

D/16-17/21-22

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

Embery (2)

v

Fire Brigades Union

Date of Decision

11 January 2022

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## **Decision**

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

I refuse to make a declaration that the Union breached Rule G1(2)(i) as described by Mr Embery in Complaint 1 below.

I refuse to make a declaration that the Union breached Rule G1(3)(iii) as described by Mr Embery in Complaint 2 below.

## **Reasons**

2. Mr Embery submitted an application to pursue three complaints on 26 August 2021. I struck out one of those complaints on 17 November 2021. That complaint does not form part of this decision.
3. Mr Embery sought to amend the two remaining complaints ahead of the Case Management Meeting, (“CMM”) on 1 December. The Union agreed to some of those amendments and I reached a decision on the amendments under dispute. The complaints, as amended, are set out below.

### **Complaint 1**

In giving legitimacy to, and pursuing under the rule book, a complaint about me from the general secretary that had been submitted to someone other than my regional secretary, the union breached rule G1(2)(i). Rule G1(2)(i) provides the only mechanism by which a complaint may be submitted by the general secretary about an ordinary member of the union (which is what I was). Complaints under that rule must be submitted to the member's regional secretary. The rule is unambiguous in that regard. However, the general secretary submitted his complaint to the vice-president of the union. The vice-president has jurisdiction, under rule G3, only in respect of complaints submitted about certain categories of

senior official. Despite this, he immediately afforded the general secretary's complaint official status and conducted a two-months-long investigation under rule G3. In doing so, he ensured that rule G1(2)(i) was breached. As a consequence, the investigation took a trajectory that it would not otherwise have taken – specifically, matters were dealt with at a national, rather than regional, level. A subsequent rule breach, as detailed separately to the certification officer, was also attributable to this original decision to afford legitimacy to, and investigate under rule G3, a complaint that had been submitted outside of the rule book. The vice-president accepted the complaint from the general secretary and commenced his rule G3 investigation on 3 October 2020. I complained to the president in emails dated 20 and 22 December 2020. The president rejected my complaint in a letter dated 8 February 2021.

## Complaint 2

In invoking rule G1(3)(iii) when a disciplinary complaint did not exist, the union breached that rule. Rule G1(3)(iii) permits an executive council member to effectively remove authority for the administering of a disciplinary complaint from a regional secretary in circumstances where he, the executive council member, believes that the respective regional committee has failed, or will fail, to deal with that complaint. However, for the rule to be invoked at all, a disciplinary complaint must, by definition, already be in existence. The wording of the rule demonstrates that it is predicated on that assumption. But given that the general secretary had never submitted a formal disciplinary complaint under rule G1(2)(i) to my regional secretary (the only recognised method within the rule book for him to do so), rule G1(3)(iii) could not be legitimately invoked by Mr Noble. There was no disciplinary complaint – that is to say, there was no complaint that had been submitted in line with the established disciplinary procedure. Mr Noble invoked rule G1(3)(iii) on 9 December 2020 after conducting a two-month-long investigation under rule G3. I complained to the president in emails dated 20 and 22 December 2020. The president rejected my complaint in a letter dated 8 February 2021.

4. A hearing took place by Video Conference on 9 December 2021. Mr Embery represented himself. He submitted a combined skeleton argument and witness evidence. At the CMM it was agreed that paragraphs 1-67 were Mr Embery's witness evidence and the remaining paragraphs, his skeleton arguments.
5. The Union was represented by Mr Oliver Segal of counsel, instructed by Victoria Phillips, Thompsons Solicitors. The Union submitted a skeleton argument. It did not submit any written witness statements. There was also, in evidence, a bundle of documents consisting of 279 pages containing correspondence and the rules of the Union for consideration at the hearing. Mr Segal submitted a legal authority to support the arguments set out in his skeleton argument. Neither Mr Segal nor myself had questions arising from Mr Embery's evidence and so he was not required to give oral evidence

### **Findings of fact**

6. The following facts were agreed at the CMM on 1 December 2020. I will address any disputed facts, where necessary, elsewhere in my decision.
7. Mr Embery is a member of the Fire Brigades Union. He was also a member of the Executive Council until he was barred from holding office at a disciplinary hearing on 12 June 2019.
8. At a disciplinary hearing, on 12 June 2019 the Union imposed a fine on Mr Embery. It also debarred him from holding office which meant that he was no longer a member of the Executive Council.
9. On 30 December 2019, Mr Embery wrote to Mr Wrack, General Secretary of the Union. In that letter he explained that he would not be paying the fine and explained the reasons why.
10. On 23 January 2020, Mr Wrack wrote to Mr Lambe, the Acting Regional Secretary for London. He enclosed a copy of Mr Embery's letter of 30

December 2019 and referred him to Mr Embery's refusal to pay the fine, asked him to consider the matter and take necessary action by reference to Rule G1 (1) (v). He also explained that Mr Lambe may wish to discuss procedural matters with his Executive Council Member and offered his assistance and that of the Assistant General Secretary.

