

D/2-12/20-21

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

Simpson (4)

v

Unite the Union

Date of Decision

14 July 2020

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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 applicant’s complaints as set out in his email of 21 February 2020 (see attached Annex) 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 emailed my Office on 31 January 2020. He stated that that he “wish(ed) to complain that Unite the Union has breached its rules, threatened to breach its rules and breached procedure through its application of disciplinary procedures against me through mis-application of Unite Rule 27 in breach of the Trade Union and Labour Relations Act 1992 and has acted against the principles of natural justice.”
3. My office entered into correspondence with Mr Simpson so that he could identify the Rules which he alleged had been breached and what those breaches were. Rule 27.7.1 requires that there should be a right of Appeal to a disciplinary sanction; however, Mr Simpson’s complaint did not appear to be about whether the Union had held an Appeal hearing or about the procedure which it followed in doing so.
4. Subsequently, on 21 February 2020, Mr Simpson set out 12 separate complaints. These are set out in Annex A. Following this letter, there were exchanges of emails which set out my powers and sought additional clarification from Mr Simpson so that I could consider whether his complaints fell within my jurisdiction.

The Relevant Statutory Provisions

5. 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

6. Mr Simpson made complaints to Unite the Union alleging that two union members had acted towards him in a defamatory and abusive manner. The Union investigated these complaints and decided not to take forward any disciplinary action against those members. Following the investigation, the Union decided to take disciplinary action against Mr Simpson under Rule 27.1. This action concluded with an appeal hearing on 4 September 2019 and Mr Simpson was expelled from the Union.
7. In 2019 I accepted three complaints made by Mr Simpson about the earlier stages of the disciplinary process and made arrangements for the complaints to be listed for a Hearing. For various reasons, I have not yet been able to schedule that Hearing; however, I expect it to go ahead later this year.
8. The complaints set out in Annex A relate to the appeal process which concluded on 4 September 2019.

Complaint 1 (see Annex)

9. In Complaint 1, Mr Simpson argued that, “Unite breached Rule 27 and the principles of natural justice by progressing a disciplinary hearing on 08-05-2019 and an appeal hearing that concluded on 04-09-2019 having refused to operate the member complaints procedure. The principles of natural justice were breached in this regard through a lack of procedural fairness and application of bias. This is a breach of Unite Rule 27 where Rule 27 EC directions state ‘The disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice’.”
10. Mr Simpson also claimed that, “Unite refused to progress my complaint (dated 17-09-2018) against the investigating officer and Unite employee, thereby breaching Unite rule 27.8 and the rules of natural justice”

11. Dealing first with the complaint about natural justice, my predecessors and I have taken the view that natural justice, in this context, can usefully be considered to include the following principles:
 - a. The member has a right to be heard by an unbiased tribunal
 - b. He has a right to be given notice of any charges of misconduct, and
 - c. He has a right to be heard in answer to these charges.
12. My Office asked Mr Simpson to explain exactly how these principles had been breached in respect of the Appeal Hearing as his earlier complaints had already addressed the issue in respect of the earlier stages of the disciplinary process. His arguments appear to relate to bias in the Union's investigation of his complaint about the Investigating Officer and to the outcome of the Appeal. My statutory role is limited to complaints about breach of Rules and I cannot, therefore, consider whether the appeal process reached the right conclusion. Nor can I consider a complaint which does not identify how the relevant Rule has been breached.
13. Turning now to the Mr Simpson's argument that the Union breached Rule 27.8 by progressing disciplinary action against him prior to concluding his complaint, under the separate members' complaints procedure, about the Investigating Officer in his case. Although he cites Rule 27.8, that Rule does not require a member complaints procedure to be completed before a complaint can be taken forward. He has not, however, done so and nor can I see a Rule which would require this. I cannot deal with complaints about the members' complaints procedure as this relates to complaints from Members about Union staff which is outside my statutory remit.
14. I have considered whether, by taking forward the appeals process at the same time as the complaint Mr Simpson had made about the Investigating Officer, was a breach of Rule bearing in mind the Union's legal guidance, which appears to form part of its Executive Committee Guidance on disciplinary processes. That cannot, however, be the case here as the disciplinary action against Mr Simpson related to his earlier accusations about two Union Members. The complaint against the

Investigating Officer could not, therefore, have been the reason for disciplinary action being taken against Mr Simpson.

