D/18/21-22

Decision of the Certification Officer on an application made under Section 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992

Embery

v

Fire Brigades Union

Date of Decision 11 March 2022

Contents

Decision

1. Upon application by Mr Paul Embery ("the claimant") under section 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") that:

   > The Fire Brigades Union breached section 30(2) of the 1992 Act by failing to comply within 28 days with Mr Embery's request for access to accounting records of the Union made by the claimant on 9 April 2021, with details confirmed by him on 27 April 2021.

   I am satisfied that Mr Embery's complaint is well-founded. In reaching this decision I have noted that the Fire Brigades Union accept that Mr Embery is entitled to access those records.

2. Where I am satisfied that the claim is well-founded, I am required by section 31(2B) of the 1992 Act to make such order as I consider appropriate for ensuring that the claimant is allowed to inspect the accounts requested. The order I make is as follows:

   > The Fire Brigades Union is ordered to give Mr Embery access to the accounting records set out in the Appendix to this decision. The records at paragraphs 3 to 6 of the Appendix may be provided in a redacted format as set out in the Appendix.
   >
   > The inspection is to take place on or before 25 March 2022, or such later date as both parties may agree. The inspection shall be at a reasonable hour and at the place where the records are normally kept, unless both parties agree otherwise.
   >
   > The Union shall allow the claimant to be accompanied at the inspection by an accountant (being a person eligible for appointment as a statutory auditor under Part 42 of the Companies Act 2006). The Union need not allow the claimant to be accompanied by such an accountant if the

accountant fails to enter into such agreement as the Union may reasonably require for protecting the confidentiality of the records.

The Union will secure that, at the time of the inspection, the claimant is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he may request.

Reasons

Background

3. Mr Embery is a member of the Fire Brigades Union ("the FBU" or "the Union"). On 9 April he sought access to the Union's accounting records. Subsequently, on 12 May 2021, he submitted to my office an application regarding access to the Union's accounting records.

4. Following correspondence with Mr Embery, the complaint was confirmed by him in the following terms.

> "Fire Brigades Union breached section 30(2) of the 1992 Act by failing to comply, within 28 days, with Paul Embery's request, of 9 April 2021, for access to the Union's accounting records."

5. There has been considerable correspondence between the FBU and Mr Embery. For the purposes of my decision, I do not need to go into the detail of that correspondence; however, it is important to note that the parties have agreed the following:

    a) Mr Embery seeks access to the records which are set out in the Appendix to this decision.

    b) These records are accounting records within the meaning of section 30 of the 1992 Act.

    c) Mr Embery is entitled, as a Member of the FBU, to access these records.

d) Mr Embery and the FBU have agreed that he should access some of those records in a redacted format as they may contain personal data. These are set out at paragraphs 3 to 6 of the Appendix.

6. This decision is, therefore, limited to the following issues which remain in dispute:

   a) Whether Mr Embery should sign a confidentiality agreement before he accesses any of the accounting records set out at Paragraphs 1 and 2 of the Appendix. I will refer to these records as the "relevant accounting records".

   b) Whether any personal data should be redacted from the relevant accounting records before Mr Embery is given access to them.

   c) The date by which Mr Embery should be given access to all records that are the subject of his request

7. It is important to note that the FBU have offered Mr Embery access to all of the accounting records provided that he sign a confidentiality agreement which would prevent him from disclosing any of the documents, or the information contained in the documents, to a third party. Mr Embery has refused to sign the agreement.

8. I listed this case for a hearing on 22 February 2022. Having read both parties' submissions, however, I invited their comments as to whether a hearing was necessary as the issues under dispute were well documented, supported by detailed submissions and neither party had sought to introduce written or oral evidence. Both Parties agreed to this and I invited them to make final submissions by 22 February 2022.

9. Oliver Segal QC made submissions on behalf of the FBU. Mr Embery represented himself. I also had access to a bundle of documents provided by both parties.

