Appeal No. UKEAT/0125/20/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 March 2021
Judgment handed down on 6 April 2021

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

DR STEPHEN WATKINS — APPELLANT

BRITISH MEDICAL ASSOCIATON — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	DR STEPHEN WATKINS (The Appellant in Person)
For the Respondent	LORD HENDY (One of Her Majesty's Counsel) BETSAN CRIDDLE (Of Counsel) Instructed by: British Medical Association

SUMMARY

TRADE UNION RIGHTS

The decision of a trade union's Certification Officer, responding to a number of complaints about the treatment of a disciplinary complaint, was not erroneous in law. There was no error in the application of the relevant disciplinary rules, and the process was not rendered cumulatively unfair by reason of a number of matters including a possibility that a disciplinary panel had seen prejudicial material.

There was however an error of law in the Certification Officer's assessment of a complaint about whether the treatment of another disciplinary matter was consistent with the rules of the trade union. A rule requiring that disciplinary action "should not be used to stifle constructive debate or deter members from seeking election" could be engaged whether or not there was any intention for the action to have that effect.

THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. The appellant appeals against the decision of the Respondent's Certification Officer ("the CO") dated 14 October 2019, dismissing complaints brought by him, in particular alleging breaches of its rules as a trade union during disciplinary proceedings against him.

2. The disciplinary proceedings arose because the Appellant posted a message on the Respondent's List Server which expressed criticism of the Respondent's newly elected Deputy Chair. A complaint[1] was made about the message and a member disciplinary process took place. The outcome was that the Appellant was suspended from all committees and other elected roles with the Respondent for 12 months from 24 October 2017. The sanction was upheld on appeal.

3. In an application to the CO on 26 July 2018, the Appellant made a number of complaints about the process and about some other matters.

4. One was conceded, namely that the sanction should have commenced on 29 January 2018 (when the appeal was determined) rather than 24 October 2017. Nothing now turns on that (or on the fact that the CO's decision also made an incorrect reference to the sanction being wrongly applied on "29 January 2018 and 12 February 2018 and other dates"). Some others were not upheld and have not been proceeded with.

[1] In this case, and therefore in this judgment, the word "complaint" is used in two different senses. A disciplinary complaint was made against the Appellant and was decided by a disciplinary panel and then by an appeals panel. The Appellant then made an application to the Certification Officer under TULRCA section 108A which contained a sequence of "complaints" numbered from 1 to 6, inviting the CO to rule that rules had been broken in the determination of the complaint against him.

5. The remaining complaints are reflected in the grounds of appeal, by which the Appellant contends that:

1) The CO should have ruled that the disciplinary and appeal panels should have asked whether the Appellant's conduct was of equivalent seriousness to the examples given in rule 7.6 (see below). In addition the failure to do this meant that the process did not comply with Article 13 of the Respondent's Articles of Association.
2) The CO should have ruled that the constitution of the appeal panel was not in accordance with Article 14 of the Respondent's Articles of Association.
3) The CO should have ruled that the disciplinary panel had wrongly had regard to prejudicial material to which the Appellant was not given an opportunity to respond.
4) The Respondent wrongly allowed the disciplinary process, and/or another separate disciplinary complaint, to be used to stifle debate.

Factual background: the disciplinary proceedings

6. In the summer of 2017, the Respondent held elections for the Deputy Chair of its Council. On 9 August 2017, a "Dr H" was elected. The Appellant had supported another candidate who was the incumbent. On 10 August 2017 he posted a message which was addressed to Dr H but which was visible to all Council members. The message made several comments about Dr H, some positive and some negative, and suggested that her candidature had been used to further ulterior motives of some voters whom he described as "malevolent".

7. On 17 August 2017 the Respondent's Treasurer Dr Dearden made a complaint about the posting. It was handled under the "LOV Support and Sanctions" process, and was considered by a panel chaired by Ms Debra Jones on 12 October 2017.