15. Consequently, my view is that Complaint 1 has no reasonable prospect of success and/or is otherwise misconceived and should, therefore, be struck out.

Complaints 2-12 (see Annex)

16. In complaints 2 to 12 Mr Simpson set out a number of actions carried out by the Union which he believes were in breach of its Rules. My office has, unsuccessfully, sought clarification from him as to how these actions breached Union Rules and explained that I can only consider the procedure and process followed by the Union. I do not have a role in reviewing whether the Union reached the appropriate decision and nor can I act as an appeal tribunal.

17. Mr Simpson has included a reference to the Rules in each of complaints 2 to 12; he has not, however, described the procedures which were followed by the Union nor indicated how those procedures amounted to a breach of the Union Rules. Each of his complaints 2 to 12 appear to include a subjective assessment of the conclusion reached by the Union rather than explaining why the procedure itself did not comply with the Union Rules. I have no role in considering the decisions which were taken at each stage of the Appeal; my role is limited to considering whether the Union followed the relevant rules in taking forward the disciplinary process. Consequently, I cannot consider Mr Simpson's complaints.

18. My view is that complaints 2 to 12 fall outside my jurisdiction and should be struck out on the grounds that they have no reasonable prospect of success or are otherwise misconceived

Conclusions

19. For the reasons given above I am satisfied that the complaints 1 to 12 in Annex A are misconceived and that there is no prospect of success and/or are otherwise misconceived.

20. 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 them an opportunity to show cause why the order should not be made. Mr Simpson was therefore invited, on 11 June 2020, to provide representations as to why his complaints as set out in the attached Annex should not be struck out.

21. Mr Simpson replied by a letter dated 29 June 2020. However, Mr Simpson did not address any of the issues in the 11 June letter as to why the rules were engaged in his complaints. He did not provide any new relevant information to support his case. Neither did Mr Simpson show a breach of rule in relation to the appeal hearing.

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

Sarah Bedwell

The Certification Officer

Annex

Complaints:

Rules breached:

Rule 27 and the principles of natural justice (hearing rule, bias rule and evidence rule) as incorporated in Unite rules and in Rule 27 that requires the application of fairness, lack of bias, no one judging their own case, investigators being independent and impartial, the person complained against being advised of allegations in as much detail as possible, decision makers making decisions based on evidence before them and not on mere speculation or suspicion.

Rule 27 and associated policy and unite EC directions are laid out in full after definition of the 'Actions carried out by the union in breach of rule'.

Date of rule breaches :

From 02-03-2018 (date of complaint to Unite) to 04-09-2019.

Actions carried out by the union in breach of rule:

1) Unite breached rule 27 and the principles of natural justice by progressing a disciplinary hearing on 08-05-2019 and an appeal hearing that concluded on 04-09-2019 having refused to operate the member complaints procedure.

The principles of natural justice were breached in this regard through a lack of procedural fairness and application of bias. This is a breach of Unite rule 27 where Rule 27 EC directions state "The disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice".

Unite Rule 27.8 states "Complaints against employees shall be investigated under the Members' Complaints Procedure".

Unite refused to progress my complaint (dated 17-09-2018) against the investigating officer and Unite employee, Elaine Dougall, thereby breaching Unite rule 27.8 and the rules of natural justice.

(This refusal was confirmed by Unite lawyer, Neil Gillam, in a letter dated 24-10-2018.)

Unite's guidance for Rule 27 prohibits action against complainants while complaints against union officials are in process. Unite breached rule 27 by progressing disciplinary action against me prior to operation and conclusion of the member complaints procedure concerning my complaint against Ms Elaine Dougall.

Unite's legal guidance for Rule 27 states "disciplinary action cannot be taken" against members when "they have claimed that the union or one of its officials, representatives or trustees has broken or is proposing to break the law or the union's rules". Unite's

letter dated 22-05-2019 advising of the disciplinary panel's expulsion decision makes clear that part of the reason for my expulsion concerned the panel's view that "The complaints made by brother Simpson about the conduct of Officials involved in the process were not justified.". It is a breach of Rule 27 that Unite's decision to expel was based on my complaint against Unite Official Elaine Dougall. Unite confirmed this breach of rule in their letter dated 22-05-2019 by stating "The panel notes the conduct and accusations being leveled against Senior Officials of the union and whilst not being asked to consider same, note further it conforms to a pattern of behaviour on the part of brother Simpson and confirmed to the panel the correctness of our decision in the matter that we are asked to consider". The appeal panel confirmed their consideration of my complaint against Unite official Elaine Dougall in their decision making when they referred in their letter dated 4-9-2019 to "misplaced accusations being directed towards officials".

