5.2 withdrawal of workplace credentials;*

*27.5.3 removal from office;*

*27.5.4 barring from holding office and*

*27.5.5 expulsion.*

*27.6 The full range of disciplinary sanctions shall be available to the Executive Council and Regional Committees; however the range of disciplinary sanctions for other bodies shall be limited to the following :*

*27.6.1 Branch, shall have the power to censure;*

*27.7 Appeals*

*27.7.1 A member shall have the right to appeal against any disciplinary sanctions.*

*27.7.2 In the case of a sanction imposed by a Branch, or Branch Committee, the appeal shall be to the Regional Committee, whose decision shall be final.*

*27.7.3 In the case of a sanction imposed by a Regional Committee the appeal to shall be to the Executive Council, whose decision shall be final.*

*27.7.4 In the case of disciplinary action initiated by the Executive Council the appeal shall be to an Appeals Committee elected from the Policy Conference, whose decision shall be final. Such an Appeals Committee shall be constituted on the basis of at least one delegate from each Region, under a procedure to be agreed by the Executive Council. There shall be an eligibility criterion to serve on the Appeals Committee of at least 5 years continuous membership of the Union.*

*27.8 An employee may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union. Complaints against employees shall be investigated under the Members' Complaints Procedure agreed by the Executive Council and if disciplinary action is deemed appropriate this shall be executed under the procedures negotiated with employees' representative bodies for that purpose."*

20. There has been no suggestion that any issue as to the construction or interpretation of rule 27 is assisted by the words of any other rule therefore I have not set out any other rule in this decision.

## THE POLICY

21. Only one relevant policy exists. It is called “*Policy on harassment dignity and respect*” and is issued in the form of or at least has at its head a statement from Unite’s general secretary. In order to avoid any suggestion of selectivity, it is set out in full; it is in these terms: –

**“Unite the Union  
Policy on harassment dignity and respect**

**Statement from the General Secretary**

*Unite is founded on principles of dignity and respect. Our Union is proud of its industrial and democratic structures which have been put in place to ensure our union's active members can play a full part in Unite's life. This policy on harassment sets out our commitment to ensuring the diversity of our union is respected, and that all feel welcome and able to participate fully. It also confirms the procedures and standards required to put this commitment into practice.*

*Len McCluskey  
General Secretary*

**Standards and Procedures**

*All members, employees and guests attending conferences, meetings, courses, or other events organised by the Union, on Union property, or attending events on behalf of the Union are expected to respect the Union's policy against harassment and to treat others with dignity and respect. These standards apply throughout 'free time' and off event premises, as well as during formal event time to ensure that harassment at any time associated with an event does not undermine full participation or cause harm*

*The union is committed to seeking to create an environment free from harassment, and where all are treated with dignity and respect. If you feel that you have been harassed, please see procedures below.*

*If you feel that anything you have done or said may have caused offence you should be aware of the procedures below, and immediately change the way you behave and, where appropriate, apologise.*

**What is harassment?**

*Harassment is unwanted conduct that violates a person's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment. There are different forms of harassment, including sexual harassment, racial harassment, harassment on grounds of disability, age, religion or belief/non-religion or non-belief, and homophobic bullying/harassment on grounds of sexual orientation or trans status. It may be physical (unnecessary touching, gestures even assault), verbal (unwelcome remarks, personal questions, threats or malicious 'jokes'), or non-verbal (offensive literature or pictures, notes or texts, being ignored or excluded), and may include repeated incidents, which, if viewed in isolation may initially appear minor, or one single serious incident.*

*Please note that behaviour that is offensive to one person might not be to another. Also, a lack of intention to harass does not prevent conduct being harassment.*



### **The Union's commitment**

*The Union endeavours to make sure that all members are aware of what harassment is and that it is a disciplinary offence for both members and employees.*

*Our Officers and staff are trained to assist a complainant with an informal resolution (see below) and can also assist with a complaint under the appropriate formal procedure. Our trained harassment listening support network can also provide listening support as appropriate.*

### **If you suffer harassment at a union event**

*Please be assured that the union takes this very seriously, and is committed to dealing effectively and quickly with any complaints that may arise. It is your decision whether you want to take a complaint informally or formally or through both routes. It is advisable to make notes of any incident of harassment, who the perpetrator is, the nature of the harassment, where and when it happened and any witness to the harassment.*

