D/41/18-19

Decision of the Certification Officer on an application made under Section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992

Kelly

V

Musicians' Union

Date of Decision 1 February 2019

Contents

Decision

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

   > I grant Mr Kelly's application for a declaration that on 16 February 2018, the union breached rule XVII 4 by upholding complaints against the applicant which appear to relate to alleged incidents which are said to have occurred more than 28 days before the date of the underlying complaints themselves.

2. I consider it appropriate to make an enforcement order. I order that:

   a. Mr Kelly be restored to membership of the Musicians' Union
   b. Mr Kelly be reinstated to the Recording and Broadcast Committee
   c. Mr Kelly be restored as an Approved Musicians' Union Contractor
   d. The Union must not remove Mr Kelly's Approved Musicians' Union Contractor Status, or include him within the Ask us First List, on the basis of any disciplinary or other Union process which arises from Mr Kelly's membership of the Union and which is based on information which was considered as part of the disciplinary process which began with the General Secretary's letter of 24 January 2018.

Reasons

3. Mr Kelly brought this application as a member of the Musicians' Union (or "the Union") when the alleged breach occurred. He did so by a registration of complaint form received at the Certification Office on 14 August 2018.

4. Mr Kelly made six complaints that the Union had breached its rules relating to disciplinary proceedings. The first complaint raised a question as to whether, within its Rules, the Union was entitled to begin a disciplinary process at all. The other five complaints relate to the conduct of the disciplinary process. Consequently, I suggested, and the parties agreed, that it would be sensible to

hear the first complaint as a preliminary issue before going on, if necessary, to hear the procedural complaints.

5. Following correspondence with my office, Mr Kelly confirmed complaint 1 as follows:-

   > On 16 February 2018, the Union breached rule XVII 4 by upholding complaints against the applicant which appear to relate to alleged incidents which are said to have occurred more than 28 days before the date of the underlying complaints themselves

6. At a hearing before me on 8 January 2019, Mr Kelly was represented by Mr David Reade QC of counsel, instructed by Mr Charlie Thompson of Harbottle and Lewis Solicitors. The Union was represented by Mr Stuart Brittenden of counsel, instructed by Ms Victoria Phillips of Thompsons Solicitors. A written witness statement for the Union was given by Mr David Ashley, Assistant General Secretary, who also gave oral evidence. There was in evidence a bundle of documents consisting of 340 pages containing correspondence and the Rules of the Union. Both Mr Brittenden and Mr Reade provided skeleton arguments.

Findings of fact

7. Dominic Kelly was a Member of the Musicians' Union.

8. On 24 January 2018 Horace Trubridge, General Secretary of the Musicians' Union, wrote to Mr Kelly informing him that the Union had received a number of serious complaints from musicians whom Mr Kelly had booked for work. Mr Trubridge explained that the complaints had been investigated and would be considered at a meeting of the Executive Committee Disciplinary Sub-Committee.

9. The allegations all related to incidents which had occurred more than 28 days before they were reported to the Union.

10. The Disciplinary Sub-Committee met on 14 February 2018. They decided to uphold two of the three charges against Mr Kelly and that the gravity of the offences was so serious as to warrant expulsion from the Union.

11. The Disciplinary Sub-Committee also recommended that the Executive Committee should withdraw Mr Kelly from the Union's list of approved contractors and place him on the "Ask us First List".

12. The Executive Committee met on 7 March and set the time period for the expulsion and the removal of approved contractor status as ten years. Mr Trubridge subsequently informed Mr Kelly, by email on 27 March 2018, that he would remain on the "Ask us First List" for the period of his expulsion.

13. Mr Kelly appealed the decision made by the Disciplinary Sub-Committee. This appeal was considered by the Executive Committee Appeals Sub-Committee on 20 April 2018 and was not successful.

The Relevant Statutory Provisions

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

> 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

15. The Rules of the Union which are relevant for the purposes of this application are:-

Rule I: Objects and definitions

2 The MU's objects are:

a To secure the complete organisation of all musicians for their mutual protection and advancement;

b To regulate members' relations with their employers and/or employers' associations, and with each other;

. . .

h To promote equality for all including through:

(i) collective bargaining, publicity material and campaigning, representation, Union organisation and structures, education and training, organising and recruitment, the provision of all other services and benefits and all other activities;

(ii) The Union's own employment practices.

i To oppose actively all forms of harassment, prejudice and unfair discrimination whether on the grounds of sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age, or other status or personal characteristic.