The Relevant Statutory Provisions

10. The statutory provisions which are relevant for the purposes of this application are as follows:-

1992 Act:

28 Duty to keep accounting records

(1)A trade union shall

(a) cause to be kept proper accounting records with respect to its transactions and its assets and liabilities, and

(b) establish and maintain a satisfactory system of control of its accounting records, its cash holdings and all its receipts and remittances.

(2) Proper accounting records shall not be taken to be kept with respect to the matters mentioned in subsection (1)(a) unless there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions.

29 Duty to keep records available for inspection

(1) A trade union shall keep available for inspection from their creation until the end of the period of six years beginning with the 1st January following the end of the period to which they relate such of the records of the union, or of any branch or section of the union, as are, or purport to be, records required to be kept by the union under section 28. This does not apply to records relating to periods before 1st January 1988.

(2) In section 30 (right of member to access to accounting records)—

(a) references to a union's accounting records are to any such records as are mentioned in subsection (1) above, and

(b) references to records available for inspection are to records which the union is required by that subsection to keep available for inspection.

(2)The expiry of the period mentioned in subsection (1) above does not affect the duty of a trade union to comply with a request for access made under section 30 before the end of that period.

30 Right of access to accounting records

(1)A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union.

In the case of records relating to a branch or section of the union, it is immaterial whether he was a member of that branch or section.

(2) Where such access is requested the union shall

(a) make arrangements with the member for him to be allowed to inspect the records requested before the end of the period of twenty-eight days beginning with the day the request was made,

(b) allow him and any accountant accompanying him for the purpose to inspect the records at the time and place arranged, and

(c) secure that at the time of the inspection he is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he requires.

(3) The inspection shall be at a reasonable hour and at the place where the records are normally kept, unless the parties to the arrangements agree otherwise.

(4) An “accountant” means a person who is eligible for appointment as a statutory auditor under Part 42 of the Companies Act 2006. (5) The union need not allow the member to be accompanied by an accountant if the

accountant fails to enter into such agreement as the union may reasonably require for protecting the confidentiality of the records.

(6) Where a member who makes a request for access to a union's accounting records is informed by the union, before any arrangements are made in pursuance of the request-

(a) of the union's intention to charge for allowing him to inspect the records to which the request relates, for allowing him to take copies of, or extracts from, those records or for supplying any such copies, and

(b) of the principles in accordance with which its charges will be determined, then, where the union complies with the request, he is liable to pay the union on demand such amount, not exceeding the reasonable administrative expenses incurred by the union in complying with the request, as is determined in accordance with those principles.

(7) In this section "member", in relation to a trade union consisting wholly or partly of, or of representatives of, constituent or affiliated organisations, includes a member of any of the constituent or affiliated organisations.

31 Remedy for failure to comply with request for access

(1)A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer.

(2) Where the Certification Officer is satisfied that the claim is well-founded he shall make such order as he considers appropriate for ensuring that the applicant

(a) is allowed to inspect the records requested,

(b) is allowed to be accompanied by an accountant when making the inspection of those records, and

(c) is allowed to take, or is supplied with, such copies of, or of extracts from, the records as he may require.

European Convention on Human Rights

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

United Kingdom General Data Protection Regulation

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’);

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’);

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (‘accuracy’);

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (‘storage limitation’);

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’).

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (‘accountability’).

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by domestic law.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The domestic law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on domestic law which constitutes a necessary and proportionate measure in a democratic society to safeguard national security, defence or any of the objectives referred to in Article 23(1), the controller shall, in order to ascertain

whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;

(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;

(d) the possible consequences of the intended further processing for data subjects;

(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where domestic law provides that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the

field of employment and social security and social protection law in so far as it is authorised by domestic law or a collective agreement pursuant to domestic law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;

(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

(g) processing is necessary for reasons of substantial public interest, on the basis of domestic law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of domestic law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;

(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or

ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of domestic law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;

(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) (as supplemented by section 19 of the 2018 Act) based on domestic law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

3. Personal data referred to in paragraph 1 may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under domestic law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under domestic law or rules established by national competent bodies.

