

**CASE MANAGEMENT DECISIONS OF THE ASSISTANT CERTIFICATION OFFICER
ON APPLICATIONS MADE UNDER SECTION 108A OF THE TRADE UNION AND
LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

Mr Alec McFadden

v

Unite the Union

Date of Decision

24 July 2017

An application to the Certification Officer was submitted on 26 October 2016 by Johnson and Boon Solicitors on behalf of Mr Alec McFadden (“the Claimant”) under section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) concerning an alleged breach of rule by Unite the Union (“the Union”) concerning disciplinary proceedings against Mr McFadden which began around November 2015.

Following fairly extensive correspondence between the applicant and this office intended to clarify the complaints, the complaints were copied the Union for comment on 1 March 2017. The complaints are set out in appendix 1. Having considered the parties submissions, the Certification Officer appointed me to hear the case. I gave my directions to the parties for a preliminary hearing and case management discussion which was held on 4 July 2017.

At the hearing Mr McFadden was represented by Mr Yunus Bakhsh. The Union was represented by Mr Michael Potter of Counsel. Mr Neil Gillam, Unite the Union Legal Department and Mr Adrian Weir, the Union’s Assistant Chief of Staff were also in attendance.

PRELIMINARY HEARING DECISION AND DIRECTION ORDERS

PRELIMINARY ISSUE 1

1.

- (a) It was accepted on behalf of Unite the Union (“the Union”) that the misconduct alleged against Mr McFadden (“the Applicant”) had to amount to a breach of the Union’s policy on harassment dignity and respect (at pages 36-7 of the bundle put in by the Applicant or pages 31-32 of the bundle used at the hearing on 4 July 2017). Therefore the occasion on which the alleged incident took place had to have occurred when the Applicant was attending a conference, meeting, course or other event organised by the union, on union

property, or while attending an event on behalf of the union. It is argued on behalf of the Applicant that he was charged with misconduct only contrary to rule 27.1.7 and that as a consequence the alleged act had also to have taken place “in the workplace”.

- (b) It is argued on behalf of the Union that the charge was brought under rule 27 generally and not only under rule 27.1.7; therefore the act alleged did not have to have taken place in the workplace.
- (c) It is further argued on behalf of the Union that rule 27.1.7 should be construed, according to the principles governing the construction of trade union rules, as though the words “in the workplace” were not present or added nothing to the words of the policy as to the nature of the event or location at which the alleged misconduct took place. It was conceded that, if on the proper construction of rule 27.1.7 the words “in the workplace” remain, on the facts the alleged misconduct did not take place in the workplace.
- (d) It is argued on behalf of the Applicant that the alleged misconduct did not take place at a location or in the circumstances which fell within the policy, that he was charged only under rule 27.1.7, that the alleged misconduct did not take place “in the workplace” and that the proper construction of rule 27.1.7 is not as alleged by the Union.

2. Neither party seeks to adduce any further evidence relating to the resolution of the issues set out above. If those issues were to be resolved in favour of the Applicant, his complaint would succeed irrespective of the other issues. It was, therefore, agreed that the Assistant Certification Officer (“ACO”) should determine as a preliminary issue :-

- a) whether the alleged misconduct occurred at a location or in the circumstances set out in the relevant part of the policy
- b) whether on the proper construction of rule 27.1.7 the words “in the workplace” should be eliminated or treated as having no meaning
- c) 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.

3.

- a) It is directed that the preliminary issue above shall be resolved by the ACO without any further hearing
- b) The parties shall provide to the ACO written submissions as to that issue, together with all authorities on which they propose to rely, with relevant passages properly identified, by 4 pm on 4 August 2017.

- c) The ACO shall then proceed to make his decision on the preliminary issue and provide it to the parties

PRELIMINARY ISSUE 2

During the course of the discussions consideration was given to the possible treatment of the points raised by issues 8g, 17 and 21 of the Applicant's list of issues, all relating to the refusal of the Appeal Panel to consider the evidence of Mr Sutton, as a preliminary issue. It was subsequently made clear by Mr Potter on behalf of the Union that it was intended to call factual evidence on that subject; and it was agreed that, therefore, there could be no preliminary issue as to that subject.