Rule V: EC powers and duties

1 Subject to the Rules the EC shall have all the powers of the MU and all powers necessary for or conducive to the attainment of the objects of the MU including the power to delegate its authority. Mention in the Rules of specific powers of the EC shall in no way limit these general powers, always provided that policy decisions of the biennial Delegate Conference shall be binding on the EC as far as is practicable.

. . .

4 The EC shall determine any matter on which the Rules are silent but shall have no power to alter the existing Rules, save as is expressly provided for elsewhere in these Rules.

. . .

16 At its first meeting in each year the EC shall appoint from amongst its number three members plus one reserve to serve on a Disciplinary sub-committee and three members plus one reserve to serve on an Appeals sub-committee comprising different EC members. In the event that a member of the Disciplinary sub-committee or Appeals sub-committee has or may have a conflict of interest in relation to a charge to be heard by that sub-committee, that member shall for the purpose of proceedings relating to that charge be replaced by a substitute sub-committee member.

Rule X: Duties of members

4 It shall be the duty of members to report in writing to an appropriate Official any disciplinary offence or breach of Rule of which they have knowledge.

Rule XVII: Disciplinary procedures

1 All MU members have a duty to observe the Rules of the MU.

2 Disciplinary action may be taken against any member who does any of the following (including doing so as a member of a political party):

a Disregards, disobeys or breaks any of the Rules or regulations of the MU applicable to them, or any instruction issued in accordance with the Rules;

b Acts in a manner prejudicial or detrimental to the MU or their Region;

c Commits:

(i) Any act of discrimination or harassment on grounds of age, colour, disability, marital status, race, religion, sex or sexual orientation; or,

(ii) Any other discriminatory conduct which is prejudicial to the objects of the MU set out at Rule I;

d Misappropriates any money or property belonging to the MU which is under their control, or fails properly to account for money which was, is or should be under their control or defrauds the MU in any way;

e Evades payment of the correct rate of subscriptions.

3 Disciplinary action may not be taken against a member where the conduct complained of consists solely of acting as an Officer or Official of the MU for or on behalf of or in accordance with the decision of a committee or other body of the MU.

4 Where a complaint of an alleged disciplinary offence is made to the General Secretary within 28 days of the alleged offence and there appear to the General Secretary to be reasonable grounds to think that a member might be guilty of a disciplinary offence the General Secretary shall investigate whether charges are justified.

5 It shall be open to the General Secretary to delegate all or part of the investigation to such person or persons as the General Secretary thinks fit.

6 The General Secretary shall consider the result of such investigation and consider whether there are reasonable grounds to think that a member might be guilty of a disciplinary offence and whether charges are justified and should be brought.

7 If the General Secretary considers that a charge (or charges) should be brought the General Secretary shall appoint an Assistant General Secretary (or other Official) to prepare and prosecute the case on behalf of the MU and a different Assistant General Secretary (or other Official) to act as secretary to the Disciplinary sub-committee appointed in accordance with Rule V.16.

8 A disciplinary charge shall be heard by the Disciplinary subcommittee of the EC appointed in accordance with Rule V.16.

9 Where the Disciplinary sub-committee considers a disciplinary charge is proved against a member, it may impose any one or more of the following penalties:

a Censure of the member;

b Debarring the member from attending any Delegate Conference and/or Regional meeting for whatever period it deems appropriate;

c Debarring the member from holding any MU office for whatever period it deems appropriate;

d Suspension of the member from all or any of the benefits of membership for whatever period it deems appropriate;

e Suspension of the member from holding any MU office for whatever period it deems appropriate.

f Expulsion of the member from the MU.

Considerations and Conclusions

Background

16. There is little dispute as to the facts of the case. The only witness evidence was provided by David Ashley. Mr Ashley is Assistant General Secretary of the Union and was secretary to the Sub-Committees who considered the complaints against Mr Kelly.

17. Following the genesis of the #MeToo Campaign in 2017 the Union set up a “Safe Space” online so that its members could report, in a safe environment, sexual harassment at work. They, and other entertainment unions, published information and highlighted the problem and discrimination faced particularly by their female members. The complaints against Mr Kelly arose from alleged incidents which had been reported through that “Safe Space”. All of the alleged incidents were reported to the Union more than 28 days after they had occurred. The Union regarded the complaints made about Mr Kelly to be very serious and decided that it could not do anything other than institute disciplinary proceedings against Mr Kelly.

