

D/5-6/19-20

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

Simpson

v

Unite the Union

Date of Decision

28 May 2019

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Decision

1. Upon application by Mr Tom Simpson (“the applicant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

Pursuant to section 256ZA of the 1992 Act, I strike out the claimant’s complaints 1 and 2 of his application on the grounds that the complaints, as advanced by Mr Simpson, have no reasonable prospect of success and/or are otherwise misconceived.

Findings of fact

2. Mr Simpson first contacted my office in November 2018. He told me that the Union had breached its rules when handling a complaint made by him and in taking forward disciplinary action against him. Following correspondence with my office, Mr Simpson confirmed complaints 1 and 2 as set out in the attached annex.
3. Mr Simpson complained to the Union about the alleged defamatory and abusive behaviour of two other members of Unite the Union. The Union considered Mr Simpson’s complaints and, following an investigation, concluded that there was no evidence to substantiate the allegations raised by Mr Simpson. This decision was sent to Mr Simpson on 29 June 2018.
4. Having concluded that there was no evidence to substantiate Mr Simpson’s complaint the Union decided to investigate whether Mr Simpson had any malicious intent in bringing forward the complaint. This was considered by the Finance and General Purposes Committee (F&GP) of the Scottish Executive Committee who instructed a senior officer to undertake an investigation to identify whether there was any malicious intent which might lead to a disciplinary charge against Mr Simpson. The F&GP Committee decided to suspend Mr Simpson from any lay elected positions and from attending any lay committee meetings, including his branch committee during the investigation and any subsequent disciplinary hearing.

The Relevant Statutory Provisions

12. 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.

256ZA Striking out

- (1) At any stage of proceedings on an application or complaint made to the Certification Officer, she may—
 - (a) order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived,
 - (b) order anything in the application or complaint, or in any response, to be amended or struck out on those grounds, or
 - (c) order the application or complaint, or any response, to be struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant or complainant or (as the case may be) respondent has been scandalous, vexatious, or unreasonable.

(4) Before making an order under this section, the Certification Officer shall send notice to the party against whom it is proposed that the order should be made giving him an opportunity to show cause why the order should not be made.

The Relevant Rules of the Union

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 sub-committee 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 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.

Considerations and Conclusions

Background

Complaint 1

5. Mr Simpson alleged that Rule 27.3.2 was breached by the Union because, at the time the investigation was launched, Mr Simpson was not informed of any allegations of serious breaches of Rules 27.1 .1 – 27.7.7 or any evidence that Mr Simpson complaints had subsequently shown to be vexatious, malicious or defamatory.
6. As I understand the position, the Union had not, at the point at which Mr Simpson complained to me, completed its investigation and so had not decided whether there were grounds for any disciplinary charges (or allegations). As it had not formulated any charges alleging potential breaches under Rule 27.1.1 - 27.7.7 it could not disclose any charges (or allegations) to Mr Simpson. My understanding is that the investigation has now been completed and that the Union has taken forward a disciplinary charge against Mr Simpson which it has disclosed to him in accordance with Rule 27.1.
7. Consequently, there has been no breach of Rule 27.1.1.1 -27.7.7. I, therefore, find that this complaint has no realistic prospect of success.

Complaint 2

8. The F&GP Committee decided to suspend Mr Simpson from any lay elected positions and from attending any lay committee meetings, including his branch committee during the investigation into his conduct and any subsequent disciplinary

hearing. Mr Simpson states that in suspending him, the Union breached the principles of natural justice.

9. Rule 27.4 enables the Union to suspend a member under investigation, as a precautionary measure, prior to disciplinary charges being made in certain cases. That Rule does not require the Union to set out the reasons for the suspension.

10. It is generally accepted that the principles of natural justice apply when a disciplinary process is being conducted and the result of that process could be a sanction. The minimum requirements of natural justice in a disciplinary process may be regarded as:

(1) the member has a right to be heard by an unbiased tribunal;

(2) he has a right to be given notice of any charges of misconduct, and

(3) he has the right to be heard in answer to those charges.

9. At the time of his complaint Mr Simpson had not been charged with a breach of Rules. The Union's investigation has now been completed, charges have been disclosed to Mr Simpson and a disciplinary hearing has been arranged. My reading of the Rules is that any sanction, as opposed to a precautionary suspension, can only be applied following the disciplinary hearing which must be held in a way which is consistent with the principles of natural justice.

10. This complaint, however, is about the decision to impose a precautionary suspension on Mr Simpson during the investigation into his conduct. It is hard to see, therefore, how the Union could have breached the principles of natural justice as expressed above before charges were laid. The decision to suspend ahead of a charge being laid appears to fall within the Rules.

11. It will be open to Mr Simpson to raise questions relating to the conduct of the investigation and whether any decisions are consistent with natural justice during his disciplinary hearing with the Union. The Union will then be able to take Mr Simpson's views into account when reaching a finding on any charges and any potential sanction.