11. On 28 January 2020, Mark Rowe, a National Officer of the Union, wrote to Mr Lambe by email. He referred to a letter which Mr Embery had sent to the General Secretary on 25 January which included a reference to the payment of a fine. He included the text of an email he had sent to Mr Embery which referred him to the Union's disciplinary procedure in relation to the non-payment of a fine imposed under the rules. Mr Rowe's email referred the matter to the London Region for consideration.
12. On 1 October 2020, Mr Wrack wrote to Mr Embery explaining that he would be making a complaint to the Vice President of the Union, Mr Andy Noble, about non-payment of the fine. He also explained that he would be making a complaint about Mr Embery's failure to return Union property. Mr Wrack made his complaint by letter on 1 October 2020.
13. On 3 October 2020, Mr Noble wrote to Mr Embery explaining that he had received Mr Wrack's complaint and was undertaking an inquiry under Rule G3. He sought a meeting with Mr Embery, via video conference, and offered various dates.
14. On 5 October 2020, Mr Embery replied to Mr Noble. He explained that it had never been his intention not to return the laptop and telephone to the Union and explained why he had not, at that point, done so. He also questioned whether Mr Noble had the authority, under Rule G3, to investigate Mr Wrack's complaints.
15. Mr Noble replied to Mr Embery on 9 December 2020 explaining that he had considered the issues Mr Embery had raised about Rule G3 and concluded

that Mr Embery was correct. He also explained that it was appropriate for him to progress matters under Rule G1 (3)(iii).

16. On 17 December 2020, Mr Embery wrote to Mr Noble explaining that he did not agree that Mr Noble had any authority to take forward the complaint under Rule G1 (3) (iii) as no disciplinary complaint at that stage existed. Mr Noble replied on the same day noting Mr Embery's dissatisfaction with the position Mr Noble had adopted and explaining that Mr Embery could raise this point as part of the defence to the complaint.

17. Mr Noble undertook an investigation which led to the Union holding a disciplinary hearing on 26 March 2021 to consider Mr Wrack's complaint against Mr Embery. Mr Embery did not attend for personal reasons.

18. The disciplinary sub-committee which considered the complaint also considered whether Mr Noble was correct to progress matters under Rule G1(3)(iii). It concluded, by a majority vote, that Mr Noble's interpretation was correct. It also upheld the complaint and imposed a further penalty on Mr Embery.

## **The Relevant Statutory Provisions**

19. 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.

## **The Relevant Rules of the Union**

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

### ***Rule G1 INTERNAL UNION DISCIPLINE***

#### ***(1) Offences***

*(v) Fails to pay any fine imposed under this rule within two months of the conclusion of proceedings, without good and sufficient reason;*

#### ***(2) Discipline at Regional Level***

*(i) If a member believes another member, who may belong to a different Region (the defendant), has committed a disciplinary offence, he/she shall submit a written complaint setting out details of the defendant's conduct to the defendant's Regional Secretary.*

#### ***(3) Discipline at Disciplinary Committee level***

*(iii) If a member of the Executive Council believes (which belief he/she may form after conducting a preliminary inquiry) that a*



*Regional Committee has failed, or will fail, to deal with a disciplinary complaint, he/she shall submit a written complaint setting out that belief and details of the defendant's conduct to the Secretary to the Disciplinary Committee.*

*At this stage the defendant should be informed in writing, by the Executive Council member, of the complaint made against the member*

## **Considerations and Conclusions**

21. There are a number of disputed issues between Mr Embery and the Union which extend beyond the scope of these complaints. Both parties agreed, and understood, that the scope of this decision must be limited to the complaints before me. At the CMM I attempted to agree the issues which I would need to resolve to reach a decision on these complaints. The parties could not, however, agree on those issues. Consequently, I gave Directions on the issues which I would expect them to address whilst acknowledging that they could also address wider issues where they were relevant to these complaints. The issues I identified were as follows:

- i) Was the Union able to deal with a disciplinary complaint against Mr Embery, under Rule G (1)(3)(iii)? In particular:
  - (a) Was the correspondence between Mr Wrack, Mr Rowe and the Regional Secretary in January 2020 a complaint within G (1)(2)(i)?
  - (b) Was Mr Wrack's letter of 1 October 2020 to Mr Noble a complaint which the Union was entitled to consider under Rule G (1)(3)(iii)?