18. It is not my role to reach a decision on, or to investigate in any way, the complaints against Mr Kelly. The issue for me is whether, bearing in mind the wording of Rule XVII 4 of the Union Rule Book, the Union was in breach of its Rules by initiating disciplinary action against Mr Kelly in respect of alleged incidents which took place more than 28 days before they were reported to the Union.

19. The current version of the disciplinary process has been in place since around 2004. It appears to be significantly different to the process which preceded it, although I note that the earlier process also included a reference to an offence being reported to the General Secretary within 4 weeks. Mr Ashley told me that, whilst he was not working at the Union at the time, he understood that there was a period where several disciplinary complaints were made which were intended to, or had the effect of, destabilising the Union. Since the new Rules were adopted, in 2004, only two cases had been considered. The complaints against Mr Kelly were the first to be considered by the Union. When giving evidence, Mr Ashley told me that this was the first time the Union had considered the impact of Rule XVII 4.

Summary of Submissions

20. Helpfully, both Mr Reade and Mr Brittenden made their submissions in three sections; the construction of Rule XVII 4, whether it is necessary to imply a term into Rule XVII 4 and whether Mr Kelly waived his right to complain having actively participated in the process. I will deal with my decision in the same format.

Construction

21. Mr Reade told me that the wording of Rule XVII 4 is clear and unambiguous. It forms part of a cohesive and complete disciplinary scheme which requires the Union to investigate allegations which are reported within 28 days of the relevant incident occurring and where there are reasonable grounds that a member may be guilty of an offence. His view was that this was a threshold to be crossed before disciplinary action could be taken and that both factors (time period and reasonable grounds) must be in place before disciplinary action could be taken. Put simply, there were two pre-conditions to the initiation of disciplinary action. If neither of those were present then any disciplinary action would be a breach of Rule.

22. Mr Reade referred me to the decision in **Heatons Transport (St Helens) Limited v Transport General Workers Union [1973] AC 15**. Lord Wilberforce stated at 393:

> "trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book"

23. He also asked me to consider the decision in **Jacques v Amalgamated Union of Engineering Workers (Engineering Section) [1986] I.C.R. 683**:

> "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 or 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."

24. Taken together he argued that these should be interpreted in the way expressed by HHJ Jeffery Burke QC, acting as Assistant Certification Officer (ACO) in **Coyne v Unite the Union (D/2/18-19 4 May 2018)** as "what would the reasonable trade union member understand the words to mean".

25. Applying these tests would, in Mr Reade's view, result in the natural and ordinary reading of Rule XVII 4 being applied and that both preconditions must be met before the Union could initiate disciplinary action within the Rules. If one or both were not met any disciplinary action would be in breach of the Rules. Mr Reade argued that it was not, therefore, necessary to imply a term into Rule XVII 4 for it to be effective. Any reasonable Union member would, in Mr Reade's view read the Rules in this way. He also argued that if, as the Union had asserted, the 28 day period was intended as guidance only then this must mean that the pre-condition requiring reasonable grounds must also be interpreted as guidance. This could not, in his view, be a reasonable reading of the Rule as it would remove all protections offered to the member accused of a disciplinary offence.

26. Mr Brittenden also referred me to **Jacques** and **Heaton** but referred me to a wider extract from **Heaton** at 393:

> "…trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the Court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in

the Rule Book alone: particularly as respects the discretion conferred by the members upon committees or officials of the Union as to the way in which they may act on the Union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the T.U.C. Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:

'Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules'"

27. He took a different view on the impact of **Jacques** and **Heaton** on the reading of Rule XVII 4. His view was that any reasonable Union member would read that Rule in the context of the whole Union Rule Book and understand that, taking into account the wide objectives of the Union including combatting harassment, and the Union's overall power to take disciplinary action a reasonable Union Member would expect the Union to deal with incidents which were reported more than 28 days after they had occurred.

28. In reaching this conclusion Mr Brittenden asked me to take into account the principles set out in **Wood v Capita Insurance Services Ltd [2017] 2 WLR 1095**

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality

and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…

… Interpretation is … a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…"

29. Mr Brittenden's view is that this requires the reader to take into account the Union's wide objectives which include, at Rule I 2(b), regulating members' relationships with their employers and with each other and, at Rule I 2(i) actively opposing all forms of harassment, prejudice and discrimination on various grounds. Reading Rule XVII 4 in isolation from the Union's objects would, in his view, lead to a construction which offended against common sense and prevented the Union from dealing with a wide range of potential disciplinary offences. Alongside allegations of sexual harassment or discrimination, which are frequently raised some time after the incident has occurred, this could include allegations of fraud or theft which may not be identified at the time, and offences which had been deliberately concealed. It had never been the intention of the Union to prevent itself from dealing with such allegations under the disciplinary process. Indeed, in Mr Brittenden's view, it would be absurd for it to do so. Consequently, he argued that the Union was entitled to reach a view on the construction of this Rule which was consistent with business and common sense.