### **Harassment of Unite employees**

*While the union has a clear expectation of the standards which should be followed by all its employees, it is recognised that they themselves sometimes experience poor behaviour and abuse from others. This is clearly unacceptable for all the same reasons. On any occasions when such behaviour is demonstrated, all reasonable steps will be taken by an employee to encourage constructive and respectful dialogue. However, no employee will be expected to have to tolerate unacceptable behaviour and the union's management will support any employee who is put in this position, to the extent of pursuing appropriate action if necessary.*

### **Informal Resolution**

*Often individuals are unaware that their behaviour has caused offence. If you have experienced harassment and you feel able, you can deal with the issue informally by making it clear to the harasser that the offending behaviour is unwanted, unacceptable and must stop immediately. You can do this in writing or ask a colleague or Regional Women's/Equalities Officer to accompany you as a witness if you do this in person.*

*If you are unsure whether to raise it with the harasser directly, you may find it helpful to talk the matter through confidentially with a Regional Women's Equalities Officer. Anything you raise with the Regional Women's/Equality Officer at the informal stage will be treated in strictest confidence.*

### **Formal Complaint**

*You can make a formal complaint to any Officer or staff member who is responsible for organising an event. In the case of a complaint against a member or members, the formal procedure is under the Union's Rules. In the case of a complaint against an employee, the relevant staff or Officer's disciplinary procedure would apply.*

*Once a formal complaint is made, the Union reserves the right to investigate and take disciplinary action even if the complaint is withdrawn, whilst at all times ensuring that such action does not adversely impact on the complainant.*

*Both parties are entitled to representation at all stages of the formal procedure.*

*Every care will be taken to ensure that no one is victimised because they have made, or supported someone who has made a complaint of harassment.*

*Allegations found to be made maliciously and with malicious intent may be the subject of disciplinary action against the complainant.*

*In some circumstances, the union may notify a member's employer if they have breached the harassment policy. If the person accused of harassment is neither an employee nor a member of the union – the Union will, where appropriate, expect the individual's own employer to act on the complaint and report on the outcome.”*

22. In the last paragraph of the policy, headed “Formal Complaint”, the mode by which a complaint of a breach of the policy can be made is set out. It has not been argued that any other policy exists or has existed to which rule 27.1.7 might apply. In his written argument Mr Bakhsh has suggested that there is no clear evidence as to the date of the policy which is in the bundle; but throughout the directions hearing and before it, there has been no suggestion that the policy document which is in the bundle and is set out above is not the relevant policy. No issue of fact as to which is the correct policy has been raised; if any such issue had been raised I would have had to have given directions for that issue to be resolved. I am not going to permit a wholly new point, which appears to undermine the agreed process of resolution of the preliminary issues without further evidence, to be raised. It should be noted that, at paragraph 1 (a) of my order arising from the directions hearing, it is specifically recorded that the policy to which the preliminary issues were directed was that set out in the bundle and set out above.

## **THE FIRST PRELIMINARY ISSUE**

23. It may be helpful to repeat the first preliminary issue; it is “whether the alleged misconduct occurred at a location or in the circumstances set out in the relevant part of the policy”
24. As is set out in the paragraph entitled “Standards and Procedures” on the first page of the policy, the duty to respect the policy is imposed on members, employees and guests attending conferences, meetings, courses, or other events organised by the union, on union property, or attending events on behalf of the union. Rule 27.1.7 appears to apply, on its words, to a breach of the policy which takes place “in the workplace”; those words do not limit the scope of the policy itself. It is important, though, that I should state at this point that, at the directions hearing, it was expressly conceded by Unite that the incident of which MG complained did not take place “in the workplace”. Unite therefore argue (1) that rule 27.1.7 should be construed or understood as though the words “in the workplace” were eliminated or treated as having no meaning and (2) that in any event it is not necessary for the incident to have fallen within the words of rule 27.1.7 because AM was not charged only with an offence against that sub-rule. Hence the second and third preliminary issues. The first preliminary issue is directed at a different question, whether the conduct complained of took place within the words of the relevant paragraph of the policy, as set out above.

