Appeal No. UKEAT/0111/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS,7 ROLLS BUILDING, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 18 June 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

THE MUSICIANS' UNION — APPELLANT

MR D KELLY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR DAVID READE QC (of Counsel) Instructed by: Messrs Harbottle & Lewis Solicitors 7 Savoy Court London WC2R 0EX

SUMMARY

TRADE UNION MEMBERSHIP

CERTIFICATION OFFICER

The Claimant, a member of the Respondent Trade Union, made claim to the Certification Officer (CO) pursuant to s.108A TULCRA that it had breached the Union rules by the instigation of disciplinary proceedings in respect of complaints of alleged disciplinary offences occurring more than 28 days before the date(s) of complaint.

The CO held that the Union rules gave it no power to instigate disciplinary proceedings in such circumstances; and set aside the sanctions imposed on the Claimant, which included expulsion from the Union for 10 years.

Allowing the Respondent's appeal, the EAT held that on a proper construction of the Union rules it had a discretion to instigate disciplinary proceedings in respect of alleged disciplinary offences occurring more than 28 days before the date(s) of complaint.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Musicians' Union ("the Union") against the Decision of the Certification Officer Ms Sarah Bedwell dated 1 February 2019, which upheld the claim made by a member of the Union, Mr Dominic Kelly, pursuant to section 108A **Trade Union and Labour Relations Consolidation Act 1992**, that it had breached the Union rules by the institution of disciplinary proceedings in respect of a complaint of disciplinary offences alleged to have taken place more than 28 days before the date of the complaints.

2. The Certification Officer held that its rules gave the Union no power to do so and set aside the sanctions which the Union had imposed on Mr Kelly, including expulsion from membership for 10 years. Mr Kelly is a professional oboist who also acts as what is called a "professional fixer" in the music industry, i.e. a contractor who assembles professional musicians to perform at commercial engagements. He is the Managing Director and professional fixer of the English Session Orchestra.

3. Before these proceedings he had been a member of the Union since February 1999. He had also been an approved contractor of the Union pursuant to a separate commercial agreement with the Union dated 10 January 2000 and headed "Agreement for Approved Contractors of Electronic Media Engagements" (the Approved Contractor Agreement).

4. By a letter dated 24 January 2018 the General Secretary of the Union Mr Horace Trubridge informed Mr Kelly that the Union had received a number of serious complaints from musicians whom Mr Kelly had booked for work. These comprised allegations of sexual harassment, discrimination and bullying and threatening behaviour. The letter advised that

pursuant to Rule XVII the complaints had been investigated and disciplinary charges were in consequence to be considered by the Disciplinary Sub-Committee of the Union's Executive Committee.

5. The Union rules provide as material:

> **"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 subcommittee member.**
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> **Rule X: Duties of members**
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> **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."

By Rule XVII-10 there is right of appeal to the Appeals Sub-Committee of the Executive Committee.

6. The particular focus is on Rule XVII-4. It is common ground that the charges against Mr Kelly were of alleged disciplinary offences which had occurred more than 28 days before the dates of the complaints to the General Secretary.

7. In answer to a request from Mr Kelly, Mr Trubridge by letter dated 25 January 2018 stated that "the allegations all date within the last 4 years other than one that is historical." The objection that Rule XVII-4 precluded consideration of the allegations was not made until the application to the Certification Officer.

8. Mr Kelly delivered his substantive response by letter dated 9 February 2018. He attended the meeting of the Disciplinary Sub-Committee on 14 February 2018. By its decision letter of 16 February 2018, the subcommittee advised that the charges of sexual harassment and of bullying and threatening behaviour under Rule XVII-2(c)(i) were upheld and the charge of discrimination dismissed. It advised that the sanction to be imposed pursuant to Rule XVII-9(f) was expulsion from membership of the Union, the period of which would be determined by the Executive Committee at its meeting in March 2018.

9. By letter dated 4 March 2018 Mr Kelly exercised his right of appeal to the Appeal Sub-Committee. By its reply dated 8 March 2018 the Union acknowledged the Notice of Appeal and answered various questions which he had raised. Under the heading "Sanction" the letter advised that the Executive Committee had decided that the expulsion should be for a period of 10 years

A and that "the EC also decided that your approved contractor status should be removed for a period of 10 years."