3A. In paragraph 3, ‘national competent bodies’ means competent bodies of the United Kingdom or a part of the United Kingdom.

4.. . . . . .

5.In the 2018 Act—

(a) section 10 makes provision about when the requirement in paragraph 2(b), (g), (h), (i) or (j) of this Article for authorisation by, or a basis in, domestic law is met;

(b) section 11(1) makes provision about when the processing of personal data is carried out in circumstances described in paragraph 3 of this Article.

Considerations and Conclusions

Summary of the Parties' submissions

The Union

11. Mr Segal explained that the FBU is anxious to comply with their statutory obligations but believe that there is a need to balance Mr Embery's right to access the relevant records with the rights of those individuals to whom the records relate. In the FBU's view, and for the reasons set out below, the best way to balance those rights would be for Mr Embery to enter into a confidentiality agreement so that he could not disclose the records to a third party.

Individual Rights to Privacy

12. Mr Segal explained that the relevant accounting records contain details of personal expenses and credit card returns, and donations to individuals, which is considered to be personal data pursuant to the General Data Protection Regulation as implemented by The Data Protection Act 2018 and modified by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419) and shall be referred to as "UK GDPR".

13. Consequently, any disclosure of those accounting records must be consistent with UK GDPR and, specifically with Articles 5 and 6. The personal data within the records must be processed lawfully and fairly, collected for specified purposes and not further processed. The records must also be adequate, relevant and limited to what is necessary for the purposes for which they are processed. Any processing must be for the purposes of the legitimate interests pursued by the controller (in this case the union) except where such interests are overridden by the interests or fundamental rights of the data subject which require protection of the data. Finally, Article 9 of UK GDPR, provides enhanced protections for processing "special category" data

which includes an individual's membership of a union. In particular, the union should not disclose an individual's membership outside the union unless a relevant exemption applies. Mr Segal referred me to Article 9(2)(a) as the only relevant exemption which, in this case, would require the union to be satisfied that the individual had given explicit consent to the disclosure.

14. Mr Segal also told me that, in addition to protection of their personal data pursuant to UK GDPR, those individuals named in the documents, have a right to privacy under Article 8 of The European Convention on Human Rights (ECHR).

Access to Accounting Records

15. Mr Segal explained that, in his view, the purpose of section 30 of the 1992 Act was to give union members a right to inspect their union's accounting records so that they could check that their union's spending was properly authorised, recorded, and compliant with the relevant rules and make a complaint to the court or to the Certification Officer in respect of any non-compliance. In his view, this provision was not designed to enable a member to access accounting records in order to disclose them outside the union. He also explained that the provision does not prevent the FBU from keeping accounting records confidential. This is reflected, in his view, in the requirement in the 1992 Act which enables a union to require an accountant, who is accompanying a member viewing the union's accounting records, to sign a confidentiality agreement. In his view, it is open to a union to impose a similar obligation of confidentiality on a union Member. He acknowledged that Mr Embery may be subject to the FBU's existing confidentiality policy; however, he told me that this gave little comfort to the FBU as Mr Embery had already shown that he is content to ignore the instructions of the Union's National Executive Council (NEC) when he disagreed with them, even at the risk of a disciplinary penalty.

The Way Forward

16. The FBU contend that it is likely that Mr Embery will disclose the records, including any personal data, to others. In their view, any such disclosure risks interfering with the privacy of any individuals whose personal information has been disclosed and compromises the FBU's duty of care to its staff.