I cannot see, however, that there is any evidence to suggest that the Union has breached the principles of natural justice in imposing a precautionary suspension, consistent with its Rules, during the investigation into whether a Charge should be laid.

12. I therefore find that this complaint has no reasonable prospect of success and/or is otherwise misconceived because there is an explicit right in the Union Rules to make precautionary suspensions during a disciplinary investigation, and before charges are laid, and there is no requirement for them to set out the detailed reasons for the suspension

Conclusions

12. For the reasons given above I am satisfied that the complaints to me are misconceived and that there is no prospect of success.
13. Section 256ZA (4) of the 1992 Act requires me to send notice to the party against whom the strike out order shall be made giving an opportunity to show cause why the order should not be made. Mr Simpson was therefore invited, on 25 April 2019, to provide representations as to why his complaints 1 and 2 of his application should not be struck out.
14. Mr Simpson replied by a letter dated 8 May 2019. However, Mr Simpson did not address any of the issues in my letter as to why the rules were engaged in his complaints. No new relevant information was provided to support his case.

A handwritten signature in black ink, appearing to read 'Sarah Bedwell', with a horizontal line underneath it.

Sarah Bedwell

The Certification Officer

Annex

Complaint 1

On or around 7 September the union breached rule 27.3.2 when the union instigated an investigation to determine whether Mr Simpson made malicious and vexatious complaints against Mr Morrison and Mr Stoddart. He was not informed of any allegations of serious breaches of rules 27.1, to 27.7.7 or any evidence that his complaints had been subsequently shown to be vexatious, malicious or defamatory.

Complaint 2

On or around 7 September 2018, the union breached rule 27.4 when it suspended Mr Simpson from any lay elected position he held and from attending lay Branch committees despite him not having been charged or having been made aware of any allegations or the case against him being of a serious nature. In doing so the union breached the principles of natural justice as set out below:

- a. Failing to advise Mr Simpson in advance of the decision to suspend and failing to define any charges or allegations thereby denying Mr Simpson the right to be heard in answer to any charges.
- b. The process and procedure adopted by the lay member sub committee and Mr Rafferty (Scottish Regional Secretary) unfairly and unjustly excluded any opportunity for Mr Simpson to appeal their decision notwithstanding contrary written advice sent to Mr Simpson by the Unite investigating official.
- c. Mr Pat Rafferty, Unite Regional Secretary, wrote to Mr Simpson on 7-9-2018 and unfairly and without grounds removed Mr Simpson from the positions of Branch Secretary and Branch Treasurer with "immediate effect" through reference to a F&GP Scottish Executive Sub Committee meeting held on 4-9-2018. Evidence exists to show that Mr Rafferty interfered with the application of proper procedure and process prior to the involvement of the sub committee.
- d. Unite failed to provide Mr Simpson with a full copy of Ms Dougall's investigative report (and all appendices) before the report was presented to other officials and decision making bodies in Unite. Unite also failed to provide Mr Simpson with a copy of all papers presented to the F&GP committee.

- e. The committee decision to institute an investigatory process against Mr Simpson was unfair in that he was not given any notice of the case against him, was not given a fair opportunity to answer any case, was denied the opportunity to present his own case, was not provided with detailed notification of the case to be met and not supplied with a copy of a prejudicial report which the F&GP committee had access to before making their decision. Further Mr Simpson was not advised in advance who would sit on the F&GP committee and was not heard by the Committee
- f. Mr Simpson was not provided with all documentary evidence prior to the F&GP's decision nor advised of the documentary evidence placed before the F&GP committee. given the biased nature of the Investigation Report relevant information was not presented to the F&GP committee. It is unfair that the Union, has failed to disclose and detail the evidence considered by the F&GP committee.
- g. The F&GP committee acted in a biased and prejudicial manner by not asking whether Mr Simpson had had a proper opportunity to consider, challenge or contradict any evidence, and whether he was fully aware of the nature of the allegations against him so that he could have a proper opportunity to present his own case.
- h. It is unfair that Unite member Mr Charlie McDonald took part in the F&GP decision due to his relationship with Mr Thomas Morrison. It is also unfair that Mr Thomas Kirby was involved in the investigation into Mr Simpson due to Mr Kirby's relationship with Mr Morrison and Mr Stoddart.
- i. Mr Simpson was not provided with a copy of the allegations which had been made about him. In correspondence Unite referred to "concerns" which are not covered by Rule and there was, therefore, no basis for Unite's instigation of a disciplinary investigation against Mr Simpson.
- j. Matters have not been dealt with fairly and concluded within a reasonable time. Mr Simpson's complaints against Mr Morrison and Mr Stoddart were submitted on 2-3-2018, 16-3-2018, 19-3-2018 and 22-3-2018. Mr Simpson has not been informed of any conclusion.
- k. The Union took action against Mr Simpson once he had sought a review of the decision on his complaint. There is evidence to suggest that such action was steered by Unite officials and that the investigation which followed his request for a review was biased.