B 10. Under the following paragraph headed "MU Approved Contractors Agreement" the letter stated that "the MU can and did treat your behaviour as a fundamental breach of your contract. No notice is required in the event of such a fundamental breach." Mr Kelly did not attend the appeal hearing before the Appeals Committee on 20 April 2018, but his representations had been C supplemented by his further letter dated 13 April and a letter dated 12 April from solicitors Harbottle and Lewis LLP whom he had recently instructed.

D 11. By letter dated 24 April 2018 Mr Trubridge advised that the appeal had been dismissed. He confirmed the expulsion from membership for 10 years and stated, "Your approved contractor status has also been removed and you have been placed on the Ask us First List." His placement E on that list was subsequently removed.

12. By complaint dated 14 August 2018 Mr Kelly applied to the Certification Officer pursuant to section 108A of the **1992 Act**. The complaint alleged a breach of the Union rules in respect of F disciplinary proceedings on 16 February, 8 March and 24 April 2018. The attached Particulars contended that the consideration of the charges was in breach of the 28-day condition in Rule XVII-4; and also made complaints of breach of natural justice, in particular failure adequately to G particularise the charges, failure to specify the available sanctions, inadequacy of the appeal procedure and failure to allow him to have legal representation before the Disciplinary and Appeals Sub-Committees.

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13. The Certification Officer suggested, and the parties agreed, that it would be sensible to take the first complaint concerning Rule XVII-4 as a preliminary issue. I need not rehearse the arguments of Counsel at the hearing before the Certification Officer on 8 January 2019 as these are in substantially the same terms as in today's appeal.

14. In her Decision dated 1 February 2019 the Certification Officer noted that there was little dispute as to the facts of the case. She recorded the witness evidence from Mr David Ashley, Assistant General Secretary of the Union who was secretary to the Sub-Committees which had considered the complaints against Mr Kelly. From that evidence she noted that in the wake of the #MeToo campaign the Union has set up a "Safe Space" online so that its members could report in a safe environment sexual harassment at work.

15. The complaints against Mr Kelly arose from alleged incidents which had been reported through that Safe Space. The Certification Officer continued:

> **"17. …. 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 he could not do anything other than institute disciplinary proceedings against Mr Kelly"**

16. The Certification Officer recorded from Mr Ashley's evidence that the current version of the disciplinary process had been in place since around 2004 and that:

> **"19. … whilst he was not working at the Union at that 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"**

17. On the issue of construction, she accepted the argument of Mr David Reade QC of Counsel on behalf of Mr Kelly that Rule XVII-4 was clear and unambiguous; and that there was

no room by process of construction or implied term to permit a disciplinary process where the alleged disciplinary offence had taken place more than 28 days before the date of the complaint.

18. As to construction she stated in particular that:

> **"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.**
>
> **…**
>
> **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."**

19. As to an implied term, the difficulty was that "…the wording of the Rule is explicit and forms part of a coherent disciplinary scheme": paragraph 38. She was 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": paragraph 41.

20. Counsel for the Union, Mr Stuart Brittenden, had suggested two versions of an implied term, namely "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" and 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": paragraph 41.

21. The Certification Officer stated that:

> **"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."**

22. She accepted the argument that the Union was not without remedies in respect of harassment and other offences which could not be dealt with under the disciplinary process. Mr Reade had given examples of the Union running campaigns supporting victims and dealing with contractors facing allegations. She observed:

> **"40. … 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…."**

23. The Certification Officer dismissed the Union's alternative argument that Mr Kelly had by his participation without objection in the whole disciplinary process, including the appeal, thereby affirmed or waived his rights to complain about the breach of Rule XVII-4. The ground of appeal in respect of the waiver issue was rightly not pursued in the course of oral submissions.

24. In the light of these conclusions it followed that Mr Kelly should be restored to the membership of the Union.

25. As to the requested restoration as an Approved Contractor, the Union argued that this was a matter governed by the Approved Contractor Agreement, not the Union Rules, and thus outside

the Certification Officer's jurisdiction under ss.108A and 108B. Whilst acknowledging the Union's ability to terminate Approved Contractor status under that contract, she concluded "It is clear to me that the Executive Committee removed Mr Kelly's status as part of this disciplinary process": paragraph 61. In support she cited a number of documents, including Mr Trubridge's letter of 8 March and the minutes of the Appeals Sub-Committee: see also paragraph 64.