22. The facts of this case are, largely, agreed between the parties. There is not, however, any consensus around events immediately after Mr Wrack wrote his letter of 23 January 2020 to Mr Lambe. I have addressed this at paragraphs 28 to 34 below.

## Disciplinary Procedures

23. The Union's disciplinary procedures are set out in Rules G1 to G3 of the Union Rule Book. Rule G1 describes the behaviour which constitutes a disciplinary offence. Rule G1(2) describes the procedure for dealing with discipline at a Regional Level and Rule G1(3) sets out the procedure for dealing with discipline at Disciplinary Committee Level. It is important to note that Mr Embery's complaints do not challenge the Union's power to investigate the issues which led to a disciplinary hearing; his complaints focus on the Rules upon which the Union relied in so doing.

### **Was the correspondence between Mr Wrack, Mr Rowe and the Regional Secretary in January 2020 a complaint within G (1) (2) (i)?**

24. Mr Embery told Mr Wrack, in a letter dated 30 December 2019, that he would not be paying a fine which had been imposed by an earlier disciplinary hearing. He explained his reasons for his decision.

25. Mr Wrack then wrote to Mr Lambe, on 23 January 2020, in the following terms;

*"Please find attached correspondence from Paul Embery. The letter refers to the outcome of a disciplinary hearing conducted by the Union and heard by the Executive Council. One outcome of this was the award of a fine against Bro Embery.*

*You will note that Bro Embery states on the first page, "I can tell you that, for the comprehensive reasons that will follow, I have no intention of paying the fine"*

*I refer you to Rule G1 (1) (v) and accordingly refer this matter for your consideration and necessary action in accordance with Rule G1.*

*Please be aware that the fine awarded remains in place and the rules of the union require the fine to be paid regardless of any process which may arise as a result of your actions which may follow this communication.*

*You may wish to discuss procedural matters with your Executive Council member. The Assistant General Secretary and/myself are also available to assist if necessary.”*

26. Mr Rowe, a National Officer of the Union, then wrote to Mr Embury on 28 January 2020 in the following terms:

*“I have been asked by the General Secretary to respond to your letter to him 25 January 2020.*

*I acknowledge the content of your email however, within this correspondence, I will deal specifically with the issue referred to in your opening paragraph: the matter in relation to the payment of the fine.*

*The Fire Brigades Union Rule Book Section G Internal Union Discipline lists under Rule G1 ‘Offences’ a number of offences and is specific in Rule G1(1)(v) that a member of the Union commits a disciplinary offence if that member:*

*G1 (1)*

*(v) Fails to pay any fine imposed under this rule within two months of the conclusion of proceedings, without good and sufficient reason;*

*Therefore, in the circumstances the matter has been referred to the London Region for their consideration.”*

27. The letter also enclosed a copy of Mr Wrack's letter to Mr Lambe referenced at paragraph 25 above.

28. As part of his submissions, Mr Embery told me that Mr Wrack's letter of 23 January 2020 was not a complaint under the Disciplinary Rules. He gave several reasons for this which I set out below:

- i) Mr Wrack does not use the word complaint. He drew the issue to Mr Lambe's attention and referred the matter to the London Region for his consideration.
- ii) Mr Lambe told Mr Embery that he did not regard the letter as a complaint but that he might take up the General Secretary's offer to discuss the matter with himself and others.
- iii) Mr Lambe decided, in February 2020, to seek clarification on the status of the General Secretary's letter. He then met with Mr Andy Dark, Assistant General Secretary, and Mr David Shek, the Executive Committee Member for the London Region. Mr Wrack did not attend the meeting. Mr Embery told me that this was because "the likelihood that he wished to avoid being put on the spot" as to whether the letter was a complaint.
- iv) Mr Lambe told Mr Embery that, at that meeting, Mr Dark had pointed out that the letter did not appear to be a formal complaint under the Rule Book. Mr Dark attempted to persuade Mr Lambe to act on Mr Wrack's letter and to appoint a local investigator specifically to avoid a situation in which Mr Wrack acted as a complainant and was subsequently required to attend a disciplinary Hearing. Mr Dark's assertion that the letter was not a formal complaint was supported by the letter, dated 8 December 2020, from Mr Noble to Mr Lambe.