25. I need to say before turning to my resolution of the first preliminary issue – and it is relevant to my resolution of the second and third issues as well – that, although both parties in their written argument make reference to the role and content of natural justice in the disciplinary processes of a trade union, it does not appear to me that it is relevant to consider either the role or the content of natural justice in the context of Unite’s disciplinary processes for the purpose of the resolution of the preliminary issues. If I were to have resolved those issues in such a way that a full hearing would be required, AM’s criticisms of the way in which those processes were applied in his case would necessarily involve consideration of the principles of natural justice and as to whether there has been any breach of those principles. However, in my judgement, resolution of the preliminary issues is not informed by the principles of natural justice
26. In their written arguments both parties have sought to rely upon established principles of the construction of trade union rules; those principles are, in my view, of more relevance to the second and third preliminary issues than to the first; but I have borne them in mind in considering each of those issues; and it will be helpful if I set out, briefly, what those principles are, as I see them. Both parties have referred to the well-known passage in the judgement of Warner J in *Jacques v AUEW [1986] (ICR 683, at 692B)* which is as follows: –

*“The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally like a statute, but so as to give them a reasonable interpretation which accords with what in the court’s view they must have been intended to mean, bearing in mind their authorship, their purpose, and the readership to which they are addressed”.*

27. That passage is based on substantial authority and has been followed and applied in more recent decisions, and I accept and propose to apply it as appropriate in the present case. I accept, too, the statement of principle relating to the construction of contracts set out at p 1043, paragraph 13-051 of *Chitty on Contracts Volume 1*, in these terms: –

*“The current approach of the courts to the construction contracts is ‘neither uncompromisingly literary nor unswervingly purposive’ The instrument must speak for itself, but the words used must, as stated by Lord Hoffman, be understood to bear the meaning which they would convey to a reasonable man having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.*

I have been referred in Mr Potter’s argument to *The Interpretation Of Contracts, 6th Edition* by Sir Kim Lewison, the relevant parts of which do not differ from the principles which I have set out.

28. However, in relation to the first preliminary issue, neither party has in its written argument proposed that the relevant words of the policy should have any meaning other than their ordinary and natural meaning, whether because the policy is a trade union document and plays a role in the union’s rules or for any other reason;

and therefore I approach this issue on the basis of considering the agreed facts, as set out above, and the relevant words in their ordinary and natural meaning

29. There is no doubt that the policy applied, in general terms, to AM. It applies to members, employees and guests; AM was not an employee of Unite; but he was a member of Unite.
30. The policy applied to AM as a member when he was attending a conference, meeting, course or other event organised by the union or attending an event on behalf of the union. If it were essential on the facts of this case to make a decision as to whether the words “on union property” limit the preceding words or create a second set of circumstances in which the policy would apply to members, I would decide in favour of the first alternative. The comma after “by the union” points against that view; but those attending conferences etc elsewhere than on union property would fall within the second set of circumstances in which the policy would apply. The two sets of circumstances are comprehensive, the first embracing events etc on union property and the second embracing events etc on behalf of the union but not on union property. However I do not need to rely on that construction in order to reach my conclusion that the circumstances in which the alleged misconduct occurred were not those of a conference etc organised by the union (whether or not on union property). What was taking place when the alleged misconduct occurred was not organised by the union. Unite were, of course, concerned in and supportive of the march against austerity; but on the evidence before me it was organised by Trade Union Councils, and not by Unite. Unite is a separate body from Trades Councils in general or from any one such Council individually. Mr Potter in his written argument states that the march was organised by Trades Councils and funded by the North West Regional Trade Unions Congress by way of a development grant made payable to the County Association Trade Union Council; that is consistent with the evidence before me. There is no evidence that the meal was organised by or paid for by Unite as opposed to by that Congress or by Trades Councils or a Trade Council.
31. Nor is there evidence that AM was attending the meal on behalf of Unite. Mr Potter’s skeleton says that AM was attending the event as President of a Trade Union Council and as a trade union member; but it is not suggested that he was attending on behalf of Unite.
32. For these reasons my answers the question posed by the first preliminary issue is that the alleged misconduct did not occur at a location or in the circumstances set out in the relevant part of the policy.