30. Similarly, Mr Brittenden argued that the obligation on members to report breaches of Rules and the wider power to take disciplinary action at Rule XVII 2 supported the interpretation, offered by Mr Ashley in his witness statement, that the 28 period should be interpreted as guidance only. For it to be otherwise would frustrate the objects of the Union and its ability to take disciplinary action. He confirmed, however, that the Union's position was that where the allegations were reported more than 28 days after the incident occurred there remained a need for there to be reasonable grounds to believe that an offence may have occurred.

31. Mr Brittenden explained that none of the Officials or Committee Members had taken the view that Rule XVII 4 prevented them from taking disciplinary action; this was evidenced by Mr Ashley's written evidence. More importantly, however, Mr Kelly himself had not challenged the position despite having a copy of the Rules and knowing from an early stage that the allegations were more than 28 days old. In Mr Brittenden's view, this could only mean that most reasonable union members, including Mr Kelly, would expect the Union to be able to deal with serious breaches of Union Rules which had been reported more than 28 days after the alleged incident. On that basis the proper construction of Rule XVII 4 was that the Union was able to take disciplinary action in such cases.

32. Mr Reade disputed that the Union was applying the test properly. In his view the reasonableness test must apply to the words of the Rule rather than to the broader picture of what a Union Member would expect their Union to be able to do. Applying the test to the words themselves could only lead to one interpretation; that only those allegations which were reported within 28 days and where there were reasonable grounds to suspect an offence had occurred would be investigated. He also contested how one part of Rule XVII 4, the time period, could be treated as guidance but the other, the requirement for there to be reasonable grounds, should be regarded as a Rule.

33. Mr Reade also challenged the Union's position that the 28 day time limit was in conflict with the Union's wider objectives on harassment. He believed that there were a number of ways in which the Union could have dealt with the allegations against Mr Kelly which would have supported the Union's objectives. These included offering counselling and raising the issues with Mr Kelly outside the formal disciplinary process.

34. The question for me, at this stage and before I go on to consider whether a term should be implied into Rule XVII 4, is whether Mr Reade is right that a reasonable member would read Rule XVII 4 to mean that the Union is prevented from dealing with allegations relating to incidents which took place more than 28 days before they were reported to the Union. The wording of the Rule is as follows:

> Where a complaint of an alleged disciplinary offence is made to the General Secretary within 28 days of the alleged offence and there appear to the General Secretary to be reasonable grounds to think that a member might be guilty of a disciplinary offence the General Secretary shall investigate whether charges are justified.

35. The wording reads, to me, very clearly that the General Secretary must pass forward all complaints where the two pre-conditions are met. There is no discretion and any reasonable Union Member would, in my view, read the rule in this way. The question, therefore, is whether in the absence of either or both of those criteria the reasonable Union Member would understand that, in the context of the wider Rules, the pre-condition which requires that the incident be reported within 28 days should be read only as guidance. Whilst I have sympathy with the Union, I cannot agree that a reasonable Union Member would read the Rule in this way. There is no lack of clarity around the wording of the Rule and no disciplinary route available where either, or both, of the preconditions are not met.

36. As Mr Reade expressed Rule XVII is a comprehensive and coherent framework for a disciplinary process which deals with members' obligations to comply with Rules and sets out a clear process from receipt to appeal. It is not unusual for a Union to have such a process and it is right that each stage should be set out clearly so that members affected, either as complainants or defendants, understand that process. It is not, in my view, inappropriate for such a process to have a time limit which prevents action against old or historic complaints. A 28 day time limit seems, however, surprisingly short and will, undoubtedly in my view, generate problems for the Union in dealing with many complaints. That does not mean, however, that the Rule should be ignored or treated as guidance.

37. Mr Ashley, in his witness statement, told me that the Union's position on the interpretation of this Rule accords with basic common sense. To an extent, I agree with him, but my difficulty is that the Union's position does not accord with the very clear wording of the Rule.