OTHER ISSUES

The numbering in bold below is taken from the Applicant's list of issues numbers 1 to 22 which is set out at appendix 2. What follows emerged from the discussions between the parties and the ACO and the submissions put forward at the hearing on 4 July 2017

- 1** It is agreed that the Applicant was found guilty of a breach of rule 27. Whether he was charged under rule 27 1.7 or under rule 27 generally is part of the preliminary issue.
- 2, 3 and 4** fall within the preliminary issue
- 5 and 6** It is now conceded on behalf of the Applicant that the alleged misconduct, if proved, fell within the word "harassment" in the relevant policy
- 7** It is agreed that rule 27 incorporated the principles of natural justice; there will be argument as to what those principles consist of for the purposes of this case.
- 8** (i) Whether the principles of natural justice incorporated the allegations set out in issue 8 is disputed in respect of allegations (b), (c), (f) and (g).

(ii) As to (a) whether there was insufficient notice is in dispute. As to (d) the allegation of bias is based on what the Disciplinary Panel Chair said as set out in issue 13. It is not disputed that he used those words. As to (e) the Applicant's case is based on use of those words. As to (f) the allegation that the standard of proof was beyond all reasonable doubt is not pursued; it is now conceded on behalf of the Applicant that the standard was of a high degree of probability. The Union contends that standard was that of the civil standard of proof.

(iii) Whether in any of the respects alleged there was a breach of the principles of natural justice and the effect of any such breach is in dispute.
- 9** It is accepted that this adds nothing to issue 8.

- 10** As a result of concessions made by the parties, the issue here is whether adequate notice was given to the Applicant before the Disciplinary Panel hearing.
- 11** Whether the Disciplinary Panel adopted the findings of the Investigatory Panel and, if so, what consequences follow are disputed issues.
- 12** It is accepted that this issue adds nothing to issue 8 (b).
- 13 and 14** It is accepted that these issues add nothing to issue 8 (e).
- 15 and 16** It is not in dispute that the Applicant asked to be given the opportunity of examining the claimant and the witnesses and was not given such opportunity. These issues therefore add nothing to issue 8 (b).
- 17 and 21** These issues raise the Applicant's case as to the evidence of Mr Sutton. They therefore add nothing to issue 8(g).
- 18** It was conceded that the Appeal Panel was not actually biased; a point may be taken as to apparent bias.
- 19 and 20** The position on these issues is as in 15 and 16 in respect of the Disciplinary Panel. The facts are not in dispute.
- 21** See above.
- 22** It was conceded that this issue does not add anything.

DIRECTIONS IN RESPECT OF THE ABOVE ISSUES

These directions are made on the basis that the above issues need to be resolved in the light of the decision on the preliminary issue.

1. The hearing of the issues which have to be decided, as set out above, will take place on 9 and 10 October 2017 at 10 am at a location in London which will be notified to the parties
2. Each party shall provide to the Certification Office by 4pm on 11 September 2017 a list of the documents he/it wishes to form part of the hearing bundle, with a copy of each such document
3. The final bundle shall be issued to the parties by the Certification Office by 15 September 2017.
4. Each party shall provide to the Certification Office witness statements for each witness to be called by that party by 4pm on 25 September 2017 (this dates constitutes a variation from the date indicated at the preliminary hearing).

Witness statements thus provided shall stand as the witnesses' evidence in chief, subject to any application at the hearing.

5. Each party shall provide to the Certification Office a skeleton argument and copies of all authorities to be relied upon, with relevant passages identified, by 4pm on 25 September 2017 (this date constitutes a variation from the date indicated at the preliminary hearing). Those skeleton arguments shall include the parties outline submissions as to the consequences in law of any breach of the principles of natural justice which may be proved and as to the extent, if any, to which any such breach by the Disciplinary Panel is said to have been cured or not to have been cured by the appeal.
6. Each party shall confirm attendees at the hearing by 2 October 2017.