17. Mr Segal suggested two proposals which would enable the FBU to meet their obligations to both Mr Embery and those individuals named in the relevant accounting records. The first option, as has previously been proposed by the FBU, would involve Mr Embery entering into a confidentiality agreement before he views the accounting records. Such an agreement would enable Mr Embery to have full access to the relevant records but would prevent him from disclosing the records to others and, it appears, specifically to anyone who is not a member of the FBU. It is worth noting that the Union have offered to vary the terms of the original confidentiality document; however, I have only seen the draft agreement which was first proposed in October 2021.

18. The second option would involve redacting all of the personal data from the relevant accounting records before Mr Embery is given access to those documents. This was an approach which was considered by my predecessor in Mills v Unite the Union D/38/15-16 and, upheld on appeal in Unite the Union v Mrs K Mills UKEAT /0148/16/LA**.** My predecessor considered whether he had the power to order the Union to redact the names of the officials before disclosing the records to Mrs Mills. He concluded that disclosure would not infringe the rights of the individuals under Article 8(1) of the European Convention on Human Rights (ECHR) as they could not have an expectation of privacy. He also undertook a balancing exercise under Article 8(2) and similarly concluded that disclosure was a justifiable interference with the individual's privacy, which was necessary for the rights and protections of others.

19. Mr Segal argued that it was clear from reasoning of the Employment Appeal Tribunal in the Mills case referenced at paragraph 18 above that I have a power to restrict Mr Embery's right to view or disseminate the data contained in the accounting records in order to protect the rights of those individuals who are named in the documents. He also argued that there were additional issues, which were not addressed in the Mills' case, which I should take into account here:

    a) Mr Embery has reserved his right to disclose some of the information contained in the accounting records. Whilst Mr Embery has acknowledged that he would not disclose any home address or contact details, this would not prevent correspondence being directed at individuals at their Union office. Mr Segal told me that some of those whose names might be disclosed have already been targeted by "vile correspondence" threatening their well-being and that of their families. This was not an issue in the Mills' case.

    b) UK GDPR was not in force at the time that the Mills' case was considered and so was not a factor in that decision.

20. Mr Segal has also made submissions as to the nature of any order which I should make. Both he and Mr Embery are aware of my preliminary view that I have no power to require Mr Embery to enter into a confidentiality agreement. Whilst Mr Segal agrees, he has reminded me of my power to undertake any inquiries which I see fit before making any order which I consider appropriate. In his view this could include inquiries into the rights to privacy of those individuals whose personal data might be disclosed. The Union's position is that, in the absence of any reasoned explanation from Mr Embery opposing the Union's proposed conditional order, it would not be appropriate for me to make an order requiring disclosure until Mr Embery has provided the relevant undertaking.

21. As an alternative, and if I do not agree that it would be appropriate for me to make an order which would, effectively, impose an obligation on Mr Embery to sign a confidentiality agreement then the FBU invite me to make an order which would enable them to disclose the relevant records to Mr Embery in a redacted format so that it would not be possible to identify any individuals named in the relevant records. This would enable the Union to replace the name of each official with a number or letter.

22. Mr Segal told me that, were I to make an Order requiring disclosure of the records listed in the Appendix, the FBU could provide access to the records in full at “short notice” although he did not say what time period was covered by “short notice”. He also explained that redaction of the documents could take “some weeks” because of the volume of records which would need to be considered. As a compromise, if I considered that the documents should be redacted, the FBU would be willing to offer Mr Embery access to the full records and redact only those which Mr Embery intended to copy for his own use.

Mr Embery

23. Mr Embery’s position is straightforward. He is entitled to access the accounting records of his union. There is nothing in the 1992 Act which limits his right of access by, for instance, requiring him to sign a confidentiality agreement. The only condition which may be placed on his access is the requirement to pay a fee for any reasonable expenses incurred by the FBU. Nor does the 1992 Act define the purposes for which a union member may seek access to the accounting records of their union or the purposes for which he may use those records.