26. The Certification Officer also accepted that it was within her powers to prevent the Union from taking this action as part of any disciplinary or other process arising from Mr Kelly's membership of the Union. This was to ensure that the Union could not impose a similar sanction under any new procedures arising from Mr Kelly having been restored to membership. She continued:

> **"65. … It would remain, of course, open to the Union to act on other information or for other reasons which have 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…"**

27. The Order which she made in that respect was as follows:

> **"(d). The Union must not remove Mr Kelly's Approved Musicians' Union Contractor Status… 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."**

The Union's Submissions

28. The Union's appeal on the preliminary issue is again divided into arguments identified as "Construction" and "Implied term." This division reflects the observations of Lord Neuberger in **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd** [2016] AC 742 that, whilst construction and the implication of terms involve determination of the scope and meaning of the contract, the factors to be taken into account on an issue of construction are also taken into account on an issue of implication:

> **"27 … that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context."**

Construction

29. Mr Brittenden submits that the cardinal principle of construction is that the Rules of the Union must be construed as they would be understood by the members. Thus, he cites the House of Lords in **Heaton's Transport (St Helens) Limited v Transport General Workers Union** [1973] ICR 308 where Lord Wilberforce stated in particular:

> **"…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… 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 unions' behalf…."**

30. The authorities showed that the Rules of a Union were to be construed as a whole, as with any contract: see **Wood v Capita Insurance Services Ltd** [2017] 2 WLR 1095. There were not be construed literally or like a statute, but would be given a reasonable interpretation which accorded with their intended meaning, bearing in mind their authorship, their purpose and the readership to which they were addressed: see **Jacques v Amalgamated Union of Engineering Workers (Engineering Section)** [1986] ICR 683. The Court should be slow to reach a decision which on the face of it was contrary to what both the members and common sense would have expected: **McVitie v UNISON** [1996] IRLR 33. As Lord Reid stated in **L Schuler AG v Wickman Machine Tools Sales Ltd v Schuler AG** [1974] AC 235 at 251E:

> **"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."**

31. On its proper construction Rule XVII-4 did not operate as an exclusionary rule or one which conferred immunity from disciplinary proceedings once 28 days had elapsed between the date of the alleged misconduct and the date of the complaint. The construction by the Certification Officer was unduly literal. It did not take sufficient account of the Rulebook as a whole (and in particular the objects and the other rules relating to disciplinary offences) and resulted in absurdity.

32. As to the Objects clause (Rule 1), he pointed in particular to those contained in sub rule 2(b) and 2(i). The latter included the object of active opposition to all forms of harassment and discrimination. The Objects were in turn referred to in Rule XVII-2(c) (ii).

33. Rule XVII-1 provided that all members had a duty to observe the rules. That obligation was unqualified and not subject to any temporal limitation. The effect of the Certification Officer's construction was to render the duty conditional and contingent upon the fortuity of the offence being reported within 28 says.

34. Rule XVII-2 provided that disciplinary action "may be taken" against a member who committed the identified acts of misconduct, including harassment on the grounds of the identified protected characteristics or misappropriation/fraud in respect of Union money. Once again, and unsurprisingly given the nature of the identified misconduct, this contained no temporal limitation. Her conclusion that e.g. a Union official could not be disciplined for misappropriating branch funds when this only came to light after 28 days was obviously untenable.

35. Likewise Rule X-4, which under the heading "Duties of members" provided that "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." This duty again had no temporal limitation. This was because the Union needed such information for the purpose of considering disciplinary proceedings. It would be anomalous to the Union to impose a general obligation on members to report misconduct without temporal limitation if the Union was powerless to act if it had occurred more than 28 days before the complaint was made.

36. Accordingly, the reference to 28 days in Rule XVII-4 should be construed as having no more than guideline or advisory status. The Certification Officer had acknowledged the problems in a literal construction, observing that the 28-day limit was "surprisingly short" (paragraph 36) and stating her agreement "to an extent" with Mr Ashley's statement that the Union's interpretation accorded with basic common sense; paragraph 37. However, she had nonetheless accepted a literalist approach which produced an absurd result.

Implied term

37. In the alternative, the Certification Officer was wrong not to imply a term to the effect that the Union was able to initiate disciplinary proceedings in respect of any offence falling within Rules XVII-1 or 2 which was reported to the General Secretary 29 or more days after its occurrence. This was on the basis of the officious bystander test or otherwise on the grounds of business (including internal union) efficacy: see in particular the decisions of the Supreme Court in **Marks & Spencer plc v BNP Paribas** and **Ali v Petroleum Company of Trinidad and Tobago** [2017] IRLR 432.