- v) Mr Wrack did not wish to be a complainant under the Rules because this could have resulted in Mr Wrack presenting the case at a Hearing under Rule G1(2).
- vi) Mr Wrack had not, at any stage, contacted Mr Lambe to find out why his correspondence (referenced at paragraph 25 above) had failed to elicit a response. He did not take any further action in respect of the letter until his letter of 1 October 2020.

29. The Union submitted that Mr Wrack's letter of 23 January 2020 was clearly a complaint under Rule G1(2)(ii). Mr Segal told me that this Rule required a member, who believes another member to have committed a disciplinary offence, to submit a written complaint to the defendant's Regional Secretary.
30. The complaint must set out details of the defendant's conduct in writing and must be submitted to the Regional Secretary. In Mr Segal's view, Mr Wrack had clearly set out details of the relevant conduct and had done so in writing to Mr Lambe the Acting Regional Secretary and so the letter, whether or not it used the word complaint, was a complaint under Rule G1(2)(ii). The fact that there had then been a subsequent discussion about whether the letter was indeed a complaint did not detract from this.
31. I am persuaded by the argument put forward by Mr Segal that Mr Wrack's letter of 23 January 2020 was clearly a complaint for the purposes of Rule G1 (2) (ii) which requires only that a Member raise the issue, in writing, with the relevant Regional Secretary setting out details of the defendant's conduct. Mr Wrack did precisely that and, I agree with Mr Segal, that this appears to be sufficient to enable the Regional Secretary to treat the letter as a complaint and act under Rule G1. In addition, Mr Wrack made reference to G1 (1)(v) which describes the non-payment of a fine as a potential disciplinary offence and explains that he was referring the matter for Mr Lambe's consideration and necessary action in accordance with Rule G1.

32. In principle, therefore, it seems that, Mr Wrack was making a complaint under Rule G1(2)(i). Mr Embery, however, has raised interesting points which question whether it is permissible to construe the Rule without reference to the contextual events at that time. There are two points which, in my view, are straightforward. Firstly, I am not persuaded that the letter should have used the word “complaint” for it to be treated as a complaint within the Rules. There is no requirement within the Rules for it to do so. Nor am I persuaded that Mr Wrack’s apparent failure to follow up on Mr Lambe’s progress is necessarily determinative or relevant as to whether there was a complaint. It may be unusual for a General Secretary to make a complaint and then to take no action for several months, but the Rules do not require him to do so. It may suggest, however, that the General Secretary did not intend the letter to be treated in such a way that he would be the complainant under Rule G1(2). The General Secretary’s intentions in writing the letter are a key theme in Mr Embery’s argument.

33. Mr Embery believes that Mr Wrack did not intend his letter to be a complaint under the Rules and that the Union’s Head Office did not treat it as such. Support for this argument is based on a conversation he states took place between himself and Mr Lambe which reported on the meeting between Mr Lambe, Mr Dark and Mr Shek. I have not seen any minutes of that meeting and none of the participants were called as witnesses. I have, however, seen various documents which show that the Union did not consider the letter to be a complaint. In particular, I note that Mr Wrack did not make any reference to it when he wrote, on 1 October 2020, to Mr Noble setting out his concern that Mr Embery’s fine remained unpaid together with an additional concern that Mr Embery had not returned Union property.

34. Mr Segal accepted that the Union’s position as to whether Mr Wrack’s letter was a complaint was not expressed consistently but explained that, in his view, the pertinent question was whether Mr Wrack’s letter was, in fact, a complaint within the meaning of Rule G1 (2)(ii). The fact that some National

Officials had not considered it to be a complaint did not, in his view, prevent it from being a complaint within the Rules. Mr Wrack did not give evidence at the Hearing. Consequently, the only clear evidence I have seen as to his intention, when writing to Mr Lambe, is the letter itself. In my view, Mr Wrack is clear that he was referring the issue to the London Region for consideration and necessary action under Rule G1. That leads me to believe that he intended that the Region should deal with the issue he had identified. It does not, however, give me any indication as to whether he regarded himself as a complainant under the Rules. Mr Embery believes that Mr Wrack had not intended the letter to be a complaint. I do not agree, however, that Mr Wrack's intentions are the key factor in determining whether there was a complaint. In my view it is more appropriate to consider whether the Region would have been entitled to take disciplinary action under Rule G1(2)(ii) following Mr Wrack's letter. My reading of Rule G1(2) (ii) is that all that is required is that a complaint sets out the detail of the conduct and is addressed to the Regional Secretary.