8. By a letter dated 24 October 2017 Dr Watkins was informed of the panel's decision, determining that he had failed to meet the standards of behaviour required by the Respondent's code of conduct paragraphs 2.3 (personal conduct) and 3 (shared responsibility) and that, by way of sanction, he would be suspended from all BMA committees and other elected roles for 12 months starting from the date of the letter, pursuant to rule 8.1.8 of the support and sanctions process (as to which, see below). In particular the panel said that it:

> **"… was mindful that you had acknowledged that your posting of 10 August had been inappropriate although you stated that you had not intended it to have the impact it did.**
>
> **Nonetheless, the Panel was of the firm view that, given the central message of the posting, its timing, and the fact that it was placed in writing on the listserver, which is essentially a public forum, it was a deliberate and manipulative action that was calculated or very likely to undermine an individual new to their office and to cause damage, that could not easily be undone, to their reputation and ability to effectively execute their duties. As well as this, it risked damaging confidence in the democratic process.**
>
> **The Panel took note of the fact that you have a long record of service in the BMA and other organisations, much of it at senior, officer, level. In the Panel's view, given that you had the benefit of this experience, your decision to make the points that you did on the listserver in the manner which you did, was particularly culpable."**

9. The Appellant appealed on 12 November 2017. The case was heard by an appeals panel on 23 January 2018. The appeals panel, setting out its decision in a letter dated 29 January 2018, upheld the first panel's findings in all but one respect and concluded that the sanction was proportionate, reasonable and appropriate. It noted in particular that the posting had caused considerable damage to Dr H and had damaged confidence in the democratic process. This might have been limited by an immediate retraction and a full, unqualified apology but these had not been forthcoming (a point disputed by the Appellant). The only change made by the appeals panel concerned the Appellant's motivation. The panel considered that the words "a deliberate and manipulative action that was calculated or" should be removed from the original decision letter. The relevant sentence therefore would be amended to say that the posting, in view of its timing and its placement on a public server, was very likely to undermine Dr H and to cause damage to her reputation and ability to execute her duties.

10. On 26 July 2018 the Appellant submitted his application to the CO under section 108A(1) of the Trade Union and Labour Relations (Consolidation) **Act 1992** ("TULRCA"), making seven complaints about the panel decisions. One complaint was struck out on 29 July 2019 as having no reasonable prospect of success. As I have said, one complaint about the start date of the sanction was conceded. The other five complaints were rejected, in a written decision dated 14 October 2019 from which this appeal is brought.

Legal framework

11. Section 108A of TULRCA provides (so far as material):

> **"(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."**

12. If the CO makes the declaration sought, section 108B(3) provides:

> **"Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements –**
>
> **(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;**
>
> **(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future."**

13. This appeal is brought under section 108C which provides:

"An appeal lies to the Employment Appeal Tribunal on any question of law arising in proceedings before or arising from any decision of the Certification Officer under this Chapter."

14. It is common ground that the Respondent is a trade union for the purposes of this legislation.

15. The Respondent's Articles of Association contain the following material provisions:

"13. The grounds upon which a member, officer or member of any committee may be investigated are that: -

(1) their conduct has been

(a) detrimental to the honour and interests of the medical profession or the Association; or

(b) likely to bring the profession into disrepute; or

(2) They have wilfully and persistently refused to comply with the articles, bye-laws or the rules of any division or branch of which they may be a voting member.

14. (1) Where a director, chief officer, voting member, division, branch or committee or a member of the official staff of the Association believes that a member, officer or member of any committee has contravened the provisions of article 13 the allegation must be submitted in writing to the chief executive.

(2) The chief executive shall investigate the allegation and in doing so shall inform the member concerned of the allegation and invite the member to comment on the allegation. The chief executive may, in accordance with article 57, delegate all or part of the investigation to such person or persons as they think fit.

(3) The chief executive (or those persons appointed by them to conduct the investigation) may:

(a) dismiss the allegation with no further action upon concluding the investigation;

(b) issue an oral or written warning upon concluding the investigation;

(c) refer the allegation to go to a hearing upon concluding the investigation; or

(d) during or after the investigation and in consultation with the council chair, representative body chair or treasurer, temporarily suspend a member from some or all BMA offices pending a hearing …

(4) If the chief executive is satisfied that a hearing is necessary, … the chief executive shall request the council to set up a panel of three or more members of the Association to hear the case. The member may appear before the hearing and may be accompanied by a friend or representative

who may be legally qualified, or they may make a submission. The chief executive or their appointed delegate shall present the case on behalf of the Association. The hearing shall be held in public unless the panel considers that there is good reason not to do so.

(5) The decision of the panel shall be reported to the council but council shall not have the power to overturn the decision.

(6) The panel shall have the power to:

(a) expel the member from the Association;

(b) suspend the member from membership of the Association for such period and on such terms as it considers appropriate;

(c) suspend the member from some or all of the BMA offices held by them for such period and on such terms as it considers appropriate;

(d) issue a public censure in respect of the member's conduct on such terms and through such medium as it considers appropriate;

(e) issue an oral or written warning.