38. The arguments on construction were again applicable. Furthermore, the rules were silent as to what should or might happen if a disciplinary offence were reported more than 28 days after its occurrence. There was no express prohibition against the Union commencing disciplinary proceedings. The Certification Officer wrongly gave weight to the question of whether Rule XVII-4 was "sufficiently unclear." That was an irrelevant consideration. Even where a rule was free from ambiguity, that did not preclude the implication of a term where that was warranted. The effect of the Certification Officer's construction was impermissibly to read Rule XVII-4 as if it read "within 28 days of the alleged offence (and not otherwise)."

39. It was no answer to say that the Union could respond to complaints of harassment, financial misconduct etc., which fell outside the time limit in lesser ways not involving the disciplinary process. Contrary to the Certification Officer's observation ways, the Union rules did not impose the timeless obligation and powers in Rules X-4 and XVII-1 and 3 merely in order "that the Union is aware of potential breaches which it cannot deal with through the disciplinary process." (para 44).

Mr Kelly's Response

40. In support of the conclusions reached by the Certification Officer on the issue of construction, Mr Reade submitted as he did below that the approach to construction was correctly summarised from the authorities by His Honour Jeffrey Burke QC as Assistant Certificate Officer in **Coyne v Unite the Union** D/2/18 - 19, 4 May 2018, namely "What would the reasonable trade union member understand the words to mean?"

41. This did not differ from the approach in respect of any contract: see in particular **British Actors' Equity Association v Goring** [1978] ICR 791 per Viscount Dilhorne at 794 - 795 and

Evangelou v McNicol [2016] EWCA Civ 817 per Beatson LJ at paragraphs 20 and 21. Nor did the correct approach to construction allow departure from unambiguous language: **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900 per Lord Clarke at paragraph 23.

42. On its proper construction, the natural and ordinary meaning of Rule XVII-4 was plain and unambiguous. As the Certification Officer held, it imposed two conditions which had to be satisfied for the launch of an investigation, i.e., the time limit and reasonable grounds to think that the member may be guilty of a disciplinary offence. This could not be construed as mere advisory guidance.

43. The construction which had been upheld involved no breach of the Objects of the Union nor inconsistency with the obligations of members in Rules XVII-1 or X-4. The Objects could also be advanced outside the disciplinary process; and reports of misconduct which fell outside the time limit of Rule XVII-4 could likewise be addressed in other ways.

44. The construction was not to be regarded as excessively literal. On the contrary, the Certification Officer had properly directed herself to consider what a reasonable trade union would understand the words to mean. That meaning was clear.

45. There had been no distinction between the status of the two conditions in Rule XVII-4 the Union's construction would mean that the condition of "reasonable grounds" also had to be treated as merely advisory. Alternatively, one condition was to be treated as advisory and the other as mandatory. In either case that made no sense.

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46. The key purposes of Rule XVII-4 were the protection both of members and the Union from having to deal with old and historic complaints. This was achieved by confining the investigative powers of the General Secretary. In such circumstances a narrow construction was appropriate: **Loosely v National Union of Teachers** [1998] IRLR 157 at paragraph 36. To view the rule as advisory would undermine that purpose.

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47. The effect of the Union's construction would be to replace a strict 28-day time limit with no limit at all. The imposition of an unfettered discretion to embark on disciplinary proceedings was inconsistent both with the language of the Rule and with the evidence of Mr Ashley recorded in the Decision as to the reason for its introduction in 2004. The Union's case was an exercise in rewriting, not in interpreting, the contract.

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48. As to an implied term, it was trite law that any such term must be consistent with the express terms of the contract: **Johnson v Unisys Ltd** [2003] I AC 518 per Lord Hoffmann at paragraph 37. The Certification Officer rightly held that any term which permitted the General Secretary to initiate disciplinary proceedings in respect of any offence reported more than 28 days after its occurrence would be inconsistent with the express terms of Rule XVII-4. Her consideration of whether or not those terms were "sufficiently clear" was a correct precursor to determining whether the asserted implied term would contradict it.

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49. Any proposed implied term must be reasonably certain: **Torre Asset Funding Ltd & Anor v the Royal Bank of Scotland plc** [2013] EWHC 2670 (Ch) per Sales J, as he then was, at paragraph 152(x). The fact that the Union had provided two different formulations and the written and oral arguments below demonstrated the inability to identify an appropriate term. The variant postulated by the Court in argument, i.e, in the same terms as XVII-4, but inserting "not"

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before "within" and substituting "may" for "shall", fared no better. Amongst other things, it provided no certain basis for the exercise of the proposed discretion.