35. It is clear to me that that both of those requirements were met and, without any written or oral evidence from Mr Wrack or Mr Lambe which might contradict this, I can only reach the view that the letter falls within Rule G1(2)(ii) irrespective of Mr Wrack's specific intentions at the time that he wrote the letter. In my view the Region would have been entitled to act on that letter under Rule G1(2). As Mr Embery has identified, the Region had three options as to the decision which it could take under Rule G1(2); to take no action, to proceed to a disciplinary hearing or to undertake a preliminary hearing. It appears that, after discussions with Head Office, the Region took no decision under Rule G1(2) and the issue of the non-payment of the fine remained open.
36. There was little discussion at the Hearing about Mr Rowe's email of 28 January 2020 to Mr Lambe. The letter includes the text of Mr Rowe's email to Mr Embery explaining that the issue of the non-payment of the fine would be

referred to the Regional Office and explains that the matter “is now referred to the London Region for consideration”. Having reached the view that Mr Wrack’s letter was a complaint I do not need to reach a similar decision on this email but, for the avoidance of doubt, it appears to me that the Region would also have been able to act on this email.

**Was Mr Wrack’s letter of 1 October 2020 to Mr Noble a complaint which the Union was entitled to consider under Rule G (1) (3) (iii)?**

37. Mr Wrack’s letter of 1 October 2020 explained that he was submitting a complaint to Mr Noble about Mr Embery’s conduct. The letter identified the conduct as the non-payment of a fine and the failure to return Union property following his removal from his post on the Executive Council. He offered advice on the procedure, under the Union Rules, for handling the complaint and explained that Mr Rowe had, on 28 January 2020, referred the non-payment of the fine to the Region. He recorded that “The (regional) officials have made clear that they do not consider the matter to be one which can or should be considered by the regional committee/at regional level”.

38. Mr Wrack identified two possible procedural routes for handling the complaint. The first was under Rule G3 because the complaints arose from matters whilst Mr Embery was a member of the Executive Council. The second was Rule G1(1) which would have enabled the matter to be dealt with by the regional committee.

39. Mr Embery’s view is that Mr Wrack’s letter of 1 October 2020 should have been addressed to Mr Lambe as Regional Secretary. This would have enabled the Region to deal with the disciplinary issue and, had they failed to do so, a member of the Executive Council could have considered whether to take action under Rule G(1)(3)(iii). In his view, there was no complaint and the Union had no authority to deal with the underlying issues because Mr Wrack had written to Mr Noble rather than Mr Lambe.



40. I have already concluded that Mr Wrack's letter of 23 January 2020 to Mr Lambe was a complaint under Rule G1 (2)(i). It is also clear from the correspondence in the bundle that the matter was not dealt with at regional level. It is worth noting here that the correspondence in the bundle is of little assistance to me in identifying the reasons why the Region did not take any action. Mr Embery has provided reports (paragraph 41) of the discussions between Mr Lambe, Mr Shek and Mr Dark. I have also seen the minutes of the Disciplinary Committee which record that Mr Lambe and Mr Shek had made it clear that they had difficulties in proceeding because:

- i. The fine had been awarded by the Executive Council (a higher body);*
- ii. Regional Officials in London had concerns as to whether or not the London Regional Committee (a lower Committee than the Executive Council) could adjudicate or amend the original award;*
- iii. There were serious concerns of previous occasions made by Mr Embery to lobby the London Regional Committee. Mr Shek was concerned that this would occur again.*

41. I have not been provided with any witness statements from the Regional Officials who handled the issue in January 2020. I have, however, seen emails from Mr Lambe which show that, whilst he was not treating Mr Wrack's letter of 23 January 2020 as a complaint, he was open to dealing with any complaint under the Rules should he receive one. He also told Mr Noble, by email on 3 November 2020, that he believed that Mr Shek had sought advice from the General Secretary.