## **THE SECOND PRELIMINARY ISSUE**

33. Rule 27 of Unite’s rules is set out in full at paragraph 19 above. It is AM’s case that Unite, in bringing against him a charge of misconduct in breach of their policy on harassment, dignity and respect, acted under rule 27.1.7. It can immediately be seen that that sub-rule applies, on its face, to breaches of the policy “in the workplace”. When the directions hearing on 4 July 2017 began, I had anticipated that there would be an issue as to whether the misconduct alleged took place “in

the workplace”. However, during the course of that hearing, Mr Potter conceded, as set out in paragraph 24 above, on behalf of Unite that the misconduct alleged did not take place “in the workplace”. It was Unite’s contention, he said, that the rules should be construed as if the words “in the workplace” were not present; and that argument is taken up in his written submissions.

34. The argument put forward on behalf of Unite is that the policy is designed to protect not only employees but also members and guests of Unite who may be on the union’s premises and who, when they are on the union’s premises, are entitled to be free from harassment or other actions which the policy is intended to prevent. Rule 27 as a whole is entitled “Membership Discipline”; it forms part of a set of rules which is intended to constitute part of the contract between Unite and its members; and the purpose of rule 27.1.7 is to make it a disciplinary offence for a member to break the terms of the policy for example in the manner alleged in this case; but members may act in a way which constitutes a breach of the policy when not at a workplace – for example at a branch meeting or on a demonstration or march; the argument perhaps might have added “or in a restaurant after a march”. It is said that no other rules relating to members are confined to the workplace; it is the union’s policy to promote equality and fairness for all. Rule 2.1.6 of Unite’s rules provides that one of the stated objects of Unite is:

*“to promote equality and fairness for all, including actively opposing prejudice and discrimination on grounds of gender, race, ethnic origin, religion, class, marital status, sexual orientation, gender identity, age, disability or caring responsibilities”*

35. Therefore, it is suggested, I should treat the words “in the workplace” as an aberration and treat them as if they were not present in rule 27.1.7. Unite submits that I am able to take that approach on the basis that the ordinary meaning of the words used could not have been intended by the parties and produces an arbitrary or irrational result; see *Chitty* cited above.
36. While I accept, of course, the principles to which I have been directed, Unite has not referred me to any authority which illustrates the application of those principles in such a way not so as to differ from the ordinary meaning of the words in issue but so as entirely to remove words which appear on the face of the sub-rule to have been placed within it for a purpose. Mr Potter’s written argument accepts that the more extreme the interpretation advanced, the more cogent must be the underpinning evidence and that the construction put forward might appear to contradict the ordinary meaning of the words of the relevant sub-rule. He may have intended the first of those two points to support the construction which he advances; but in my judgment, if words which are not of themselves incomprehensible or repugnant to the contract as a whole are used in the rules of a union, there must be strong or highly persuasive evidence and/or submissions if a court or other judicial body is to treat them as if they were simply not there.
37. There is no external evidence before me to support the suggestion that the words “in the workplace” are an aberration. I am told in Mr Potter’s written argument that rule 27.1.7 was added to the rules in 2015; but there is no evidence as to how or why the words in issue came to be included in the new sub-rule, whether there

was any debate about those words or what they were or were not intended to achieve. I do not criticise Unite for not putting forward such evidence; there may well be, even in modern times, doubts about the extent to which there may have been problems over admissibility; but the formal position is that, for whatever reasons, I do not have any persuasive evidence that the words at issue were the result of an aberration or error. It is not suggested that they are the result of a printing error or “typo”.

