

D/11/21-22

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

Foden

v

National Education Union

Date of Decision

26 October 2021

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Decision

1. Upon application by Mr Neil Foden (“the complainant”) 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 complainant’s complaints on the grounds that they have no reasonable prospect of success and/or are otherwise misconceived.

Reasons

Background

2. Neil Foden brought this application as a former member of the National Education Union (the Union). He did so by a registration of complaint received by the Certification Office on 15 April 2021.
3. Mr Foden was a member of the National Education Union and served as secretary for his local Union branch in Wales prior to the termination of his membership.
4. Following a finding of unacceptable professional conduct, the Education Workforce Council of Wales (EWC) placed a reprimand on Mr Foden’s registration as a school teacher for a period of 2 years. The Union’s Professional Conduct (Criminal Convictions) Committee (“the Committee”) considered the finding and recommended that the Union’s National Executive Committee removed him from membership of the Union.

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

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

4 Joining the union

4.4 The Executive may reject any application for membership if in its opinion the activities of the applicant are or have been either incompatible with the Union's declared aims and objects as set out in these rules, or such activities could bring the Union into disrepute. Where, in the opinion of the Executive, the activities of an existing member are incompatible with the Union's declared aims and objects as set out in these rules, or such activities could bring the Union into disrepute, they will be dealt with in accordance with the disciplinary procedures outlined in appendix A.

22 Professional conduct and discipline

22.1 There shall be a code of Professional Conduct established by the Joint Executive Council and included as Appendix I to these rules.

22.2 Any questions as to the professional conduct of any member whether it arises on the personal application of any member or otherwise shall stand referred to the National Disciplinary Committee and be dealt with in accordance with the procedure set out in Appendix A of these rules.

22.3 If a member (including a member who is in membership under a Joint Partnership Scheme) is convicted of a criminal offence or consents to a caution, or the relevant regulatory body prohibits the member from teaching or makes a finding of unacceptable professional conduct or is barred from working with children and/or vulnerable adults by the Disclosure and Barring Service, except where there is no material relevance to her/ his fitness to be a member of the Union, her or his right to Union membership and all claims and entitlements to Union benefits shall be reviewed by the Professional Conduct (Criminal Convictions) Committee and the Executive, if so decided the member shall forfeit such rights, claims and entitlements.

22.4 If the relevant regulatory body imposes an Interim Prohibition Order on a member the Professional Conduct (Criminal Convictions) Committee, the Executive may suspend the member from membership pending the outcome of the relevant regulatory body proceedings.

22.5 All questions relating to the discipline of members and any appeals on the question of eligibility for membership shall be dealt with in accordance with the provisions of Appendix A of these rules.

23 Alteration and interpretation of the rules

23.1 Except where provided for below, no alteration in, or addition to, the rules of the Union may be made except at the Annual Conference by a motion in accordance with these rules, or at a Special Conference called for this purpose. Any alteration or addition to the rules shall require a 2/3rd majority vote until 1 January 2022 or three years from the end of the transitional period, whichever is the sooner and a simple majority thereafter.

Appendix A

National Disciplinary Committee and National Appeals Committee

1 Disciplinary Offences

1.1 A member of the Union commits a disciplinary offence if that member :

- (a) acts contrary to the Code of Professional Conduct of the Union;
- (b) acts contrary to the Rules of the Union;
- (c) refuses to comply with a lawful instruction of the Union;
- (d) is knowingly involved in any fraud on the Union or misappropriation of Union funds or property;
- (e) misuses protected data contrary to the Data Protection Act Licence of the Union;

- (f) frustrates any decision or penalty of the National Disciplinary Committee or National Appeals Committee; or
- (g) in any other way engages in conduct which brings injury or discredit to the Union.

2 Elections for National Disciplinary Committee and National Appeals Committee

- 2.1 The members of the Union in each of the seventeen Executive Districts of the Union shall elect a member to form the Panel of seventeen members who shall be eligible to serve on either a National Disciplinary Committee or a National Appeals Committee.
- 2.2 Elections to the Panel for the National Disciplinary Committee and National Appeals Committee shall be for a term which shall not exceed four years.
- 2.3 Candidates for election to the Panel must have been in standard membership of the Union within the last 10 years and in membership of the Union for at least five years continuously prior to the date of closure of nominations. A member wishing to stand must be nominated by their Local District. A standard member elected to the Panel who becomes a retired member during their term is entitled to continue their term of office until its expiry but shall not be entitled to stand again for the Panel. Officers of the Union and members of the Executive at the date of closure of nominations are ineligible to stand for the Panel for the National Disciplinary Committee and the National Appeals Committee.