(7) The sanction imposed by the panel shall take effect 21 days after the decision of the panel unless the member appeals against the decision of the panel. The member shall have the right of appeal against the decision of the panel within 21 days to a panel of three members appointed annually by the council. Any appeal hearing shall take place within 21 days of the appeal being received.

…

(11) Council shall have the power to determine the detailed procedures appropriate for the investigation and hearing process under this article."

16. On 17 May 2017, and with effect from 1 July 2017, the Respondent's Council adopted a process to deal with conduct which might not fall within Article 13. This, under the heading "Living our Values" (or "LOV"), consists of two linked documents, namely a code of conduct which prescribes certain standards of behaviour and a "support and sanctions process" which is used to deal with complaints of breaches of the code.

17. Under the sub-heading "Principles", rule 2 of the support and sanctions process (also referred to in this judgment as the "LOV process") requires that the process be "fair, documented and applied consistently to all members". Rule 17 states that "the process should not be used to stifle constructive debate or deter members from seeking election".

18. Under the sub-heading "Tackling poor behaviours informally", there is a further heading "Choice of sanctions" referring to a range of sanctions "which should be proportionate to the issue being investigated". There is then a non-exhaustive list ranging from a verbal warning to expulsion from membership, and including suspension from committee business and office holding.

19. Rule 7.1 states that a first finding of misconduct will usually lead to a verbal or written warning, but the rules further provide:

> **"7.4 Some acts, termed gross misconduct (see 7.6), are so serious in themselves or have such serious consequences that they may call for suspension or expulsion without notice for a first offence.**
>
> **7.5 A fair complaint process should always be followed, before suspending or expelling a member.**
>
> **7.6 Acts likely to be viewed as gross misconduct at the BMA are likely to include theft, fraud, physical violence, sexual assault/harassment, gross negligence or serious breaches of confidentiality."**

Ground 1

20. Rule 7.6, quoted immediately above, gives examples of matters which could amount to gross misconduct. By ground 1(a) the Appellant argues that the CO erred in holding that the panels were entitled to establish their own criteria and were not bound to ask specifically whether his conduct was similar to those specified in rule 7.6.

21. By ground 1(b) it is also contended that the process was required to comply with Articles 13 and 14 above, and that a failure to follow rule 7.6 prevented this. This raises the question of the relationship between Articles 13 and 14 on the one hand and the LOV process on the other.

22. I begin with ground 1(a).

23. It is common ground that the rules of a trade union fall to be construed in accordance with the principles applying to the interpretation of contracts, bearing in mind their context as a trade

union's constitution. Both parties have referred me to *Wise v USDAW* [1996] ICR 691 at 705 where Chadwick J said:

> **"… the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose, and the readership to which they are addressed."**

24. The Appellant contends that under the LOV process, suspension for a first offence is possible only in a case of gross misconduct, and that gross misconduct is defined by reference to the examples in rule 7.6. Therefore both panels should have compared his conduct in terms of seriousness with the examples in rule 7.6 in order to decide whether it amounted to gross misconduct. Since the panel chairs accepted that they did not make that comparison, the CO should have upheld his complaint in that regard.

25. Lord Hendy QC, representing the Respondent, argued instead that rule 7.6 contains mere illustrative examples and that gross misconduct in this context should have the meaning which it is given in employment law generally. There, gross misconduct is misconduct which is so serious that it justifies dismissal without notice. That being so, it is defined as a form of repudiatory conduct evincing an intention no longer to be bound by the contract of employment: see **Dunn v AAH Ltd** [2010] IRLR 709 per Rix LJ at [6-7].

26. The Appellant submitted in response that the concept of contractual repudiation was not apposite in a case of disciplinary action by a trade union but that, even if this was the right test, then rule 7.6 was intended to define what would amount to repudiation.

27. The CO stated in her decision:

> **"150. Dr Watkins' position was that neither Panel specifically addressed whether his behaviour was comparable to the offences outlined at paragraph 7.6, therefore, it was not open to them to apply the**

sanction of suspension. He argued that neither Panel had applied the test for suspension appropriately but had, instead, applied their own test. I do not agree with him. It is clear that both Panels fully considered the impact of Dr Watkins' behaviour, which he has admitted, and considered what sanction was appropriate. It would have been good practice for them to have reflected in their letters that they considered his behaviour to amount to gross misconduct and to explain the reasons why. But the fact that they did not do so does not mean that either Panel acted unfairly.