The complaint against Ms Dougall dated 17-09-2018 defined her breach of Unite rules and the rules of natural justice. It was therefore a breach of unite rules and natural justice that unite progressed disciplinary action against me that concluded with my expulsion as confirmed by an appeal hearing process that ended on 04-09-2019 through use of Elaine Dougall's unfair investigation and without allowing progress of my complaint against Ms Dougall through the member complaint procedure Certification Officer jurisdiction: section 108A of the 1992 Act.

2) Unite breached their rules, the disciplinary procedures, their harassment and dignity policy and the rules of natural justice by the appeal hearing concluding an expulsion decision without a finding of a false basis to my complaints against Mr Morrison and Mr Stoddart and without any evidence of malice or vexaciousness on my part.

3) Unite breached rule 27.3.2 through the disciplinary and appeal panel's failure to 'show' that my complaints against Mr Morrison and Mr Stoddart were "vexacious, malicious or defamatory".

4) The union breached rule 27 by progressing disciplinary action against me since none of my conduct in making complaints against Mr Thomas Morrison and Mr Keith Stoddart was in breach of rule and / or shown by the union to be in breach of rule. Rule 27 EC directions state "the union may only discipline members for conduct which is in breach of rule".

5) Unite breached rule 27.3.2 through the disciplinary and appeal panels' failure to define any "serious breaches of clauses 27.1.1 to 27.1.7" by me prior to an expulsion decision.

6) Unite breached rule 27 by deciding to expel me from union membership on the false and baseless claim that I breached rule 27.1.3 where disciplinary action can only be taken if it is proved that a member "Knowingly, recklessly or in bad faith" provided the union "with false or misleading information relating to a member". My complaints against Mr Stoddart and Mr Morrison were based on evidence, evidence that was held by the union. The union choose to ignore this evidence. My complaints were made in good faith and in compliance with union rules. Unite failed to show or prove any bad faith or falsehood by me. The disciplinary hearing decision to expel as upheld by the appeal panel was therefore made in breach of rule 27.

7) Unite breached rule 27 by deciding to expel me from union membership on the false and baseless claim that I breached rule 27.1.1 through use of complaint language that was "strong and unequivocal". My complaint language accurately defined Mr Morrison's admitted aggressive, unwanted touching and defamatory behaviour. My complaint against Mr Morrison was based on evidence held by the union and was made in full compliance with union rules. Unite failed to show or prove any breach of rule 27.1.1 by me. Their decision to expel on a claim that I breached rule 27.1.1 as upheld by the appeal panel was therefore made in breach of rule 27.

8) Unite breached rule 27 by deciding to expel me from union membership on the false and baseless claim that I breached rule 27.1.5 by bringing "injury and discredit" on the Unite members complained against since Unite held evidence in support of my complaints against Mr Morrison and Mr Stoddart and that all aspects of my complaints were true and were not found by Unite to be untrue. It is therefore false for the union to claim that my complaints were responsible for bringing injury and discredit to those members complained against. Unite's decision to expel on a claim that I breached rule 27.1.5 as upheld by the appeal panel was therefore made in breach of rule 27.

9) Unite breached Rule 27.2 through the disciplinary and appeal panels unfair use of the fundamentally flawed investigations by Unite Officials, Ms Elaine Dougall and Mr Stephen Deans, having had the deficiencies clearly explained to them in advance of their deliberations.

10) Unite breached rule 27.2 and the prevailing principles of natural justice by failing to ensure that the disciplinary process with particular regard to the conduct of the disciplinary and appeal panels was "fair and conducted in accordance with the principles of natural justice". This is evidenced by Unite acting contrary to their Policy on harassment dignity and respect where it is stated "every care will be taken to ensure that no one is victimised because they have made a complaint of harassment". Unite's harassment and dignity policy defines harassment as "unwanted conduct that violates a persons dignity" and goes on to state it may be physical unnecessary touching and

makes the clarification that "a lack of intention to harass does not prevent conduct being harassment". It is a breach of Unite rule and the rules of natural justice that this definition was not accepted and that it was undermined by the disciplinary and appeal panels as evidenced by the content of Unite's disciplinary and appeal panel letters to me dated 22-05-2019 and 4-9-2019.