3 National Disciplinary Committee

- 3.1 A complaint made by a member of the Union against a member of the Union, which may consist of one or more alleged disciplinary offences, will

be heard by a National Disciplinary Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee.

- 3.2 A National Disciplinary Committee shall choose its own Chairperson.
- 3.3 A complaint under these proceedings may be made by a member of the Union or by an Officer of the Union acting on behalf of the Officers of the Union. If the complaint is formulated by an Officer of the Union then the Officers of the Union may suspend 35 National rules of the National Education Union effective from 3 October 2020 that member or members from membership of the Union pending the hearing of the disciplinary proceedings. The General Secretary of the Union shall notify the relevant Local District and Branch of any such suspension.
- 3.4 The conduct of National Disciplinary Committee proceedings shall be in accordance with the rules of natural justice. The member making the complaint and the member being complained about have the right to a fair hearing, without bias, conducted with reasonable promptness consistent with fair opportunity to present their respective cases. Before a National Disciplinary Committee, the parties may call witnesses of relevance to the matters in dispute.
- 3.5 The decisions of a National Disciplinary Committee or a National Disciplinary Committee Chairperson acting on behalf of the Committee are final subject only to the right of appeal to the National Appeals Committee.
- 3.6 A complaint made by a member of the Union calling for a matter to be considered by a National Disciplinary Committee must be made in writing to the General Secretary specifying matters which come within one or more of the disciplinary offences referred to above at (a) to (g). The complaint will

not be considered unless made within six months of the circumstances giving rise to the complaint unless the National Disciplinary Committee find exceptional reasons for doing so. The complaint will be dealt with in accordance with the written procedures made under these Rules.

- 3.7 Following consideration of the complaint a National Disciplinary Committee may either dismiss the complaint or find the complaint justified. If the National Disciplinary Committee find the complaint justified they may impose one or more of the following penalties: (a) reprimand and warning as to future conduct; (b) severe reprimand and censure; (c) suspension from the Union for a fixed period; (d) removal from office or accreditation held by the member either indefinitely or for a specified period; (e) disqualification from holding office or role in the Union either indefinitely or for a specified period; (f) exclusion from the Union.
- 3.8 When it comes to deliberate on the penalty the National Disciplinary Committee will have before it and will take into account any previous decisions of a National Disciplinary Committee or National Appeals Committee relating to the member who has been complained about.
- 3.9 The decision of the National Disciplinary Committee with reasons shall be sent to the parties to the dispute. The decision will inform the parties of the rights of appeal to the National Appeals Committee.

4 National Appeals Committee

- 4.1 An appeal from a decision of a National Disciplinary Committee will be heard by a National Appeals Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee. The Panel members who form the National Appeals

Committee shall not in any way have been involved in the decision made by the National Disciplinary Committee.

- 4.2 A National Appeals Committee shall choose its own Chairperson.
- 4.3 When a National Disciplinary Committee complaint has been found to be justified the member complained about, now called the appellant, has a right of appeal in respect of the finding and the penalty provided that the appeal is submitted to the General Secretary within the time limit and in the manner set out in written procedures. The appeal must be in writing and set out the grounds for the appeal.
- 4.4 When a National Disciplinary Committee complaint has been found not to be justified the member who has made the complaint, now called the appellant, has a right of appeal limited to the process or procedures by which the decision was made and not relating to the substance or merit of the decision provided that the appeal is submitted to the General Secretary within the time limit and in the manner set out in written procedures. The appeal must be in writing and set out the grounds for the appeal.
- 4.5 Operation of the penalty of the National Disciplinary Committee shall remain suspended pending the decision of the National Appeals Committee which shall be final.
- 4.6 The conduct of National Appeals Committee proceedings shall be in accordance with the rules of natural justice. The parties involved in the appeal have the right to a fair hearing, without bias, conducted with reasonable promptness consistent with fair opportunity to present their respective cases.

- 4.7 The appeal will be dealt with in accordance with the written procedures made under these Rules.
- 4.8 The National Appeals Committee has full powers to remove any penalty imposed by the National Disciplinary Committee or to replace any penalty imposed by the National Disciplinary Committee with an alternative penalty or penalties as allowed by these Rules save that the National Appeals Committee may not impose a more severe penalty than the penalty imposed by the National Disciplinary Committee.