50. In any event the various suggested implied terms satisfied neither of the tests reaffirmed in **Marks & Spencer**, i.e. business efficacy and/or obviousness. Mr Reade emphasised the strict requirements identified in the judgment of Lord Neuberger at paragraphs 16 and 21. He pointed in particular to the principle that "a term should not to be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including the term": paragraph 21. Having particular regard to the evidence of Mr Ashley, there was no basis to conclude that it was necessary as a matter of business efficacy; and the intervention of the officious bystander would have prompted a discussion on the exercise of a discretion rather than an immediate and obvious response. Once again, the Union's case involved rewriting the Rule book.

Analysis and Conclusion

Construction

51. In order to construe the Rule, it is in particular necessary to consider the other rules which relate to the report of a disciplinary offence. By Rule X-4 there is a duty on all members to report in writing to an "appropriate Official" "any disciplinary offence or breach of Rule of which they have knowledge." By the definition section in Rule 1 "Official" includes the General Secretary. Since it is a duty on all members, it also applied to the member who has committed a disciplinary offence. The duty has no limitation of time.

52. This is reinforced by Rule XVII-1 which provides that all members have a duty to observe the Rules, i.e. including Rule X-4.

53. Rule XVII-2 then provides the power for disciplinary action to be taken against any member who does any of the acts thereafter identified. Those acts are the disciplinary offences in respect of which disciplinary action may be taken. They are all matters which, if they come to their knowledge, members must report pursuant to Rule X 4. As with X-4, Rule XVII-2 has no limitation of time. The identified disciplinary offences include very serious matters which by their nature the offender is likely to conceal. Rule XVII-2 also includes a reference back to the Objects clause (Rule 1) which includes the object of active opposition to all forms of harassment and unfair discrimination.

54. Rule XVII-4 provides that, where the two conditions are satisfied, the General Secretary "shall" investigate whether charges are justified. In my judgment, on a proper construction it imposes a mandatory obligation of investigation where those two conditions are satisfied. I do not accept Mr Brittenden's submission that it merely provides advisory guidance to the General Secretary.

55. Conversely, the Rule does not contain an express prohibition against initiation of an investigation in any other circumstances. The question is whether there is such a prohibition by necessary implication, as the Certification Officer in effect held.

Implied Terms

56. In my Judgment, it is a necessary implication that the General Secretary may not initiate an investigation where it does not appear to him that the relevant complaint gives reasonable

grounds to think that a member might be guilty of a disciplinary offence. There would be no rational basis for that course.

57. However, I do not accept the same conclusion applies where the condition of reasonable grounds is satisfied but the complaint relates to an alleged disciplinary offence which occurred more than 28 days beforehand. In those circumstances I can see no basis to imply a term which prohibits the initiation of an investigation; and every basis to imply a term which provides the General Secretary with a discretion do so. As a matter of drafting, I consider that the necessary term is straightforward; namely in the same terms as XVII-4, but with the insertion of "not" before "within 28 days" and the substitution of "may" for "shall".

58. In my Judgment such a term is compelled by the tests both of business (which must be included trade union) efficacy and obviousness. Any other conclusion is inconsistent with the other Rules on disciplinary offences and produces a result which defies good sense and cannot have been objectively intended.

59. The purpose of the Rule X-4 obligation on all members to report such disciplinary offences is evidently in order that the Union can consider whether disciplinary proceedings should be initiated. That obligation, like the general empowerment provision in Rule XVII-2, has no time limit in respect of the relevant offence. As Mr Brittenden observed, the Union Rules cannot be understood to require disciplinary offences to be reported merely so that it "is aware of potential breaches which it cannot deal with through the disciplinary process": cf. Decision paragraph 44.

60. The identified offences involve, or at least include, matters which the offender is inherently likely to conceal. The effect of the construction advanced on behalf of Mr Kelly is to produce the result that a member who successfully conceals his misconduct, whether e.g. misappropriation of funds or sexual harassment, for the 28-day period cannot be the subject of a disciplinary process. I do not accept that the objective intention of the Rules was to protect members or all the Union in this remarkable way. Furthermore, the suggestion that the intended protection was in respect of "old" or "historic" offences evidently cannot be squared with an immunity from disciplinary process which begins after 29 days without a report.