24. He told me that the FBU had tried to frustrate his request from an early stage. They directed him to their annual report, sought to charge him an up-front fee for accessing the records and told him that the finance team were too busy with other work. After he made a complaint to my office, in May 2021 he was

offered access to the records and agreed a date of 29 October 2021. Shortly before that, the FBU asked him to sign a confidentiality agreement which required him to acknowledge his obligations as a data controller and restricted his use of any data he obtained from the records. He was also given a copy of the FBU's confidentiality policy. Mr Embery did not sign the confidentiality document.

25. He told me that he has sought to resolve the issues with the FBU and has engaged in correspondence with them in good faith. He does not accept that the FBU's most senior officials have a right to anonymity in respect of how they have spent or received the FBU's funds.

Unite the Union v Mills

26. Mr Embery agreed with Mr Segal that the decision in the Mills' case is relevant to this case. He did not agree, however, that any potential disclosure, by him, of information contained within those records is a relevant issue. He told me that he has not given notice of any intention to publish or disclose the information in any way. He refused to sign the confidentiality agreement because it was hastily cobbled together and factually inaccurate but also because he believed that there may be extreme circumstances (whistleblowing for instance) where he wished to place the information in the public domain. Consequently, he considered it unreasonable for the FBU to suggest that he intends to disclose personal data and to use this as a reason for taking a different approach to the one adopted in the Mills' case.

27. Whilst he recognised that the Employment Appeal Tribunal in the Mills' case did not deal with subsequent disclosure of financial records he did not believe that the decision in that case prevented her from doing so. Neither my predecessor nor the Employment Appeal Tribunal placed any restriction on how Mrs Mills could use the information which she obtained from the accounting records. Consequently, the information was effectively being made public at the time it as disclosed to Mrs Mills. Mr Embery referred me to

the Information Commissioner's guidance on the Freedom of Information Act 2000 that disclosure to one requester should be treated as disclosure to the "world at large". In other words, disclosure to Mrs Mills was, effectively, placing the information in the public domain.

UK GDPR

28. Mr Embery agreed with Mr Segal that Articles 5 and 6 are relevant. He recognised that Article 6(1)(f) enables me to undertake a balance of interests test similar to that which Mr Cockburn undertook in the Mills' case. This would, in his view, enable me to balance the interests of Mr Embery and those individuals whose personal data is included in the relevant accounting records. He also drew my attention to Article 6(1)(c) which provides that processing is lawful where it is necessary for compliance with a legal obligation to which the controller is subject. In his view this means that disclosure of the personal information is lawful where a union is disclosing the information as part of its obligations under section 30 of the 1992 Act.

29. Mr Embery did not accept, however, that the Union could rely, in his case, on the fact that an individual's union membership was protected data under Article 9 of UK GDPR. He referred me to Article 9(2)(e) which enables the disclosure of an individual's union membership where that individual has manifestly made the information public. He told me that the individuals likely to be affected by any disclosure were the most senior members of the FBU, acting as the Union's high profile representatives, engaging with employers and politicians, calling strikes and attending meetings at all levels of the FBU. Their names, photographs and official contact details are published on the FBU's website alongside links to their social media accounts.

ECHR

30. Mr Embery does not appear to accept that national union officials have any rights under Article 8 of ECHR in respect of union expense claims and credit

card returns submitted by them. He reflects, however, that any balancing exercise under Article 6(1)(f) of UK GDPR would be so similar to any balancing exercise under Article 8 (2) of ECHR that my predecessor would have reached the same conclusion in the Mills case had UK GDPR been in force and Article 6(1)(f) been taken into account.

Duty of Care

31. Mr Embery condemned the letter which had been sent to some FBU officials as unacceptable and wrong. He did not, however, believe that an isolated incident of this kind should interfere with the normal requirements of democracy, accountability and transparency in relation to matters of internal union finance. He also reflected that senior union officials' profiles and contact details remained on the FBU website. The FBU had not removed these which, in his view, suggested that Mr Segal's argument in respect of the FBU's duty of care to officials was not compelling.