Implied Rule

38. Mr Brittenden has suggested that Rule XVII 4 is silent on what happens to complaints that are received after 28 days have passed and that we can rely on **McVitae v UNISON [1996]**, or an implied rule, to fill that gap. His difficulty, however, is that the wording of the Rule is explicit and forms part of a coherent disciplinary scheme. Nor is he helped by the Union's acceptance of the second pre-condition (that there must be reasonable grounds to believe an offence took place) as being absolute. Despite the Union's explanation it remains unclear to me how one condition should be treated as guidance but the other interpreted literally. I asked Mr Ashley how the Union made these distinctions; he told me that this was the first time they had done so and believed that they were applying common sense. That may be the case; however, the Rule is clear about when complaints should go forward.

39. I have considered whether the Objects of the Union, the obligation on members to report rule breaches and the Union's power to take disciplinary action are, in some way, hindered by my interpretation of Rule XVII 4 and, if so, whether it is necessary to imply a term into that Rule. The Rule certainly limits the number of cases in which action may be taken; however, that does not automatically place it in conflict with the wider Rules notwithstanding that, in this case, the time period is surprisingly short. As I have noted above, it is not, in my view, inappropriate for such a process to have a time limit which prevents action against old or historic complaints. Similarly, it is not inappropriate for the Union to investigate only those complaints where there appear to be reasonable grounds to believe a disciplinary offence has been committed.

40. Mr Reade dealt with this point at the Hearing. He took the view that there are a number of ways in which the Union could work to combat harassment and that most of those would fall outside the disciplinary process. For instance, the Union could run campaigns, support victims and deal with contractors facing allegations. It is not for me to identify whether any of those would be relevant in this case but I agree with Mr Reade that the disciplinary process is not the only mechanism for

dealing with allegations such as those faced by Mr Kelly. Nor should a limitation contained within the disciplinary scheme be seen as a barrier to the Union raising the issue in other ways. Mr Brittenden contended that, where there are serious complaints against an individual, then disciplinary action may, in the Union's eyes, be the only appropriate course of action. That certainly appears to be the decision taken by the Union here. But that, in itself, is not sufficient to draw me to the conclusion that what the Union saw as an 'appropriate course of action' was not in breach of the Union's Rules.

41. On that basis I am not persuaded that Rule XVII 4 when read alone, or in the wider context of the Rules, is sufficiently unclear as to require a term to be implied into it for it to be effective. I would add that Mr Brittenden offered two implied terms, one in his skeleton argument and one at the Hearing. In his skeleton argument Mr Brittenden suggested that a term be implied "to the effect that the Union can initiate disciplinary proceedings where evidence of serious misconduct comes to light more than 28 days after commission of the act". At the hearing the wording offered was that "the Union has the power to initiate disciplinary procedures in respect of an act of misconduct which is reported more than 29 days after it occurred".

42. Although the wording is different both have the impact of removing the 28 day time limit thus undermining the impact of an express provision in the Rule. It is interesting to note, however, that one wording appears to relate only to serious misconduct. As far as I can see the Rules, as drafted, do not appear to provide a process for serious cases although, of course, the seriousness of an offence may be relevant when considering sanctions.

43. Finally on this point, Mr Brittenden argued that there is no wide fetter on the Union's ability to deal with older complaints as the Rule does not expressly state this. In other words, there is no overall time limit on the Union dealing with complaints. He also argued that members are obliged to report a breach of rule, whenever it occurred, and that there is no time limit on that reporting which is inconsistent with there being a time limit on the Union's ability to deal with a

complaint. This is supported by Mr Ashley's evidence that nobody at the Union considered that the 28 day period was anything other than guidance. Mr Ashley also went further to say that, if the 28 day reporting period had any effect, then the Union would have ensured that members were aware of the restriction and given guidance about raising a complaint quickly.

44. I agree that there is no explicit restriction on the reporting period but, my reading of Rule XVII 4 is that it enables the Union to deal only with those complaints which meet its pre-conditions. That, in effect, prevents the Union from dealing with other complaints under its disciplinary process. I am not persuaded that the Union's lack of guidance on this point is sufficient to undermine my reading of the Rule. If I accepted that a lack of guidance to members enabled a Rule to be ignored then Unions could, should they choose to, ignore Rules simply by failing to draw them to the attention of their Members. That cannot be right. Similarly, it may be inconsistent to require Members to report all breaches when there is a limitation as to which complaints the Union can deal with. But that does not mean that the limitation has no effect; it may simply mean that the Union is aware of potential breaches which it cannot deal with through the disciplinary process.