11) Unite breached the rules of natural justice and is breached Unite rule 27.2 through its breach of the 'harassment, dignity and respect policy' through the unfair and biased actions of the disciplinary and appeal panels by conducting disciplinary procedures and action against me in the absence of evidence of a false basis to my complaints against Mr Morrison and Mr Stoddart and without any finding of malice on my part. The harassment, dignity and respect policy states that "allegations found to be made fallaciously and with malicious intent may be the subject of disciplinary action against the complainant". It is a breach of natural justice that Unite failed to abide by their harassment and dignity policy. This breach of natural justice is a breach of Unite rule 27.2.

12) Unite breached Rule 27.2 and the rules of natural justice through their excusing and attempted normalising of Mr Morrison's admitted abusive behaviour and through their failure to properly address the Mr Morrison's and Mr Stoddart's defamatory behaviour thereby subjecting me to victimisation in breach of unite rule 27.2 and in breach of the principles of natural justice.

John Gillespie, Unite chair of the panel that decided on my expulsion and the other panel members, continued with a flawed application of rules, policy, natural justice and procedure by excusing Mr Morrison's admitted abusive behaviour as described in my letter 'Appeal against unfair expulsion'dated 22-07-2019. In the letter I state "Mr Morrison has admitted physically abusive acts of behaviour towards me. His behaviour included sexual contact that was not the subject of my consent. It was a threatening exercise of control and power where Mr Morrison admitted the controlling nature of his abusive behaviour. In an attempt to avoid admission of sexual motivation he wrote "I do recall on one occasion squeezing his shoulders as I was going by him to the toilet telling him to pipe down as he was sounding off about something to comrades seated around the table in the party office". Mr Morrison fails to mention that this was a social occasion where a live band was playing. It was not the only occasion where Mr Morrison "squeezed" my shoulders in the party office. What ACAS says about sexual harassment: "Sexual harassment is unwanted conduct of a sexual nature. It has the purpose or effect of violating the dignity of a worker, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Something can still be considered sexual harassment even if the alleged harasser didn't mean for it to be. It also doesn't have to be intentionally directed at a specific person.". It is clear that the Scottish Unite disciplinary panel acted contrary to this accepted definition of sexual harassment when they attempted to excuse and normalise Mr Morrison's behaviour in their expulsion letter dated 22-05-2019 by stating that Mr Morrison's behaviour may not

have been to my "liking" and "certainly could not objectively be described as 'sexually abusive, injurious or harassing'". It was not for them to determine Mr Morrison's motivation simply that it happened. Their decision is contrary to ACAS advice on this matter." Tony Woodhouse, Unite chair of the appeal panel that decided on my expulsion and the other panel members, continued with a flawed application of rules, policy, natural justice and procedure by excusing and attempting to normalise Mr Morrison's admitted abusive behaviour. In the Unite letter dated 4-9-2019 Mr Woodhouse states "Physical contact, whether accidental or purposeful is not uncommon in everyday life in both professional and social situations. If it makes an individual uncomfortable it should be challenged or raised on the spot. This does not seem to have been the case in any of the situations described by yourself.". This evidences a blame the victim approach and denies the reality of victim reactions concerning experience of sexually abusive behaviour. Rape Crisis Scotland state regarding listening to victims "Don't ask them why they didn't fight back - people can freeze" and advise "Don't ask why they didn't say anything sooner". They also advise victims "take things at your own pace" and state "it is up to you whether to report to the police immediately or some time later". It is interesting to consider Unite's consideration of my complaints against the Rape Crisis Scotland advice "It may be difficult for men to talk about what has happened because of the common view that men should be 'strong' and able to protect themselves or (in the case of straight men) because they think the assault has 'made them gay'. Because sexual assault of men is less common, they may not come forward because they think they will not be believed.". It is clear that Unite's male dominated panels acted with ignorance and bias that demonstrated a flawed application of Unite rules, policy, procedure and natural justice rules.