The Way Forward

32. Mr Embery agrees with Mr Segal that I do not have the power to require him to enter into a confidentiality agreement. He also told me that he has no intention of entering into an agreement and so the focus of his submission was whether I should require the FBU to give him access to the relevant accounting records in full or redacted format. For the reasons I have summarised above, he seeks an order which would give him access to the records without any redaction. He has asked that, given the passage of time since he first made his request, and the obstacles he has faced in dealing with that request, he should be given access to the records within 14 days.

Conclusions

33. The parties have reached agreement on the terms of Mr Embery's access to most of the accounting records included in his request. The outstanding issue is whether the individuals who are named in the relevant records (those at

paragraphs 1 and 2 of the Appendix) have any right to privacy, under ECHR and UK GDPR in respect of the information contained within those records, and, if so, whether those rights should outweigh Mr Embery's rights to view, disseminate, or disclose that information. Both parties agree that the real issue lies in disclosure of those accounting records at paragraph 1 of the Appendix and have focused their submissions on those points. As the Union accepts in its submissions that the real issue for practical purposes relates to paragraph 1 of the Appendix I am satisfied that Mr Embery is entitled to view and take copies of the records referenced at paragraph 2 of the Appendix pursuant to section 30(2) of the 1992 Act. Consequently, this decision focuses on the issues raised in paragraph 1 of the Appendix.

34. It is helpful if I deal first with Mr Embery's right to access the information. I agree with Mr Segal as to the purpose of section 30 of the 1992 Act; however, Mr Embery is also correct that the 1992 Act does not limit, in any way, the purpose for which a union member may seek access to accounting records and places no restriction on what that member can do with any financial records. My approach to this case is, therefore, that Mr Embery should have access to the relevant records without any redaction or additional restriction as to their use unless such access would unjustifiably impact on the rights of those named in the relevant records. Consequently, I must consider whether those individuals have rights under Article 8 of the ECHR or Articles 5, 6 and 9 of UK GDPR which would outweigh Mr Embery's rights and enable me to make an order which would either (1) enable the FBU to withhold disclosure until Mr Embery had entered in to an appropriate confidentiality agreement, or (2) enable the FBU to redact any information which would enable Mr Embery, or a third party, to identify any named individual.

35. I also agree that a union, should it choose to do so, has a right to consider its accounting records to be confidential within the union. I do not, agree, however, that this implies that a union can require their members, when exercising their statutory rights, to sign a confidentiality agreement along the

lines of that which may be required of an accountant who accompanies them when exercising that right. Had Parliament intended that this would be the case then it would surely have included a similar provision. It is, however, open to any union to use its rules, supported by appropriate internal governance procedures, to maintain the confidentiality of records. I note that the FBU has a confidentiality policy in place but that they believe such a policy gives little comfort in this case. I have, therefore, taken into account the FBU's views on the likelihood of disclosure when undertaking the balance of interests test.

Article 8.1 ECHR

36. Mr Segal did not make any significant submissions on the individual's rights to privacy under Article 8(1) as he dealt primarily with UK GDPR. Mr Embery referred me to my predecessor's conclusions in the Mills' case where at paragraph he found at paragraph 49 that:

> "In my judgement, the 'right to respect for his private and family life, his home and his correspondence' of union lay representatives who are paid stand-down allowances or members who are paid other expenses are not infringed by ordering the disclosure of the Union's accounting records relating to the payment of those allowances and/or expenses. I find that such persons have no reasonable expectation that the payments they receive from the Union will remain private from other Union members."