38. Furthermore, I am not persuaded that the words are inconsistent with the purpose or intent of the rules. While I do not doubt that the policy is intended to provide protection to members, employees and guests against harassment and the like at events organised by the union or at events which they attend on behalf of the union, it does not follow that it was the intention of Unite and of its members to allow charges of misconduct to be brought against members for acting in breach of the policy when they were not at their workplace. The existence of the policy as an important measure of protection for members, employees and guests does not necessarily bring the consequence that any member who breaches the policy at any location must be open to disciplinary processes under rule 27.1.7.
39. In my view there may have been a practical purpose behind the use of the words in issue. Union meetings and events may, of course, take place at a workplace i.e. the place at which members of the union are employed or work other than under a contract of employment. There may also be union meetings and events which take place at a location which is not the workplace of any of the members. I can see no reason why it may not have been decided or intended that the new sub-rule, which introduces a specific route of disciplinary process for breaches of the policy, with the prospect at the end of such a process of severe penalty, should not have been confined in its effect to events or occurrences at the workplace of a member rather than at other locations.
40. Mr Bakhsh has referred to the speech of Viscount Dilhorne in *Porter v National Union of Journalists* [1980] IRLR 404 in which he said, at paragraph 38: –

*“In construing these rules I adhere to what I said in British Actors Equity Association v Goring [1978] ICR 791, namely that different canons of construction to those applied to any written document are not to be applied to the rules of a union. I regard it as our task to construe them so as to give them a reasonable interpretation which accords with what in our opinion must have been intended. The more imprecise the language the greater may be the difficulty in deciding what was intended. I agree with my noble and learned friend Lord Wilberforce that the rules must not be construed as if drafted by parliamentary draughtsmen and that custom and practice may operate to moderate a union’s rules as they operate in practice... But custom and practice, while it may moderate the operation of a rule, cannot in my opinion entitle a union to act in conflict with it.”*

41. I accept that my task is to construe rule 27.1.7 so as to give it a reasonable interpretation which accords with what, in so far as can be ascertained, was intended. The words at issue here are capable of a reasonable interpretation, on the basis that discipline to enforce the policy was only to be applied to members if the breach took place in the primary location of the relationship of any worker with

his trade union, namely in the workplace. It may be that, as a result, some breaches of the policy by members may fall within the words of the policy but may not be such as to attract potential discipline; but I do not see anything necessarily aberrant or unacceptable in that, in terms of the operation of the sub-rule.

42. There is no suggestion that there has been any custom or practice which would support the construction which Unite seek to put on rule 27.1.7.
43. There is a further point which has to be considered. It is Unite's contention that the incident alleged against AM was – or at least could be – the subject of disciplinary processes under sub-rules 27.1.1, 27.1.4 and 27.1.5, as conduct which was contrary to the rules or a duty or obligation imposed on AM by the rules, as conduct inciting, espousing or practising discrimination or intolerance or as conduct which brought injury or discredit upon a member of the union, namely MG. Those provisions are not subject to any limitation such as that imposed in rule 27.1.7 by the words "in the workplace". If that is correct, the argument that those words need to be removed to enable a disciplinary process to be instituted against members who act contrary to the policy but not in the workplace is immeasurably weakened.
44. Accordingly, I resolve the second preliminary issue in favour of AM. In my judgement the words "in the workplace" cannot by a process of construction, be treated as if they were not present; if such a construction were in theory open to me on cogent evidence, such evidence has not been put before me. Therefore, it being conceded that the alleged misconduct did not take place in the workplace, the incident could not be the subject of disciplinary proceedings against AM under rule 27.1.7.

### **THE THIRD PRELIMINARY ISSUE**

45. The issue here is whether AM was charged with misconduct only under rule 27.1.7 or under rule 27 generally, in particular the three sub-rules of rule 27 referred to in paragraph 37 above and, if the latter, whether the disciplinary process under those sub-rules could apply to AM when he was not at the material time in the workplace.
46. I have set out, in paragraphs 5 to 12 above, the history of the introduction and progress of the disciplinary proceedings. Despite the references throughout the documentation to rule 27, there was no express statement of the particular sub-rule or sub-rules under which AM was charged or under which he was found guilty. However, as I have said above at paragraph 11, it was made clear throughout that AM was being subjected to the disciplinary process on the grounds that he had acted in breach of the policy. It was at no point said that he was charged with acting in any way contrary to rules or to any duty or obligation imposed on him by or pursuant to the rules, contrary to rule 27.1.1, that he was charged with inciting, espousing or practising, (presumably practising in the context) discrimination or intolerance amongst members on the grounds specified in rule 27.1.4 or that he was charged with bringing injury or discredit upon the union or any member of it, pursuant to rule 27.1.5. The documents all point to the taking of action on the grounds of AM's breach of the policy and, in my judgement, can only be read as informing AM (and others) that he was being subjected to disciplinary proceedings

for breach of the union's policy pursuant to rule 27.1.7 (irrespective of whether the conduct complained of might have come within one or more of the other sub-rules).