45. Before going on to whether Mr Kelly waived, or affirmed his rights, under Rule XVII 4 I need to look at the issue of delegation. Mr Brittenden advanced the position that, if the Union are wrong in their interpretation of Rule XVII 4, the General Secretary was relying on delegated authority from the Executive Committee under Rule V. I have two difficulties with this position.

46. The first is whether Mr Trubridge was, in fact, acting under delegated authority. Mr Ashley's statement records that Mr Trubridge believed that he had the power to take such action without relying on any discretionary powers. Mr Ashley confirmed this to me at the hearing and told me that he was not aware of any delegation from the Executive Committee to Mr Trubridge in relation to Rule XVII 4. I, therefore, have no evidence to support the contention that such a delegation was in place. The second is that Rule V 4 expressly prohibits the Executive Committee from amending the Union Rules; if my reading of Rule XVII 4 is right

then the power of delegation could not be used to enable Mr Trubridge to take action which would otherwise fall outside that Rule. It seems to me that this could be considered to amount to an amendment to the Rule as well as an exercise of discretion within the Rule.

47. It is my view, therefore, that the Union breached Rule XVII 4 in taking forward complaints against Mr Kelly. I reach that conclusion because, as all parties accept, the complaints were referred to the Union more than 28 days after the alleged incidents took place.

Waiver or Affirmation

48. Mr Brittenden asserted that, even if the Union were wrong in their interpretation of Rule XVII 4, and had acted outside the Rules, Mr Kelly had clearly and demonstrably affirmed or waived his rights to complain about that Breach. The Union identified a number of occasions when Mr Kelly asserted that he accepted that the Union were right to investigate the allegations and that he did so in full knowledge of the disciplinary process, including Rule XVII 4. The Union's view was that Rule XVII 4 had been raised only as an afterthought when the complaint was made to my office despite there having been several opportunities for Mr Kelly to raise it earlier. Those opportunities included the appeal stage at which he was legally represented. Mr Brittenden referred me to **Western Excavating (ECC) Ltd v Sharp [1978]** and **W E Cox Toner (International) Ltd v Crook [1981] ICR 823** in support of the Union's position.

49. The Union could not identify any documentary evidence which demonstrated that Mr Kelly was aware of the 28 day limitation period; however, Mr Ashley's written statement provided evidence that all members were sent print copies of the complete Union Rule book every two years.

50. Mr Reade reminded me that Mr Kelly was not represented at an early stage in the proceedings, that the Union had told him that the disciplinary process was "not a legal matter", and that legal representation was not "*necessary or appropriate*". He told me that it would be unjust to find that, having followed this advice, Mr

Kelly could not challenge a decision once he had discovered that the Rules had not been properly followed.

51. Bearing in mind that the Union had proceeded on the basis that these allegations fell within Rule XVII 4 it is perhaps not surprising that they are unable to offer evidence that Mr Kelly understood that the allegations were out of time and that he was content to proceed in that knowledge. If the Union believed that they were acting within the Rules then they would not have drawn an alleged breach, on their part, to his attention nor sought his agreement to proceeding in spite of that breach. Certainly, at the early stages Mr Kelly was not legally represented and, I am told by Mr Reade, was not aware of the time limitation in Rule XVII 4. This may seem surprising; however, I note that the Union did not provide a copy of the Rules to Mr Kelly at the time the allegations were made and relied on him having access to a copy which it had previously provided to all members. It is important to note that, whilst he was present at the Hearing before me, Mr Kelly did not give evidence, in writing or in person, and so neither I nor the Union were able to hear, or test, his recollection of events. I must give appropriate weight to this lack of evidence from Mr Kelly which makes it very difficult for me to reach a view as to whether he was aware of the time limitation in Rule XVII 4. I do, however, have the benefit of seeing the written exchanges between Mr Trubridge and Mr Kelly ahead of the Disciplinary Hearing. Taking into account the absence of direct evidence from Mr Kelly himself, my conclusion is that the questions which he put to Mr Trubridge, ahead of that Disciplinary Hearing, suggest that Mr Kelly had, at the very best, a lack of familiarity with the Rules at that stage. I have seen no evidence, however, which enables me to reach a conclusion as to whether he was aware of the time limitation in Rule XVII 4.