151. Nor do I agree with Dr Watkins that it was necessary for them to have addressed whether his behaviour was comparable to those offences listed in paragraph 7.6. Paragraph 7.6 is an indicator of offences which are likely to amount to gross misconduct. It is not an exhaustive list and in cases where a Panel finds one of those offences to have occurred I would still expect them to consider, and explain, what sanction might be appropriate. On that basis, I am satisfied that the Appeal Panel addressed, as far as was necessary, Dr Watkins' points about procedural irregularities."

28. In my judgment, the analogy between cases of wrongful dismissal and cases of trade union discipline is not a precise one, and therefore repudiatory breach of contract may not always be a helpful concept in trade union disciplinary cases. Having said that, however, trade union membership is a matter of contract and, where expulsion is a possible sanction, repudiation has some logical relevance. However, what employment law and trade union law have in common is that the practical significance of a finding of gross misconduct is not the attaching of that label, but the application of a sanction for it. Ultimately the question to be asked in disciplinary cases as in dismissal cases is whether the conduct is sufficiently serious to merit the sanction.

29. That being so, the question for each Panel was not whether the Appellant's conduct was of equivalent seriousness to the examples given in rule 7.6., but whether the conduct was sufficiently serious to merit suspension.

30. The list in rule 7.6 is of course intended to assist panels in making such decisions. As the CO said, it would be advisable for panels to explain in every case why they regard conduct as amounting to gross misconduct. But as she said, mere reference to rule 7.6 would not be enough because conduct might be of a type included in the list but not in fact be of the required seriousness.

A

31. I therefore agree with the CO's conclusions on the decisions of the Panels, and in particular of the appeals panel. The appeals panel corrected the view of the original panel in respect of the Appellant's intent, but nevertheless weighed the nature of the conduct and its impact on Dr H and arrived at the conclusion that the sanction of suspension remained appropriate. I see no error of law in that conclusion or in the decision of the CO upholding it.

B

32. Therefore Ground 1(a) cannot succeed.

C

33. I turn to Ground 1(b).

34. The Respondent's Council adopted LOV under Article 72 of the Articles of Association, which provides:

D

> **"The council is the body responsible for the lawful conduct of the Association as a recognised trade union and as a professional association. The council shall exercise such powers and do such acts and things as may be exercised or done by the Association or are conferred on it pursuant to the articles and bye-laws and are not, by the provisions of any statute or of the articles, directed to be exercised or done by the board, a general meeting or by the representative body. In particular the council shall have power, in the interval between successive meetings of the representative body, to formulate and implement policies (not being inconsistent with any policy already laid down by the representative body and subject to article 77(2)) on any matter affecting the Association."**

E

35. In her decision, the CO quoted from the Council minute of the meeting which adopted LOV. Council had recognised a need to respond to increasing reports of poor behaviour. According to the minute, "the sanctions process incorporated the existing member to member complaint process as set out in articles 13 and 14" but was viewed as providing "additional processes which could be used other than the 'nuclear option' of Articles 13 and 14."

F

G

36. The LOV support and sanctions process is set out in a published "living document", i.e. a document which may be revised from time to time. It begins with an Introduction which states that it incorporates Articles 13 and 14 and that these are reproduced in Appendix 1 to the process.

H

A Appendix 1 in fact contains Articles 13, 14 and 17. The text of the process refers once to Article 17, which prevents a member from resigning during an investigation, and twice to interim suspension during an investigation by reference to Article 14. It does not refer to Article 13 at all.

B 37. With all due respect to the Council, I do not understand what is meant by the "incorporation" of Articles 13 and 14.

38. As I have said, those Articles and Article 17 are set out in the Appendix but they are
C neither quoted nor paraphrased in the body of the LOV process. Although they are set out in the Appendix, it is clear that parts of them do not apply to the LOV process. The Article 13 definition of relevant conduct is not said to be a threshold for, or in any way relevant to, the LOV process.
D That process, and the code of conduct, clearly were intended to apply to a wider range of misconduct, some of which might not meet the Article 13 threshold and therefore not merit a "nuclear option". There are also procedural differences between the Article 14 process and the
E LOV process. Under the former, a disciplinary hearing is conducted by "a panel of three or more members of the Association" and any appeal is heard by "a panel of three members appointed annually by the council". Under the latter, the hearing and any appeal are heard by (different) panels of between three and five members "selected by the BMA corporate development
F function". The appeal deadlines under the two processes differ, and Article 14 (unlike the LOV process) states when a sanction takes effect and by when the appeal be heard.