37. I have not seen any evidence, or argument, which suggests that I should take a different view to that of my predecessor. Mr Segal's arguments focus on UK GDPR which I consider at paragraphs 39 to 46 below, and Mr Embery's intention to disclose these records. I am also persuaded by Mr Embery's argument, that whilst my predecessor's decision in the Mills' case the Union did not specifically deal with disclosure, neither my predecessor nor the Employment Appeal Tribunal sought to restrict her from disclosing any of the records which she was entitled to access. Consequently, I can see no

grounds which might cause me to take a different view in this case. I do not consider, therefore that Article 8.1 rights are engaged in this case. In reaching this conclusion I have taken the following into account:

a) Those individuals affected by the disclosure of the relevant records are the most senior national officials of the FBU. As Mr Embery has reflected, they are senior to those branch officials whose payments and expenses were the subject of the Mills' case. They should, therefore, have no expectation of, automatic protection under Article 8, in regard to their use of the FBU's funds.

b) The Employment Appeal Tribunal upheld my predecessor's decision in the Mills' case.

Article 8.2 ECHR

38. As I have found that Article 8.1 is not engaged there is no reason for me to consider Article 8.2; however, like my predecessor it is helpful if I consider whether this case raises any issues which might, if Article 8.1 were engaged, justify restricting Mr Embery's access to, or use of, the records. To avoid repetition, however, I will consider Article 8.1 alongside the issues raised by UK GDPR at paragraphs 39 to 46 below.

Articles 5 and 6 UK GDPR

39. Both parties agree that the FBU must comply with the provisions of Articles 5 and 6 and that these provisions are relevant in this case. Mr Segal has submitted that I should conduct a balance of interest test under Article 6(1)(f) before reaching a decision on the nature of any Order I may make. Mr Embery has drawn my attention to Article 6(1)(c) which enables a union to disclose the data in compliance with any legal obligation to which the union is subject. His view is that this would enable the FBU to disclose the data to him under section 30 of the 1992 Act.

40. Mr Segal has made no submissions on Article 6(1)(c). As I have not received submissions from both parties in respect of Article 6(1)(c), I have made a decision based on the balancing exercise required by Article 6(1)(f) and concluded that it is not necessary in those circumstances for me to consider whether the requirements of Article 6(1)(c) are met.

Article 9 UK GDPR

41. Article 9 of UK GDPR provides additional protections for personal data which is considered to be special category data. This would, subject to specified exemptions, prevent the disclosure of an individual's membership outside of the relevant union. Mr Segal referred me to Article 9(2)(d) as being the only relevant exemption to the additional protections. Article 9(2)(d) allows disclosure where an individual explicitly consents to such data. Mr Embery referred me to Article 9(2)(e) which would, in his view, enable the union to disclose an individual's membership where that membership has manifestly been made public by the data subject.

42. Dealing first with Article 9(2)(d), I have not been provided with any information or evidence which demonstrates that those individuals who might be affected by disclosure of the relevant records have given consent to any disclosure. Consequently, I can only conclude that there is no explicit consent for the disclosure of this data outside of the FBU. It is worth noting that I have not seen any evidence that they had been consulted; had they been consulted and given consent then it is possible that this case could have been resolved, in whole or in part, without the need for me to consider Mr Embery's complaint.

43. Moving on to Article 9(2)(e), Mr Embery argues that the union officials affected by the disclosure of the relevant records are the FBU's most senior officials who have manifestly made their positions public**.** As he described the position:

> It is surely undeniable that, in standing for high office in the union, all of the officials identified in item 1 of my request can be said to have "manifestly made public" the fact that they are members of the Fire Brigades Union. These are the most senior and public officials of the union. They attend meetings with members at branch, divisional, brigade, regional and national level; they negotiate with employers and politicians; they represent the union in the media; they are mentioned regularly in union literature and press releases; they speak at rallies and demonstrations on behalf of the union; they are the organisers of industrial action when it is called; their photographs, contact details and links to their social media accounts are published on the union's website. If that doesn't amount to manifestly making public one's membership of the union, I'm not sure what does. I trust, therefore, that I do not need to pursue this point further.

44. I have not received any specific submissions from Mr Segal on this point. He has, however, told me that the only potentially relevant exemption is Article 9(2)(d) and I can only conclude, therefore, that he does not regard Article 9(2)(e) as relevant.