5 Confidentiality

- 5.1 The proceedings of the National Disciplinary Committee and of the National Appeals Committee shall be confidential save that the outcomes of each Committee shall be communicated to the Executive and to the parties to the dispute.

6. Procedures

- 6.1 The Executive, taking into account advice from the National Disciplinary Committee and the National Appeals Committee, shall produce procedures for the election of members to the Panels for the National Disciplinary Committee and the National Appeals Committee and for the administration of their cases and the conduct of their hearings including all time limits.

Complaint 1

Considerations and Conclusions

7. The Union removed Mr Foden from membership under Rule 22.3. He told my office that this should not have been possible because the EWC finding was made before Rule 22.3 came into force. He acknowledged that the Rule did not explicitly preclude the Union from applying it in cases where the underlying incident, in his case the EWC finding, pre-dated the implementation of Rule 22.3. However, he told me that reading it in this way was consistent with the usual interpretation of statute.
8. There is, however, established case law, by which I am bound, which gives guidance on assessing the general nature of trade union rules. In *Heatons Transport (St Helens) v Transport and General Workers' Union* [1972] I.C.R 308 (*Heatons*), Lord Wilberforce explains that:

“trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the Court.”

Taking *Heatons* into account, which I am bound to do, it is hard to see why Rule 22.3 should be read in the same way as if it were statute. Mr Foden has not provided any argument as to why his case should be considered as an exception to the principles set out in *Heaton*. Nor has he been able to identify another Union Rule which might support his argument that the Rule should not be applied retrospectively. Mr Foden has not, therefore, provided any reasons why, in the absence of an explicit reference, I should read the rule in such a way that

precludes the Union from acting in cases such as his where the finding of the relevant regulatory body predates the implementation of the Rule. Consequently, I find that this complaint has no realistic prospect of success.

9. Mr Foden has also subsequently raised the point that the Union breached 23.1 by implementing a Rule which had not been approved by Conference. This does not, however, form part of Complaint 1 and I have not, therefore, considered the issue.

Complaint 2

Considerations and conclusions

10. Mr Foden believes that the Union breached rule 22.5 by failing to provide him with an appeal over the Committee's decision to remove him from membership. His view is that rule 22.5 provides him with a right of appeal and that any appeals should be dealt with in accordance with Appendix A to the Rules. He argued that the right to an appeal is implied into Rule 22.5 because the decision of the Committee affected his eligibility for membership noting that Rule 22.5 provides for appeals on the question of eligibility for membership.
11. My reading of the Rules is that they appear to create two separate procedures. The procedure which the Union followed when dealing with Mr Foden's case, under Rule 22.3, appears to be distinct from the disciplinary procedure created under Rule 22.2. There does not appear to be any overlap between the two procedures and neither procedure appears to link to the other.
12. I note that Rule 22.5 is explicit in that it covers disciplinary cases under Rule 22.2 and that Annex A sets out the sorts of issues which might lead to a disciplinary case. I also note that Rule 4.4 deals with issues around eligibility for membership and that these must be dealt with under Annex A. Mr Foden has, however, been unable to

identify a Rule which extends Annex A to cases considered by the Professional Conduct (Criminal Convictions) Committee under Rule 22.3.

13. For the above reasons, I do not consider that Mr Foden's argument of an implied right of appeal in Rule 22.5 is sustainable. Therefore, my view is that this complaint has no reasonable prospect of success. In reaching this conclusion I note that the Union reviewed the outcome of his first Hearing following submissions made by him.

Complaint 3

Considerations and conclusions

14. Mr Foden's third complaint is that the Union breached certain principles of natural justice that he says apply to rule 22.3. Whilst the complaint describes a fairly complex set of events and inter-reactions, the key issues appear to me be that: (1) Mr Foden was not provided with an appeal by a Panel independent of the original panel and (2) that the Panel was prejudiced or tainted by exposure to information that Mr Foden considered to be misleading and that this led to an unfair outcome in his case.

15. Mr Foden told me that the Union had breached natural justice because they had not offered him an appeal to an independent panel following the decision to remove him from membership. His view was that this right arose from the definition of natural justice in the Acas Code of Disciplinary and Grievance Procedures.