47. I draw attention again to paragraphs 3 and 4 of Unite's response to AM's complaint, to paragraph 23h of that response and to the fact that no sub-rule other than 27.1.7 is referred to at all in that document. That document cannot be said to have been written without knowledge of the potential issues; for in the complaint to which Unite was responding, AM's case was expressly put (bundle p253 and page 18 of this decision under Appendix) in these terms: –

*“The only policies breach of which can constitute an offence under the rules apply only at the workplace, which, for the Complainant and Mr McFadden the location of the alleged incident was not”*

48. In my judgement any fair reading of the evidential material placed before me shows that Unite was intending to bring, and brought, the disciplinary proceedings against AM on the grounds set out in rule 27.1.7 and, at the end of that process, subjected him to penalty on the grounds that he had acted in breach of Unite's policy on diversity, bullying and harassment. The argument that Unite was relying on other sub-rules of rule 27.1 is now put forward to circumnavigate the problem created by the words of rule 27.1.7, represents, in my view, an afterthought and does not represent what actually happened.
49. I should add that, if I had come to the opposite conclusion on this first aspect of the third preliminary point, I would have decided the second aspect, namely could AM be found guilty under one or more of the three alternative sub-rules referred to earlier when the incident complained of did not take place in the workplace, in favour of Unite. I see no basis for importing the words “in the workplace” into any of the other sub-rules of rule 27.1 when they were not placed there but were placed only in rule 27.1.7. However, I need not take that point further; for my conclusion on this issue is that Unite did not proceed or conclude against AM on the basis of any rule or sub-rule other than rule 27.1.7.

## **CONSEQUENCES**

50. My conclusions on the second and third preliminary points necessarily lead to the conclusion that the disciplinary proceedings could not have succeeded and were not brought within the rules because, for the reasons explained above, the incident complained of did not (if it occurred at all) happen “in the workplace”.
51. However, if I am wrong about that, it is not suggested that Unite proceeded against AM other than on the basis that he had acted in breach of the policy; and my decision on the first preliminary point is that the alleged misconduct did not fall and could not fall within the words of the policy. For that reason, too, the proceedings were outwith the rules.
52. In the formal decision by which the parties were notified of my conclusions but not of the reasons for those conclusions, I invited the parties to make submissions to



me as to remedy. It seems clear to me that AM is entitled to a declaration to the effect that Unite acted in breach of its rules in pursuing the disciplinary process as it did; and AM's complaint therefore succeeds. I am not sure what other remedy, if any, might be appropriate. If the parties agree that only such a declaration should be made, they need simply notify the Certification Officer's office to that effect. The parties have been invited to suggest other remedies as per the decision given on 3 October 2017 (see paragraph 18 above).

A handwritten signature in black ink that reads "Jeffrey Burke". The signature is written in a cursive style and is underlined with a single horizontal line.

**Jeffrey Burke QC**  
**Assistant Certification Officer**

## **Appendix**

### **The complaints**

#### **Complaint 1**

Between 13 November 2015 and 12 September 2016 and on or about 4 October 2016 the Union breached rule 27 of its rules and the terms of natural justice implied into rule 27 on multiple occasions in the conduct of its disciplinary action against Mr McFadden. The breaches occurred on the dates and in the manner set out in the annex to this complaint. The terms of natural justice implied into rule 27 are as follows:

1. The requirement to provide the respondent with timely notice of the allegation, prior to and at the Investigative Stage and the charge thereafter.
2. The requirement to allow the respondent the opportunity to prepare and put forward a defence.
3. The requirement for the charge ultimately relied upon to be within the jurisdiction of the union's disciplinary process; i.e. the facts found by the Panels must be capable of constituting the charge as ultimately formulated and one which is within the range of charges permitted by rule 27.
4. The requirement to allow the respondent to question the Complainant or the Complainant's witnesses.
5. The requirement to allow the case of the defendant to be put to the Complainant.
6. The requirement for the Disciplinary Panel or the Appeal Panel to hear the complainant or the complainant's witnesses.
7. The requirement to hear or entertain witness evidence presented by the respondent.
8. The requirement for a disciplinary panel to be free of bias.
9. The requirement to apply the standard of proof appropriate to the charge.
10. The requirement to entertain fresh evidence after the appeal when that fresh evidence could call into question the Panel's decision.