52. Mr Reade also drew my attention to the fact that, in **Connecticut Fire Insurance Co v Kavanagh [1892] A.C. 473, 480**, the Privy Council expressed the expectation that new, purely legal points should be considered in civil appeals even where they are raised at a court of last appeal and that this suggested that I

be willing to hear Mr Kelly's complaint even though it had not been raised previously.

53. I agree with Mr Reade that it is right for me to consider this complaint. Although Mr Kelly clearly participated in the disciplinary process, actively and willingly, I have seen no evidence that he was aware of the limitation in Rule XVII 4 nor, more importantly, that he agreed to proceed in full knowledge that the Union was acting in breach of its Rules. Consequently, there is no evidence that he either waived his right to make a complaint or affirmed his contract with the Union despite that breach.

Conclusions and Observations

54. I am told by the Union that the allegations which were made against Mr Kelly were very serious. From the correspondence I have seen Mr Kelly appears to agree and it is clear, to his credit, that he participated actively and willingly in the disciplinary process at the same time as raising issues with the procedure followed by the Union. I, therefore, find myself in the uncomfortable position of finding that a Union's Rules prevent it from dealing with serious allegations about one of its Members when both the Union and the Member appear to have agreed that it was right that those allegations were investigated. There are, of course, some significant differences between them about how that investigation should have taken place; nevertheless, both seem to have been in agreement, at the time that the Union received the complaint, that some sort of investigation was necessary.

55. The Union has told me that it would be absurd if the Rules prevented it from dealing with allegations which come to the Union more than 28 days after the incident which gave rise to the complaint. That may be the case; however the Union's Rule book is clear about when complaints can be taken forward for investigation. The Rule has been in place in its current format since 2004 and was not used until 2018 when the complaints against Mr Kelly were made. I am surprised that there was no review during this period.

56. At the very least, I would have expected the Union to have considered whether its disciplinary process was fit for purpose at the time it created the “Safe Space” which encouraged Members to report incidents of sexual harassment and discrimination. The Union appears to have placed itself in a position which, quite properly, enabled Members to raise issues in a safe environment without also satisfying itself that it could deal appropriately with any complaints arising from it.

57. The Union could and, in my view, should have ensured that it was able to deal with any allegations arising from the “Safe Space”. I note that the Union is considering removing the 28 time period from Rule XVII 4. I would encourage the Union to go further and review whether the whole disciplinary process is fit for purpose. In doing so it should, in my view, seek to identify the range of allegations which it might reasonably expect to be made against Members and ensure that the disciplinary procedure provides a sufficiently robust framework to deal with them.

58. Turning to Mr Kelly, having found in his favour, I must consider whether it is appropriate for me to make an enforcement Order. In his submissions Mr Reade asked me to make an Order which expunges the impact of the breach of Rules; this included:

    a. Restoring Mr Kelly to full Membership of the Union and to the Union’s Approved Contractor Status

    b. Removing Mr Kelly from the Ask us First List

    c. Reinstating Mr Kelly on the Recording and Broadcast Committee

    d. Restraining the Union from making any comments about the disciplinary process and the complaints other than that the expulsion from membership had been overturned by the Certification Officer, that Mr Kelly had been reinstated on the Recording and Broadcasting Committee and that Mr Kelly had been restored as an Approved Musicians’ Union Contractor.

59. Both Mr Reade and Mr Brittenden agreed that, in these circumstances, Mr Kelly should be restored to Union Membership. I agree that this would be appropriate. It then became clear that, at the time of the hearing before me, Mr Kelly had already been removed, by the Union, from the Ask us First List; it is not, therefore appropriate for me to order that he be removed from that List.

60. The Union argued that it was not appropriate for me to restore Mr Kelly to the Approved Contractors List because Approved Contractor status is a contractual arrangement, unrelated to Membership, between a musician and the Union which is, in their view, outside my jurisdiction. I am told that the contract enables either party to terminate the contract with 10 days notice for any reason. The Union indicated that they would have the right to invoke the termination clause within the contract should I order the reinstatement of his Approved Contractor Status.

61. Whilst it may be possible for the Union to terminate Approved Contractor Status outside of a disciplinary process it is clear to me that the Executive Committee removed Mr Kelly's status as part of this disciplinary process. This is evidenced in the following documents:

    a. Mr Trubridge's letter of 24 January 2018 which indicated that the status had been suspended pending the Disciplinary Sub-Committee Meeting,

    b. the minutes of the Disciplinary Sub-Committee Meeting on 14 February 2018 which recommended that the status be removed and the defendant be placed on the Ask us First List

    c. Mr Trubridge's letter of 8 March which records the Executive Committee's decision to remove the status for a period of ten years under the heading of "Sanction", and,

    d. The minutes of the Appeals Sub-Committee on 23 April 2018 which did not consider it appropriate to ask the Executive Committee to review the removal of the status; this was recorded under "Sanction".