61. Such an implied term is fully consistent with the express terms of XVII-4 as properly construed. In consequence the implied term is complementary to that rule and involves no rewriting of the Rulebook.

62. Furthermore, the effect of the contrary argument is to permit a member who has knowingly committed a disciplinary offence take advantage of his own breach of contract by failing to report his offence in accordance with Rule X-4 and XVII-1. In my Judgment Rule XVII-4 cannot be construed in a way which effectively sanctions that breach.

63. I do not accept that the construction of the rule accepted by the Certification Officer can be supported on the basis that the Union would be in a position to take some lesser steps short of disciplinary procedure. Once again, in the context of the Rules as a whole and the application of common sense, it cannot be the objective intention that a member who has committed but concealed a disciplinary offence for the 28-day period should be in a better position than a member whose misconduct has come to light within that period. Furthermore, the suggested lesser steps are strikingly vague.

64. I also do not accept that the evidence of Mr Ashley assists Mr Kelly. His evidence as recorded in the Decision relates to a period when he was not working at the Union and by its reference to complaints which were "destabilising the Union" provides nothing of any real substance. Furthermore, in the same paragraph the Certification Officer notes that the earlier process included a reference to an offence being reported to the General Secretary within 4 weeks.

65. I am also unpersuaded that the Union's construction gives rise to any difficulty in practice, in particular as to the exercise of the discretion which the implied term provides. This is just the sort of matter which the Union Rules may properly leave to the experience and good sense of the General Secretary acting, as of course he must in all other respects, in good faith.

66. In the circumstances, I am persuaded that the mere passage of time was no bar to the decision of the General Secretary in this case to initiate the investigation of the complaints against Mr Kelly. Accordingly, the Decision of the Certification Officer must be set aside. As Counsel agree, it also must follow that the Certification Officer's consequent enforcement Order made pursuant to s.108B is set aside in its entirety.

67. It is therefore strictly unnecessary to deal with the Union's final ground of appeal that the Certification Officer acted outside her jurisdiction in making an Order in relation to the removal of Mr Kelly's Approved Contractor status. However, the point having been fully argued and having potential future relevance, I will do so.

68. The first argument is that the status is derived from the distinct Approved Contract Agreement and has is nothing to do with the contract of membership between Mr Kelly and the Union.

69. I agree that his status as an Approved Contractor is derived from the separate commercial agreement. However, it is clear from the documents that the Union purported to remove this status by the means of the sanction which it imposed pursuant to the Rule XVII disciplinary process. In particular, that is expressly stated in the Union's letter dated 8 March 2018: see the passage headed "Sanction."

70. That type of sanction is not identified in the list contained in Rule XVII-9. As Mr Brittenden rightly accepted, that list is not exhaustive. Accordingly, it was a breach of the Rules to impose that sanction and the Certification Officer was therefore right to treat the matter as falling within her jurisdiction under ss. 108A and B.

71. The second argument is that the Certification Officer should not have made the further Order which was sought on behalf of Mr Kelly and which I have earlier recorded. It is submitted that there was no jurisdiction to make that Order, since its effect is, at least arguably, to restrain the Union from using information in connection with any decision which it may take to terminate the Approved Contractor Agreement. The termination provision of that agreement is that it "shall be binding until terminated by any party giving 10 days' written notice to the other." Accordingly, that provision entitles either party to terminate the agreement without requiring any reason for doing so.

72. In his response Mr Reade indicated that although on its face that termination provision did not require either party to have or give any reason for the requisite notice, the importance of the agreement was such that in reality termination would not be done without a reason. Accordingly, the purpose of requesting the Order was to prevent the Union from terminating the agreement by reason of the information it had obtained through the disciplinary process.

73. The position is further complicated by the fact that the Union's letter of 8 March 2018, under a separate section headed "MU Approved Contractors Agreement", gave notice to the effect that it was treating Mr Kelly's behaviour as constituting a fundamental breach of its terms.

74. The Certification Officer had no jurisdiction to make any Order which restricted the ability of the Union to terminate the Approved Contractor Agreement in accordance with its terms or the general law. That said, it is not clear to me that paragraph 2(d) of her Order does have that effect. Nor, as I read paragraph 65 of her Decision, was the Certification Officer intending to impose any such restraint. However, any Enforcement Order under s.108B must leave a Union in no doubt as to what it is permitted to do or required not to do; and there is evident doubt on the point. Accordingly, if I had dismissed the appeal on the preliminary issue, I would have set aside paragraph 2(d) of the Enforcement Order.