42. In my view it is not possible, or necessary, for me to resolve what appears to be conflicting evidence about the reasons why the Regional Office did not take action following Mr Wrack's letter of 23 January. Mr Embery's position

relies on a reported conversation between himself and Mr Lambe. The Union's position relies on reports of the same conversation contained in the notes of the original Disciplinary Hearing. The only direct evidence I have from Mr Lambe is that he did not consider it to be a complaint and that Mr Shek had sought advice from the General Secretary. I have no direct evidence from Mr Shek.

43. Consequently, I have no evidence that the Regional Office took any action decisions under, Rule G1(2) following Mr Wrack's letter of 23 January 2020. There were clearly discussions between Mr Lambe, Mr Shek and Mr Dark about how to proceed; however, there is no evidence to suggest that any decision was taken under Rule G1(2) to investigate the matter, proceed to a hearing or conclude the issue without the need for an investigation.

44. Therefore, I can only conclude that Mr Wrack was entitled to raise the issue of the non-payment of the fine with Mr Noble and that his letter could be considered under Rule G1 (3)(iii). He had already raised it with the Regional Office who had not taken any action under the Rules.

45. That is not, however, sufficient for me to reach a conclusion on Mr Embery's complaints. There are two additional issues. The first is that the original complaint to the Region was made in respect of the non-payment of the fine. I have not seen any evidence that the issue of the return of FBU equipment was raised with the Region. The second is whether Mr Noble's investigation was conducted under the appropriate Rule and, consequently, whether it was a breach of the rule.

### **Return of FBU property**

46. The FBU had provided Mr Embery with some equipment, which I understand to be a mobile phone and laptop, for use in his role as a member of the Executive Council. He was asked to return that property once he had been removed from that position. I have seen correspondence from Mr Embery in

which he explained the reasons for the delay in returning the property; that is not, however, an issue which is relevant to his complaint to me. The question for me is whether Mr Wrack, when raising his complaint about the non-payment fine with Mr Noble, was entitled also to raise a complaint which he had not already raised with Mr Lambe. The key question here is whether Rule G1 (2) iii enables a National Executive Committee to form a view that the Regional Committee will not deal with a complaint which has not yet been made. Mr Embery's view was that this was not permissible within the Rules.

47. Mr Embery and Mr Segal took very different positions about how I should interpret Rule G1(3) iii. Mr Embery's view is that a disciplinary complaint must exist before a member of the Executive Council can reach a view that a Regional Committee has failed, or will fail, to deal with it. He relied on the use of the word "will" in this context and argued that, if it had been intended that an Executive Council Member could make preliminary enquiries without a disciplinary complaint having been made to the relevant Regional Secretary, the Rule would have used the conditional "would". Mr Segal took a different view. He argued that most Union members reading Rule G1 (2) iii would understand this to mean that an Executive Committee Member could take the view that the relevant Region might fail to deal with it and refer the issue to the Secretary of the Disciplinary Committee. He argued that Mr Embery's interpretation did not reflect modern English usage and was overly restrictive.

48. Both parties made long submissions about grammar at the Hearing. I did not find either helpful to me in reaching a conclusion on this issue as there is a long established principle that union rules should not be interpreted in the same way as statute. Instead, they should be read with a degree of common sense and approached in a way which most union members would understand. The question I need to answer, therefore, is whether, having read Rule G1(2) iii, would most Union Members expect Mr Wrack to be able to raise the issue of the non-return of FBU equipment with Mr Noble, without first having raised it with Mr Lambe?

49. In answering that question it is helpful to understand the context in which Mr Wrack and Mr Noble were making their decisions. Mr Embery had been a member of the Union's Executive Council. Following an earlier disciplinary procedure, the Union's Disciplinary Committee had imposed a fine and removed him from office. He did not pay that fine and, at the time of Mr Wrack's letter of 1 October 2020, he had not returned the property. In January 2020 the Union's General Secretary had raised the issue of the non-payment of the fine with the relevant Regional Office and asked them to consider this issue under the disciplinary rules. The Regional Office did not, however, do so which meant that the fine remained unpaid. Consequently, the Union had identified two potential disciplinary issues arising from Mr Embery's conduct, both of which arose from sanctions applied by the Disciplinary Committee when Mr Embery was a member of the Executive Council. Only one of those had been raised with the Regional Committee.