39. In my judgment, the most likely meaning of this "incorporation" is that the provisions of
G Article 14 will have procedural application in the LOV process, save where that process expressly differs from it. That does not explain the incorporation of Article 13, for which I can detect no significance at all.

H

A 40. Both parties agree, and I agree, that the LOV process could not and did not amend the Articles of Association. Therefore Articles 13 and 14 continue to apply, unamended, in cases where they apply.

B 41. The Appellant (who as a member of Council voted to introduce LOV) contends that because Articles 13 and 14 could not be replaced under Article 72, those Articles, rather than any inconsistent parts of the LOV process, would continue to apply to serious cases, i.e. to cases in C which suspension and expulsion were considered. The latter situation, he says, is what must have been meant in the minute by "the nuclear option".

42. That contention merits serious consideration, not least because it would give a meaning D to the "incorporation" of Article 13. The meaning would be that Article 13 is applicable if the facts fall within its terms, and that in such a case Article 14 will apply in its original terms and without any of the inconsistent parts of the LOV process.

E 43. Nevertheless, given that I have to construe the words used in the LOV process, I cannot accept that contention. Rule 8 of the LOV process sets out a full range of 11 sanctions, with no hint that the upper end of that list is available only in an Article 13 case, and therefore also no F hint of how the list of 11 would be divided into these more and less serious categories. Just as fundamental is the fact that Article 14(6) gives a range of 6 sanctions, from an oral warning (the second item in the rule 8 list) up to expulsion. That would appear to mean that the LOV process risks replacing or subsuming the Article 14 process in less serious cases too. There is nothing to G explain that replacing or subsuming the Article 14 process is permissible, but only in a case not caught by Article 13.

H 44. The not altogether satisfactory conclusion is that the two processes have a parallel existence. Since the LOV process could not have amended or superseded the Articles of

Association, it may be that a member could insist on Articles 13-14 being applied (and the LOV process disapplied) in a case where they were plainly relevant. That would be an answer to the Appellant's contention that introducing a parallel process was beyond Council's powers.

45. I therefore reject the Appellant's contentions that (1) Article 14 must be followed in every case where suspension (or expulsion) is possible and (2) rule 7.6 must be applied as if it were a definition in order to ensure that Articles 13 and 14 are respected. Indeed, even if point (1) were right, point (2) would not follow. I remain of the view that rule 7.6 (whatever its relationship to Articles 13 and 14) only contains illustrative examples, and that the question in every case is whether the sanction is commensurate with the conduct.

46. Ground 1(b) therefore cannot succeed.

Ground 2

47. By Ground 2 the Appellant contends that the appeals panel was not properly constituted under Article 14(7) and the CO erred by ruling that the Respondent was entitled to depart from the provisions of that paragraph.

48. However, for the reasons given under Ground 1 above, the CO was right. This case was dealt with under the LOV support and sanctions process, and not under the provisions of Article 14 which are applicable to Article 13 cases. It was therefore permissible for the panels to be constituted according to the terms of rules 4 and 9, and not according to the different terms found in Article 14.

49. The Respondent has argued in the alternative that the Appellant waived any defect, essentially by proceeding with his appeal and making certain representations about the appeal

panel. I am not convinced by those arguments, given the lack of any unambiguous acceptance of a departure from Article 14, but in the circumstances I do not need to resolve them.

Ground 3

50. This ground arises from events earlier in the chronology.

51. As I have said, Dr Watkins' posted his message on 10 August 2017. On the same day, Dr Dearden – who in due course would be the author of the complaint against him – placed a posting criticising Dr Watkins' posting. Dr Watkins sent a reply, to which Dr Dearden responded, and then Dr Watkins responded to that. Dr Dearden made his complaint on 17 August 2017.

52. On 1 September 2017 Dr Watkins lodged a complaint about Dr Dearden's postings. However, he withdrew part of this complaint on 17 September 2017 and the rest of it on 27 September 2017.

53. On 27 September 2017, Dr Dearden asked for a written response by him to Dr Watkins' complaint, together with some further comments, to be shared with the panel which would hear the disciplinary hearing on 12 October 2017. According to the CO's decision, Dr Dearden had asked that panel to review the complaint made by Dr Watkins and, despite its withdrawal, give their informal view on his conduct.