62. It is, therefore, clear to me that whilst there may have been other routes by which Mr Kelly's Approved Contractor Status could have been removed the Union removed it, on this occasion, as a sanction following disciplinary procedures taken forward under Rule XVII. Similarly, I am clear that placing Mr Kelly's name on the Ask us First list was a sanction applied following the disciplinary process.

63. Mr Brittenden takes the view that these sanctions are outside the Rules of the Union and not, therefore within my jurisdiction. I have, however, considered my predecessor Mr Cockburn's decision in **Dennison v UNISON (D/12/03)** and am satisfied that section 108A (2)(b) of the 1992 Act does not prevent me from finding that the sanctions applied by the Union flowed from the disciplinary process and, therefore, fall within my jurisdiction notwithstanding that the Union may have other routes available to apply those sanctions. I agree with Mr Cockburn that:

> "The statutory provision refers to breaches of Rule which relate to disciplinary proceedings. This is a broad formulation which I find does not restrict to breaches of Rules which deal expressly with disciplinary proceedings".

64. The case considered by Mr Cockburn was, of course, different in nature to Mr Kelly because it concerned action which had been taken by a Union outside of its disciplinary process but which nevertheless resulted in disciplinary sanctions. In my judgment, however, the same principle applies here so that where a sanction is applied as part of a disciplinary process, as is the case here, that action must be considered to relate to disciplinary proceedings. Consequently, it is open to me to consider an enforcement Order in relation to all of the sanctions applied following the finding against Mr Kelly. And, in my view, it is appropriate for me to restore Approved Musicians' Union Contractor Status to Mr Kelly in the same way that it is appropriate to restore him to Membership.

65. At the Hearing Mr Reade asked me to make an Order preventing the Union from undermining any Order I might make by including, within that Order, a restriction on the Union from restoring Mr Kelly to the Ask us First List and removing his

Approved Contractor status. The Union believed that this would be too restrictive and beyond my powers; however, taking into account Mr Cockburn's decision in **Dennison v UNISON**, I am satisfied that it would be within my powers to prevent the Union from taking this action as part of any disciplinary, or other, process which arises from Mr Kelly's membership of the Union. I consider that it would be appropriate to do so because it prevents a similar breach of Rules arising by ensuring that the Union cannot impose a similar sanction under any new procedures arising from Mr Kelly having been restored to membership. It would remain, of course, open to the Union to act on other information or for other reasons which had not formed part of this disciplinary action. I do not believe that it is within my remit to grant the wider Order which Mr Reade sought as, whilst in this case it was removed as a disciplinary sanction, the Approved Contractor Relationship is not linked to Mr Kelly's Union membership. That is also the position for the "Ask us First" list.

66. Turning now to Mr Kelly's position on the Recording & Broadcast Committee; the Union told me that this was an elected position which Mr Kelly lost as a consequence of his expulsion from the Union and could only be restored following an election. I am not persuaded that this is the case; the removal of Mr Kelly from the Union was a disciplinary sanction. It seems to me that the loss of any position within the Union purely as a consequence of expulsion, must be capable of being remedied through an Order under s108 (3)(a) of the Act.

67. Finally, Mr Brittenden told me that I would be acting outside my powers by restricting the Union's rights to discuss this case in the manner suggested by Mr Reade, at paragraph 58d above. I agree that such an Order would be very restrictive and I do not think it sits within my powers to remedy a breach or prevent a similar breach in the future. I, therefore, decline to make an Order on those terms.

68. I Order that;

    a. Mr Kelly be restored to membership of the Musicians' Union

b. Mr Kelly be reinstated to the Recording and Broadcast Committee

c. Mr Kelly be restored as an Approved Musicians' Union Contractor

d. The Union must not remove Mr Kelly's Approved Musicians' Union Contractor Status, or include him within the Ask us First List, on the basis of any disciplinary or other Union process which arises from Mr Kelly's membership of the Union and which is based on information which was considered as part of the disciplinary process which began with the General Secretary's letter of 24 January 2018.

Sarah Bedwell
The Certification Officer