50. I am confident that most union members would agree that Rule G1(3) (iii) is clear that, where a Regional Committee has failed to deal with a complaint a member of the Executive Council can refer the matter to the Disciplinary Committee. I am sure they would also agree that the Rule is clear that the Executive Council Member could take similar action where they believed that the Regional Committee will not act on a disciplinary complaint. The question is, therefore, how an executive Committee Member should deal with an issue of conduct where no disciplinary complaint has been made. In my view, most members would expect the issue to be dealt at Regional level; however, I cannot see anything in the Rule which would lead a member to believe that a complaint must be made to the Regional Committee in cases where the Executive Council Member had reason to believe that complaint would not be dealt with. As Mr Segal suggested at the Hearing, this would require a complaint to be made even where the Executive Committee Member had good reason to believe it would not be dealt with and would, ultimately, be referred to the Disciplinary Committee.

51. In my view, the Rules create a presumption that disciplinary matters would normally be considered at Regional level following a complaint to the Regional Secretary. Rule G1(3)(iii) provides an exception to this, however, by enabling an Executive Member to refer an issue to the Disciplinary Committee where the Region has failed to deal with the issue or where the Executive Council Member believes that the Region will fail to deal with the issue.

52. I do not, therefore, accept Mr Embery's submissions that, in this case, Mr Noble had no power to investigate the complaint. Mr Noble was aware that the Region had been cognisant of the non-payment of the fine but had taken no action under the Rules. In his letter, dated 8 February 2020, to Mr Ricardo La Torre, Secretary to the Disciplinary Committee, he explained his reasons for believing that the London Regional Office would not deal with the allegations as follows:

*"In conclusion, I determined that Rule G1(3)(iii) is therefore applicable, insofar, that senior officials of the London Region were aware the issue required to be dealt with under rule, they had the information they needed to progress it, they have expressed justifiable and major concerns regarding the appropriateness of the LRC dealing with the matter, therefore it is my belief that the LRC will fail to deal with this matter and that I, as a member of the Executive Council having been made aware of this and having undertaken a preliminary inquiry, am submitting a written complaint in respect of the allegations"*

53. Mr Embery argued that interpreting the Rules in this way would give considerable power to Executive Council Members to initiate investigations into the conduct of members in other regions which should properly be dealt with locally. I have some sympathy with his argument and agree that most disciplinary complaints should properly be dealt with at a local level. As I have explained at paragraph 51, I believe that the Rules create a presumption that

cases will be dealt with locally. Where that is not possible the Rules allow an Executive Council Member to undertake a preliminary investigation and refer the case directly to the Disciplinary Committee.

54. This does not seem unreasonable to me as the range of disciplinary offences includes potentially serious issues such as, for instance, discrimination and the fraudulent use of funds. It also seems an appropriate approach in cases such as Mr Embery's where the issue is the enforcement of sanctions which have been applied at the Disciplinary Committee level and upheld through the appeals process.

55. I would add that, in my view, Rule G1 (3) (iii) would enable Mr Noble to raise a complaint about Mr Embery's non-payment of the fine even if Mr Wrack's letter dated 23 January 2020 to Mr Lambe is not treated as a disciplinary complaint within the Rules. That is because the Region was clearly aware of the issue of the non-payment of the fine but took no action. Whilst I have seen an email from Mr Lambe which indicated that he would take a complaint forward if he received one, I have also seen records of conversations which suggested that the Regional Executive Committee expressed concerns as to whether it was appropriate to do so. This is recorded in Mr Noble's letter dated 8 February 2020 to Mr Torre.

### **Mr Noble's Investigation**

56. Mr Embery argued that Mr Noble had incorrectly undertaken his preliminary investigation into Mr Embery's conduct under Rule G3. Subsequently, he used that information to refer matters to the Disciplinary Committee under Rule G1 (3) (iii) even though he had no power to do so. Mr Embery explained that any evidence which was gathered before 9 December 2020, when Mr Noble acknowledged that it was appropriate to progress matters under Rule G1 (3) (iii), could not be used to support any subsequent complaint.