16. My predecessors and I have taken the view that natural justice in the context of trade union disciplinary proceedings means that a union member facing disciplinary charges has a right to be given notice of those charges, the right to answer those charges and the right to be heard by an unbiased tribunal. This is most recently set out in *Simpson v Unite the Union* (2) D/23-25/20-21.

17. Mr Foden has not offered any argument as to why, in the circumstances of his case, I should extend the established definition of natural justice beyond that which has been applied by myself and my predecessors in previous cases about a breach of disciplinary rules by a union. Nor has he offered any argument as to why I should use the Acas principles, which are generally considered to be more relevant to employment law, when considering his complaint.
18. It is also worth noting that the ACAS Code of Disciplinary and Grievance Procedures requires that any appeal should be dealt with “impartially and where possible by a manager who has not been involved in the case”.
19. Mr Foden argued that information provided to the original Committee Panel by the Union was misleading, and that he was not given the opportunity to correct it. He did not, however, provide any evidence which might, at a hearing, support an argument that the Panel had taken the misleading information into account or that it could only have reached the decision to expel him had it taken that information into account.
20. For the above reasons, my view, is that the complaint 3 has no reasonable prospect of success. In reaching this view I have noted that Mr Foden was given an opportunity to respond to the information when the Panel reviewed his case.
21. Section 256ZA (4) of the 1992 Act requires me to send notice to the party against whom the strike out order shall be made giving an opportunity to show cause why the order should not be made. My office wrote to Mr Foden on 23 September 2021. This letter stated that, having considered Mr Foden’s application and further correspondence, I was minded to exercise my powers under section 256ZA of the 1992 Act to strike out his complaints on the grounds that they had no reasonable prospect of success. The letter invited Mr Foden to provide written representations as to why I should not strike these complaints out. He responded on 24 September

2021 but did not provide any additional evidence or argument to indicate that his complaints would have a reasonable prospect of success at a hearing.

Conclusions

22. For the reasons given above I am satisfied that all three of Mr Foden's complaints have no reasonable prospect of success.

Observation

23. Mr Foden commented, in his reply of 24 September 2021, that he had no access to legal representation. I have some sympathy with him as it can be difficult to bring a complaint forward without such advice. My team endeavor to guide applicants through the process but must remain impartial throughout. The 1992 Act provides no avenue by which we can offer access to legal advice or provide any assistance with legal costs.

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

Sarah Bedwell
The Certification Officer

Appendix: the agreed complaints

Complaint 1

On or around 25 March 2021 National Education Union breached rule 22.3 by removing Neil Foden from membership following a finding of ‘unacceptable unprofessional conduct’ by the Education Workforce Council. The Education Workforce Council’s finding was made before Rule 22.3 came into force. Rule 22.3 should not have been applied retrospectively.

Complaint 2

On or around 20 February 2021 National Education Union breached rule 22.5. The rule was breached in that Neil Foden was not afforded an appeal following the Union’s decision to remove him from membership. Rule 22.5 clearly implies the right of appeal.

Complaint 3

Between 22 January 2021 and 30 March 2021 National Education Union breached rule 22.3. The principles of natural justice apply to rule 22.3. These principles include the duty to give someone a fair hearing; the duty to ensure that the matter is decided by someone who is impartial; and the duty to allow an appeal against a decision. Rules of natural justice are implied into rule 22.3. Rule 22.3 was breached in that the Union failed to apply the relevant rules of natural justice to Neil Foden on the following dates and in the following manner:

- a. In the period between 22 January 2021 and 20 February 2021 the Union breached the duty to give someone a fair hearing. The principle was breached in that Mr Foden did not have sight of the documentation to be considered by the Professional Conduct (Criminal Convictions) Committee (“the Committee”) and did not have an opportunity to address the issues below prior to the first hearing on 20 February 2021. The bundle was not supplied until after the first hearing. The inaccuracies therein could have been corrected by Mr Foden prior to the hearing. This prejudiced the committee, suggesting, as they did a pattern of behaviour on Mr Foden’s part which was not borne out by the findings of the Educational Workforce Council (“the EWC”).
- b. In the period between 22 January 2021 and 20 February 2021 the Union breached the duty to give someone a fair hearing. The principle was breached in that the covering summary provided by Tushar Singh of the

Union's legal department to the Committee was, by his own admission, incorrect. It suggested that the member of staff whose treatment by Mr Foden led to the finding by the EWC had also won a tribunal case against the school. This would have compounded the negative impression of Mr Foden's leadership and conduct in a. above and was misleading and unfair.