54. On the day before the hearing Dr Watkins, who was unaware of Dr Dearden's request, asked a BMA officer, Mr Moynihan, if the panel would be seeing any documents other than those which had been sent to him. In response, Mr Moynihan mentioned the request. Dr Watkins requested sight of the documents in question but this was refused. The CO noted an email from

Mr Moynihan to Dr Watkins on 24 October 2017 saying that the material had been provided on the understanding that only the panel would see it, and that the panel had decided not to discuss or comment on this material and that, in hearing the complaint against Dr Watkins, it only took into account the documents which he had seen.

55. The CO acknowledged, and Lord Hendy agrees, that the documents were "potentially prejudicial". They contained criticism of Dr Watkins by Dr Dearden, asserting that people were afraid of him and that he had a pattern of posting messages and then apologising for them once the damage was done. Dr Dearden also suggested that he had a tendency, when challenged, to agree verbally to take a certain course but then not to comply in public. This material was directly relevant to the substance of the complaint which the panel was determining and to his possible attitude to any sanction.

56. The CO explained that there was no evidence of whether or not these statements were actually read by the original panel, but she could not rule this out. If the panel did see this material, Dr Watkins could not have responded to it because he did not see it and did not know what it contained.

57. The CO carefully noted the substance of the complaint against Dr Watkins, as it was viewed by the panel according to their decision letter (which made no reference to any other allegations). She heard oral evidence from Ms Jones, who chaired the panel, describing her sense of shock when she saw Dr Watkins' posting. The CO concluded that even if the panel had seen the extraneous documents, they would have been able to disregard them, and that the panel's decision on the complaint would have been the same in any event. Furthermore, the offending material was not sent to the appeals panel and therefore any perception of bias could not affect the appeal, so that the appeal was sufficient to ensure overall fairness.

58. Lord Hendy argues that the overall process was rightly adjudged to be fair. The original panel made its decision against the Appellant for fair and proper reasons. That conclusion could not be displaced by any speculation that the material merely might have influenced the first panel. He also echoes the point about the appeals panel correcting any problem, applying the principle that a fair appeal process can cure unfairness in a first-instance disciplinary decision: see **Taylor v OCS Group Ltd** [2006] ICR 1602 per Smith LJ at [47].

59. The Appellant, however, argued before me that this was not the right question. His complaint, he says, raised the question of whether the submission of prejudicial material was a "breach of the rules" within the meaning of section 108A. Given the CO's power to make orders preventing future breaches, e.g. for the protection of others, the Appellant submits that if there was a breach of rules, then the CO was bound to make a declaration. The Appellant also argued that the prejudicial material might have unconsciously influenced the panel in its assessment of the case as a whole.

60. It is necessary to focus on what the Appellant's complaint to the OC consisted of. Following correspondence, the complaint was set out in a finalised version which is recorded in a letter from the CO to Dr Watkins dated 10 January 2019. We are here concerned with complaint 4, which consists of a preamble and 11 bullet points. I quote the preamble and only the single relevant bullet point:

> **"On 12 October 2017, and also on various earlier dates on which procedural decisions were made which affected the hearing on 12 October 2017, the BMA breached Principle 2 of the Living our Values ("LOV") Support and Sanctions Process (which requires that the process is fair, documented and applied consistently to all members) and also rule 7.5 of the Support and Sanctions Process (which requires a fair process to be followed before suspension) and also an implied rule to similar effect within Article 14 and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct. The BMA breached these rules by operating an unfair process. The rule was breached because the process was unfair as a result of the cumulative impact of the following irregularities:**
>
> **…**
>
> - **The submission of prejudicial material to the LOV Panel, which Dr Watkins had not been permitted to see, as a result of a request by Dr Dearden for advice about his conduct …**
>
> **… "**

61. Contrary to the Appellant's main submission, it seems to me that the issue for the CO was plainly the overall fairness of the proceedings i.e. whether they were cumulatively rendered unfair by any or all of the matters of which he complained.

62. I perceive no error of law in the CO's conclusion. She was right to query (at the very least) whether the Respondent had followed best practice by passing Dr Dearden's request to the same panel that was hearing his complaint. In doing so, there was the potential for unfairness. But in my judgment she was entitled to conclude that the first panel reached a straightforward decision for proper reasons. The fact of the posting and the fact that it breached the code of conduct were admitted. The magnitude of the breach was assessed by reference to the nature and impact of the posting. Whether or not the panel saw the offending material, it was not in evidence before them when they considered the complaint. In the absence of any reference to the offending material, it was not incumbent on the CO to conclude that there was a real risk that the material had had an influence, conscious or unconscious, on the outcome.