Jeffrey Burke QC
Assistant Certification Officer

Appendix 1

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 Marry, 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’.

Appendix 2

APPLICANT’S PROPOSED LIST OF ISSUES

1. Was Mr McFadden found guilty of a breach of rule 27.1.7, i.e. breach of one of the Union’s policies on diversity, bullying and harassment in the workplace?
2. Does Rule 27.1.7 only apply to harassment ‘in the workplace’?
3. If so, for the purposes of that provision, what does the phrase ‘in the workplace’ mean?
4. Did the alleged incident take place at the workplace?
5. Likewise, what does the word ‘harassment’ mean?
6. Were the facts found capable of constituting the upheld charge?
7. Did the Union’s Disciplinary Rule 27 incorporate the rules of natural justice?
8. If so, did they incorporate the following requirements:

- a. to give timely notice of the rule allegedly broken and the facts alleged to constitute the charge in order to allow the defendant to prepare and put forward a defence and, if necessary, arrange appropriate representation?
 - b. in a case involving a conflict of evidence where credibility was a crucial issue:
 - i. to allow the defendant or his representative to question the Complainant?
 - ii. to allow the defendant or his representative to question the Complainant's witnesses?
 - iii. to put the case of the defendant to the Complainant?
 - iv. that the Disciplinary Panel and/or the Appeal Panel should hear for themselves the complainant and her witnesses?
 - c. that the Disciplinary Panel and the Appeal Panel should hear witness evidence desired to be called by the defendant?
 - d. that the Disciplinary Panel and the Appeal Panel should not be biased?
 - e. That the burden of proof was on the Complainant to prove his/her case and not on the defendant to prove his innocence?
 - f. that the standard of proof for an allegation of sexual assault was 'beyond reasonable doubt'?
 - g. that the Union should entertain fresh cogent evidence after the appeal?
9. In any event, what procedural requirements and safeguards apply in a disciplinary process in respect of a member of the union?
10. Before (i) the Investigation Panel, (ii) the Disciplinary Hearing, and (iii) the Appeal Hearing:
- a. Was Mr McFadden given adequate notice of which rule he was alleged to have broken?
 - b. Was Mr McFadden given adequate notice of the facts alleged to have constituted that breach?
11. If he was not given adequate notice of the charge before the Investigatory Panel were the Disciplinary Panel and the Appeal Panel entitled effectively to adopt the findings of the Investigatory Panel, and did they do so?
12. Was Mr McFadden denied the opportunity by himself, by a representative or through the panel, to put his case to the Complainant and her witness at the Investigatory Hearing? If so, was that permissible?
13. Did the Disciplinary Panel impose on him the burden of proving his innocence and if so was that permissible?
14. Was the Disciplinary Panel biased against Mr McFadden having accepted the case against him before it had heard from him?
15. Did the Disciplinary Panel refuse to allow Mr McFadden or his representative to cross-examine the Complainant? If so was this permissible?
16. Did the Disciplinary Panel refuse to allow Mr McFadden or his representative to cross-examine the Complainant's witnesses? If so was this permissible?
17. Did the Appeal Panel refuse to hear from a witness in Mr McFadden's defence whose (fresh) evidence if true exonerated Mr McFadden? If so was this permissible?
18. And if so, did that show bias?

19. Did the Appeal Panel refuse to allow Mr McFadden or his representative to cross-examine the Complainant? If so was this permissible?
20. Did the Appeal Panel refuse to allow Mr McFadden or his representative to cross-examine the Complainant's witnesses? If so was this permissible?
21. Did the union wrongly refuse to entertain fresh evidence after the Appeal which put the Complainant's credibility in doubt?
22. Did the disciplinary process in respect of the Claimant comply with the Union's rules or breach the Union's rules?