#### **Annexe to complaint 1**

1. Prior to and during the hearing of the Investigatory Panel on 16 January 2016, Mr McFadden was not given notice of the allegation or charge against him. The Disciplinary Panel and the Appeal Panel effectively adopted the findings of the Investigatory Panel.
2. The charge against him was defective in two ways:
  - i. The Policy he was found to have breached did not apply to the social setting in which the offence was alleged to have been committed;
  - ii. The only Policies breach of which can constitute an offence under the rules apply only at the workplace, which, for the Complainant and Mr McFadden the location of the alleged incident was not.

3. The Investigatory stage was defective in that it failed to allow Mr McFadden (or even the Panel) to put his case to the Complainant and her witness. This breach occurred on the 6 January and 22 January 2016.
4. On or about 15 April 2016, the Disciplinary Panel revealed itself to be predisposed against Mr McFadden and had already accepted the case against him. This breach occurred in the following manner. At the Hearing on 15 April 2016 before Mr McFadden began to put forward his defence or to call the witnesses he had arranged to attend, he was told by the Chair of the Disciplinary Panel: 'From what has been presented to us, in all probability, some misconduct has taken place.' What had by then been 'presented to us' was the report of the Investigation Panel. The Disciplinary Panel had not heard Mr McFadden's defence. The Panel thus did not approach the hearing with an open mind but rather regarded the report of the Investigatory Panel as having established Mr McFadden's guilt unless he could prove the opposite.
5. The Investigatory, Disciplinary and Appeal Panels all refused to allow Mr McFadden to cross-examine the Complainant and her witnesses notwithstanding that there was no comprehensible reason given for the refusal, oral evidence was admitted, the case involved the conflicting credibility of the complainant and Mr McFadden and the charge was very serious: sexual assault. The breaches at each stage of the process occurred on
  - i. 6 January and 22 January 2016 (Investigatory stage)
  - ii. 15 April 2016 (Disciplinary stage)
  - iii. 30 August 2016 (Appeal stage)
6. On or about 30 August 2016, the Appeal Panel refused to hear from a crucial witness in Mr McFadden's defence whose evidence if true exonerated Mr McFadden; in so refusing the Appeal Panel was guilty of apparent bias.
7. The Panels all applied the wrong standard of proof, namely the balance of probabilities when the offence and its consequences warranted proof beyond reasonable doubt. The breaches at each stage of the process occurred on:
  - i. 6 January and 22 January 2016 (Investigatory stage)
  - ii. 15 April 2016 (Disciplinary stage)
  - iii. 30 August 2016 (Appeal stage)
8. On or about 4 October 2016 the Union wrongly refused to entertain fresh evidence after the Appeal which put the Complainant's credibility in doubt.

## Complaint 2

On the 30 August 2016 and on or about 4 October 2016 the Union breached the implied term in the Union's Rule 27. The implied term gives the Union the power to reopen or rehear a disciplinary matter where justice requires. The implied term to rule 27 is as follows:

"Where justice requires, the union reserves the right to re-open, at the Appeal Panel, a disciplinary case in which a charge has been held proved against a member, in order to conduct a further hearing by the Appeal Panel. Such a case will arise where new evidence has come to light which could not reasonably have been produced before the prior conclusion of the disciplinary process."

The manner in which the implied term to the rule was breached is as follows:

- i. At each stage of the process Mr McFadden denied that the complainant had been telling the truth, so that her credibility was in dispute.
- ii. At the Appeal Hearing on 30 August 2016, Mr McFadden's representative, Yunus Bakhsh, sought to introduce the witness statement of James Sutton who stated that he had, on or about 14 August 2016, been told directly by the complainant that she had 'NOT been assaulted by Mr McFadden as she previously asserted' (emphasis in the original). Mr Sutton's witness statement further stated that the Complainant also told him that she had been pressurised, by persons she declined to name, into making the complaint against Mr McFadden. The Chair of the Appeal Panel refused to entertain this evidence.
- iii. By an e-mail dated 4 October 2016 from Yunus Bakhsh to Andrew Murray, Chief of Staff of Unite, the former presented further new evidence that the Complainant was not a credible witness in that she made incredible allegations about her own questioning by the Investigatory Panel. By an e-mail dated 4 October 2016, Andrew Murray, Chief of Staff replied that he did not believe that 'warrants any further action' and that 'as far as the union is concerned, this matter is now closed'.