- c. In the period between 22 January 2021 and 20 February 2021 the Union breached the duty to give someone a fair hearing. The principle was breached in that the bundle contained irrelevant material about other former members of Mr Foden's staff who had made complaints about his conduct to the EWC, none of which was deemed by the EWC to lead to a finding of Unacceptable Professional Conduct. The documents included related to tribunal judgements but when some of the matters therein were put to the EWC as complaints, no finding was made against him. Their inclusion could have misled the panel into conflating the EWC and tribunal cases and further compounded the negative impression of Mr Foden's conduct. Many of the points covered in the press cuttings were made by the former employees concerned to the EWC as complaints about Mr Foden's conduct but he was not found to have committed misconduct in relation to any of them. This information was not relayed to the Committee. The summary only refers to the complaint of one teacher and leaves the criticisms from the tribunal judge "hanging in the air", when in fact they were dismissed by the EWC. This is also misleading and unfair.
- d. In the period between 22 January 2021 and 20 February 2021 the Union breached the duty to give someone a fair hearing. The principle was breached in that the solicitor advising the Committee in his introduction to the bundle of documents used for the Committee's meeting of 20 February 2021 stated as follows:

"Finally, according to the member it would be disproportionate to remove membership given his unblemished record prior to and since the incident some six years ago. Please note that this is disputed by the member who brought this matter to the Union's attention."

Mr Foden's unblemished record was a matter of fact and was referred to by the Chair when reading the EWC judgement in public session. The wording of the section of the introduction quoted above casts doubt on this by failing to recognise that Mr Foden's record was a matter of fact rather than an assertion "according to the member" and by adding the

sentence beginning "Please note" he further undermined Mr Foden's previous record and gives the same, if not greater weight, to an assertion by the complainant. This breached the first principle of a fair hearing as it was bound to have some influence on the panel.

- e. In the period between 22 January 2021 and 30 March 2021 the Union breached the following principles of natural justice: the duty to ensure that the matter is decided by someone who is impartial, and the duty to allow an appeal against a decision. These principles were breached in the following manner.
- The Committee was misled by the Union solicitor into believing that the misleading information from the Employment Tribunal was relevant because it related to the same person that had been the subject of the EWC judgement when it did not;
 - Mr Foden's unblemished record is a matter of fact and was referred to by the Chair when reading the EWC judgement in public session. By adding the sentence beginning "Please note", the union solicitor effectively cast doubt on a statement which was a matter of fact. This further prejudiced the committee;
 - In a formal appeal, a fresh panel should either rehear the case or consider specific matters arising from the first hearing which the appellant wished to submit. This was not a fresh panel.

The Committee reviewed the decision at its second meeting on 18 March 2021 but this was effectively the same people considering an additional submission from Mr Foden. They would have been tainted by the incorrect/irrelevant information previously presented and could not set aside what they had already seen.

- f. The Union breached the duty to give someone a fair hearing in the following manner. The Union's National Disciplinary Committee ("the NDC") considered an accusation that Mr Foden had brought the union into disrepute as a result of the two tribunal cases and the associated press coverage. It was found that he had no case to answer. A letter to Mr Foden from the Union on 22 January 2021 was explicit that the referral to the Professional Conduct (Criminal Convictions) Committee had been made on the basis of the EWC decision alone. When Mr Foden submitted his response, he focused on this decision. Mr Foden was unaware that one tribunal judgment had been included in the pack and therefore had no opportunity to respond to it. The union solicitor erroneously informed

the committee that the tribunal case and the EWC finding were linked because they related to the same teacher when they did not. This prevented Mr Foden from getting a fair hearing because it misled the committee and he had no opportunity to correct the error. At no point in the letter of 22 January 2021 was it suggested that Mr Foden had brought the union into disrepute. No evidence was presented to show that he had. The accusation of disrepute was dealt with by the NDC and dismissed. The committee effectively judged Mr Foden on an accusation that he was not aware was being put to them and which had already been dismissed by the NDC;

- g. Mr Foden was misinformed about the right of appeal and has been granted none which is a breach of the principles of natural justice, particularly the duty to give someone a fair hearing. The review was undertaken by the same committee who undertook the original hearing and who would already have formed a view on Mr Foden's conduct based on irrelevant and misleading information