57. Mr Wrack's letter of 1 October 2020 to Mr Noble explained that, in his view, Mr Noble could proceed in two ways. The first was that Mr Noble may wish to investigate the issue under Rule G3 because the issues complained about were derived from Mr Embery's position as an Executive Council Member. Alternatively, any investigation could proceed under Rule G1 (2) because Mr Embery was a member of Region 10. Mr Wrack also drew Mr Noble's attention to Rule G1 (3) (iii) and the discussions between Regional and National officials about the best way to proceed. Mr Noble wrote, on 3 October 2020, to Mr Embery explaining that he had received complaints from Mr Wrack which arose from the disciplinary sanctions made against Mr Embery whilst he was a member of the Executive Council. He explained that he would be processing the complaints under Rule G3. Mr Embery replied to Mr Noble on 5 October 2020 explaining that Mr Noble could not investigate his conduct under Rule G3 as he, Mr Embery, was no longer a member of the Executive Council.

58. Mr Noble wrote to Mr Embery on 9 December 2020 explaining that, having considered the issues raised by Mr Embery, he agreed that it was not appropriate to proceed under Rule G1 (2) (i) and that he would be progressing matters under Rule G1 (3) (iii).

59. Mr Embery's view is that Mr Noble had no power to proceed under Rule G1 (2) (i) because no complaint had been made to his Regional Office. I have already dealt with this point and have concluded that Mr Wrack's letter of 23 January 2020 was a complaint to the Regional Secretary. I have also concluded that, even were that not the case, Mr Noble was able to take these issues forward as he had reason to believe that the issues would not be considered by the Regional Secretary.

60. That only leaves the question as to whether Mr Noble was able to rely on the information which he had gathered when conducting his inquiries between 3 October 2020, when he informed Mr Embery of his investigation, and 9

December 2020 when he told Mr Embery that he would be progressing matters under Rule G1 (3) (iii). Mr Embery was clear that it was not appropriate for him to do so and that he should have initiated his inquiries again, under Rule G1(2) (i).

61. I cannot see anything in the Rules which would have required Mr Noble to effectively start a new investigation in the way that has been submitted by Mr Embery. It is clear from the papers I have seen that Mr Noble had email exchanges with Mr Lambe to ascertain what had happened following the discussions between Mr Rowe, Mr Shek and Mr Lambe. These were conducted before 9 December 2020; however, I can see no reason why these were not admissible as part of the Disciplinary Committee meeting which considered the allegations against Mr Embery. It would, of course, have been possible for Mr Noble to conduct these email exchanges again but I can see nothing in the Rules which would have required him to do so. Nor can I see any prejudice in these exchanges being provided to the Committee. Mr Wrack's letter of 1 October 2020 had already identified that the Regional Office had not pursued the issue. There is also no evidence to suggest that repeating these questions would have elicited different answers.

62. The only other relevant issue appears to be that Mr Embery had refused to participate in the inquiry because he believed that it was not being conducted under the relevant rule. In his letter of 9 December 2020, Mr Noble explained that it was now being progressed under Rule G1 (3) (iii) and asked whether Mr Embery's position had changed. Mr Embery replied, explaining that he continued to challenge Mr Noble's authority to conduct inquiries because the matter had not been referred to his Regional Office. Mr Embery had, therefore, been given the opportunity to participate but declined to do so.

63. In conclusion, I can see nothing in the Union's Rulebook which would have prevented the Disciplinary Committee from relying on the information



collected by Mr Noble before 9 December 2020. Nor can I see any prejudice to Mr Embery caused by the information being collated prior to that date.

## **Conclusions**

64. Turning now to the complaints which Mr Embery has brought to me. I have concluded that Mr Wrack did make a complaint to the Regional Secretary, Mr Lambe, on 23 January 2020. That complaint related to the non-payment of a fine imposed by an earlier Disciplinary Committee Hearing and upheld at Appeal. There were discussions between Mr Lambe, Mr Shek and Mr Darke which led to Mr Rowe concluding that the Regional Office had failed to deal with the complaint. Consequently, Mr Noble was entitled to conduct the inquiry into Mr Embery's conduct in refusing to pay the fine.
65. I have also concluded that Mr Noble was entitled to consider the matter of Mr Embery's failure to return Union property even though it had not been referred to Mr Embery's Regional Secretary. Similarly, I have concluded that, even if I am wrong that Mr Wrack's letter of 23 January 2020 was a complaint under Rule G1, Mr Noble was entitled to investigate it under Rule G1 (3) (iii) because the Regional Office were aware of the issue and had not taken any action Rule G1.
66. Finally, I have concluded that Mr Noble was entitled to rely on the information he had collected under Rule G3 when referring his findings to the Disciplinary Committee under Rule G1 (3) (iii).
67. On that basis I refuse to make the declarations sought by Mr Embery.



Sarah Bedwell

The Certification Officer