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

**Mr Alec McFadden**

**v**

**Unite the Union**

**Date of Decision**

**20 November 2017**

**DECISION AS TO REMEDIES**

- 1 In my decision in these proceedings I indicated that I would grant to the Claimant a declaration that Unite the Union (“Unite”) acted in breach of its rules in pursuing against him the disciplinary process and imposing on him the sanctions described in my decision. I invited the parties to make submissions in writing to me as to any other remedy or remedies sought.
- 2 By a letter dated 11 October 2017 the Claimant’s solicitors sought four orders under section 108B(3)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992. The letter does not contain any arguments in support of the making of those orders. In his response, dated 31 October, Mr Gillam of Unite states that Unite accepts the terms of the declaration which I originally proposed and says that that is sufficient.
- 3 The Claimant asks that the declaration which I make should state that the disciplinary meetings and penalties imposed therein were void and of no effect. In my view, for the avoidance of doubt, words to that effect should be added to the declaration which I originally proposed; it will, therefore, be in the terms set out below.
- 4 Secondly the Claimant seeks an order which would have the effect of within 14 days ensuring the Claimant’s reinstatement to each position or post in a list of 10 positions or posts identified in his solicitors’ letter. Mr Gillam points out, as is indeed apparent, that some of those posts lie within other organisations and not within Unite. For example, six of the positions or posts lie with the various Trades Union Councils. In the course of my substantive decision I

drew attention to the fact that a Trades Union Council is a separate organisation from the Trades Unions who may contribute members to it. I am required by the statutory provision referred to above to make an enforcement order to remedy Unite's breach unless to do so would be inappropriate. I have no doubt that it would be inappropriate to make an order which would have the effect of placing the Claimant in a position within an organisation which is not a party to these proceedings and which has not had the opportunity to present any views or submissions to me on the terms of the orders which the Claimant seeks. It is, however, appropriate to make an order requiring Unite to reinstate the Claimant to all the posts and positions within Unite from which he was removed by reason of the penalties imposed by the disciplinary proceedings.

- 5 Thirdly the Claimant seeks an order requiring Unite to copy to the Claimant all correspondence in relation to the steps it takes in relation to the first and second orders. I do not regard it as appropriate to make such an order. Unite, by reason of the orders I am making, will have to restore the Claimant to his positions within the union within a limited time. If they do not do so they will be in breach of the second order set out below. In my view the manner by which they comply with that order is a matter for Unite. Of course if Unite does so in a manner which defeats the purpose of my orders, it is likely to find itself in difficulties.
- 6 Lastly the Claimant seeks an order requiring Unite to communicate my decision to all NW Unite's branches. Mr Gillam suggests that this is unnecessary and beyond the scope of the statutory provision; I do not agree; in my view such an order would be appropriate. The Claimant is entitled to be sure that all the branches of the union in his region know the outcome of these proceedings.

7 Accordingly, I grant the following remedies: –

1. A declaration that Unite acted in breach of its rules in pursuing the disciplinary proceedings against the Claimant and in imposing on him the penalties imposed in those proceedings and that those proceedings were null and void and of no effect.
2. An order that Unite shall take all reasonable steps to ensure that the Claimant is, within 14 days of this order, restored, for the remainder of the respective terms of each office, to each of the posts and positions within Unite from which he was removed by reason of the penalties imposed in those disciplinary proceedings.
3. An order that Unite shall forthwith communicate to each of its branches in its North-West region or area my decision in this case.

A handwritten signature in black ink, reading "Jeffrey Burke". The signature is written in a cursive style with a long horizontal line extending to the left from the end of the name.

**His Honour Jeffrey Burke QC  
Assistant Certification Officer**