63. If I had thought otherwise, I do not consider that the decision of the appeals panel would have cured the problem. That is because the problem was not identified until after the appeal and therefore the appeals panel could not consider any risk arising from it. Whilst there is no rule of law that an appeal must consist of a full rehearing in order to cure any such defect, in a case such as this the Appellant would at appeal stage be starting at a disadvantage because of the existing findings against him. If those findings had come about, at least in part, because of illegitimate material being seen, the mere fact that an appeal panel did not disagree with the findings could not in my judgment remove the effect of that risk.

64. Nevertheless, for the reasons set out above, Ground 3 also fails.

Ground 4

65. By Ground 4, the Appellant complains that the Respondent infringed Principle 17 of the LOV support and sanctions process, quoted above, in that processes were "used to stifle constructive debate" and that the CO should have ruled to that effect.

66. This is said to have occurred in two distinct ways, by reference to items 2 and 6 of Dr Watkins' complaint to the CO. I will take complaint 6 first, referring to it as Ground 4(a) of this appeal, while the point about complaint 2 will be referred to as Ground 4(b).

Ground 4(a)

67. Dr Watkins complained to the CO that the Respondent infringed Principle 17 by "accepting in [Dr Dearden's] complaint, and refusing to strike out from the complaint, a passage attacking UNITE".

68. Dr Dearden's complaint was expressed in an email containing 37 lines of text. The relevant passage occupied two lines, and said:

> **"There is, in my view, an underlying thread here of Unite's place in the BMA and potential attempts to highjack [sic] the BMA for personal and/or political purposes not part of the BMA purpose."**

69. The inclusion of that paragraph was also the first of the 11 components of the Appellant's complaint no. 4 (see 60 above). Responding to that, and rejecting the suggestion that there had been unfairness, the CO at paragraph 71 of her decision recorded that the first panel chair, Ms Jones, confirmed that Dr Watkins had asked for this paragraph to be excluded from their

consideration. She explained that the panel considered the paragraph to be irrelevant and in fact excluded it from their decision-making. Ms Jayesinghe gave evidence to the CO that it was not the BMA's practice to edit complaints before a panel hearing and that Dr Watkins had not asked her to do so. The CO concluded that the paragraph had no prejudicial or unfair effect.

70. Under complaint 6 at paragraphs 172-176 of her decision, the CO referred back to her findings on complaint 4. She concluded that there was no evidence to support complaint 6.

71. I discuss the nature of Principle 17 in more detail in the next section of this judgment. As I will explain, I consider that it imposes a filter on disciplinary action. Where the issue arises, decision makers may have to decide whether disciplinary action "should not be used" (or should not be used in a particular way) because it would have the effect of stifling constructive debate or deterring candidacy, and the proper disciplinary purpose of any proposed action should be weighed against this.

72. In fairness to the Appellant, the CO's decision did not contain a very clear analysis of the Principle 17 issue. Nevertheless, I am convinced that she reached the right decision on the facts.

73. The Appellant himself does not suggest that the inclusion of the paragraph had any stifling effect. It is possible to imagine an investigation of the issues raised by Dr Dearden's comments which could have stifled constructive debate or deterred individuals from relevant activity. If such a thing happened, that could have been an example of the process being "used" in a way which contravened Principle 17. But it did not happen. Nor do I consider that the mere presence of the offending words in the document containing the complaint made it likely to happen. I

therefore do not consider that there was any legal obligation to excise the paragraph from the complaint, and the CO's decision therefore was not erroneous in law.

Ground 4(b)

74. This issue differs from the rest of the appeal because it is not about Dr Dearden's complaint against Dr Watkins. That is why I have dealt with it separately as a second part of Ground 4.

75. During the run-up to the BMA Council elections in January 2018, a group of individuals who were considering standing for election met to consider a joint manifesto. Dr Watkins' appeal was pending at that time and therefore it was possible that he might be eligible to stand. He took part in drafting and circulating the "Manifesto for a better BMA".

76. On 9 January 2018, Sir Sam Everington, a BMA Council member, made a complaint against Dr Watkins. He questioned whether Dr Watkins should be engaging in this activity while under suspension, and complained about the content and tone of the manifesto.

77. Ms Jayesinghe, who is the Respondent's Director of Corporate Development, shared this complaint with Dr Watkins on 12 January 2018. She considered the complaint with reference to the LOV process, taking advice from the Respondent's legal team. On 30 January 2018 she informed Dr Watkins of her conclusion that the complaint did not raise any issues which needed to be considered further. No further action was taken on it.

78. That, one might think, would have been the end of it. Dr Watkins, however, told the co-authors of the manifesto about the complaint and warned them that part of it, at least, might be levelled against them. He feels that debate was or could have been stifled, or candidacy deterred, by these events, not least because the co-authors decided to stand for Council individually rather than on their joint manifesto. Dr Watkins complained to the CO that the act of Sir Sam Everington was an intentional breach of Principle 17 and that, because Sir Sam is a senior member of the Respondent, the Respondent should be "liable" for it.

79. The CO said at paragraph 55 of her decision that she had no evidence about Sir Sam's motives. She considered that the period of three weeks taken to assess and dismiss his complaint was not unreasonable. She considered that Dr Watkins had not actually demonstrated that debate was stifled, not least because none of the allegedly affected candidates attended the hearing before the CO to give oral evidence.

80. The CO added:

> **"59. … in my opinion the wording of Principle 17 is clear in that it seems to ensure that the LOV process is not used to stifle debate. In my view there must, therefore, be an intention to stifle debate for this principle to be breached. I cannot see how a Union Member or a Council member could infer any other interpretation of the words used.**
>
> **60. In my view, I do not need to consider whether the BMA should be liable for Sir Sam's actions in making the complaint. It seems to me that the liability of a Union for any member's activities will depend on the circumstances of each individual case. In this case, I have no evidence of motivation on the part of Sir Sam Everington. I have evidence from Ms Jayasinghe that she was attempting to reach a conclusion as quickly as possible and did so within a reasonable timescale, and I have not been able to test the written evidence as to whether, and if so how, debate was stifled. Consequently, I do not believe that there is any question of liability on the part of the BMA.**
>
> **61. For these reason I refuse to make the declaration requested by Dr Watkins."**

81. In oral argument, the Appellant accepted that the three week timescale would not have been sufficient to infringe Principle 17 if these events had not occurred during an election campaign. During that campaign, three weeks was a significant period.

82. In argument before me it was agreed, rightly, that vicarious liability was a red herring. The question was whether the fact that the complaint remained alive for three weeks, during an election campaign, instead of being immediately rejected, constituted an infringement of Principle 17.

83. Lord Hendy argued that what matters was the intention of the Respondent, not of Sir Sam, and that even if Principle 17 could be infringed unintentionally, there was no evidence that this had happened.

84. I respectfully do not agree with the CO that Principle 17 is not engaged unless there is an intention to stifle debate or deter candidacy. Instead, I consider that Principle 17 is comparable to provisions such as Article 10 of the European Convention on Human Rights which can be engaged when public authorities take enforcement action of a kind which could affect freedom of expression. Principle 17, when engaged, imposes a filter on the disciplinary process. The principle states that the process "should not be used" to stifle constructive debate or deter candidacy. There may be cases where that principle is engaged but where there is nevertheless an important disciplinary issue. In such a case, it seems to me that a decision maker may have to balance any actual or potential stifling effect against the importance of the disciplinary issue. The latter must be capable of outweighing the former in some cases. But if it does not, Principle 17 means that the process should proceed in such a way as to avoid the stifling effect or, if that is not possible, should cease.

85. It seems to me that the erroneous finding about intention, and the distraction of vicarious liability, stood in the way of the right questions being asked. It was necessary for the CO to decide whether, regardless of intention, this was a complaint which should not have proceeded because

of an actual or potential stifling effect engaging Principle 17 and, if so, whether dismissal of the complaint after a three week period was sufficient to achieve compliance with the Principle.

86. It is not clear to me whether Dr Watkins' point about the importance of the three week period being in an election campaign was articulated to the CO. Also, it may be that when these questions are reconsidered, the conclusions of the CO will not change. She has already identified a lack of evidence about the alleged stifling effect, and she has already found that the three week period was not unreasonable. However, those questions must be considered (and therefore reconsidered) in the right legal context.

Conclusion

87. The appeal succeeds on ground 4(b) only.

88. The parties agreed, and I concur, that in this event the Principle 17 issue must be remitted for the CO to make a new decision.