45. As Mr Embery has made clear, the individuals affected by the disclosure are the FBU's current National Executive Council Members and Head Office Officials. They are the most senior and public officials of the FBU. Their names, contact details and, in some cases, photographs are available on the FBU website and they appear in public on behalf of the FBU. It is difficult to see how they could fulfill their current roles without putting themselves forward as public representatives of the FBU. Consequently, I agree with Mr Embery that, by taking on such roles, they have manifestly put the fact of their union membership into the public domain. I am satisfied, therefore, that the relevant exemption in Article 9(2)(e) applies and does not prevent the FBU from disclosing this data, subject to the balance of interest test required by Article 6(1)(f).

46. It is also worth noting that my predecessor addressed the issue of the disclosure of an individual's membership of a union in the Mills' case referenced earlier. This was in the context of an individual's Article 8 rights as the UK GDPR was not in force at that time. In reaching the conclusion that Article 8 rights were not engaged he contrasted the rights to privacy of a member who was in receipt of expenses from the union with one who was not:

> I contrast the position of a member who claims expenses from a union with the position of someone who is merely a member of a union who seeks to prevent the disclosure to others of the fact of his/her membership. The fact of membership may be a matter or great sensitivity and its disclosure could give rise to significant detriment to the individual. In my view a member has a reasonable expectation of privacy of the fact of membership in most circumstances, even from other union members, and the disclosure of the names of members of a union without their express or implied consent may well engage Article 8.

Balance of Interests

47. For the purposes of Article 6 (1) (f) UK GDPR it is necessary for me to consider whether the right to privacy of those individuals named in the relevant records is sufficient to justify restricting Mr Embery's right to access the relevant records. The following points are relevant:

    a) It is accepted that Mr Embery has a right to access the relevant records under s30 of the 1992 Act. The Act places no restriction on the purpose for which Mr Embery can exercise his right nor any limitation on how he may use the records.

    b) The individuals named in the relevant accounting records are the most senior officers of the FBU. They are the public face of the

FBU. The FBU is a voluntary organisation funded by fees from its members and it is right that FBU members should have access to those records in order to hold the FBU to account.

c) I have seen no evidence which demonstrates that any of the individuals named in the relevant accounting records have been consulted about the disclosure of the relevant records to Mr Embery. Nor have I been provided with any evidence as to what their views might be on any wider disclosure.

d) Some of those individuals named in the records have received vile correspondence threatening their own well-being and that of their families. This has been referred to the police and has reinforced the importance of the FBU's obligations under ECHR and UK GDPR.

e) The FBU's website includes the name and contact details of those individuals named in the records. They regularly engage with third parties and in public on behalf of the FBU. I have seen no evidence which demonstrates that any names, photographs or contact details have been removed from the website following receipt of the correspondence described at 19 above.

f) Whilst there is no suggestion that Mr Embery was in any way involved with the correspondence described at paragraph 19 above, the FBU are concerned that Mr Embery may place the relevant records in the public domain. This could reduce the FBU's ability to exercise its duty of care to its senior officials.

g) Mr Embery has not expressed any intention to disclose the data. He has, however, reserved his right to do so.

48. Taking all of these issues into account, and for the reasons set out at paragraphs 39 to 46 above, I am satisfied that the requirements of UK GDPR and the ECHR, do not prevent the disclosure of the relevant records to Mr

Embery. The only remaining issue is whether the potential publication of the personal information in those accounting records would justify restricting Mr Embery's access to or, use of, the records.

49. I understand, and empathise with, the FBU's concerns about the potential impact of any wider disclosure of the relevant accounting records. They have a duty of care to their senior officials, some of whom have received correspondence which has been vile and threatening. There is, however, no suggestion that Mr Embery was in any way involved or connected to that correspondence. Nor have I seen any suggestion that the correspondence was in any way related to the relevant records.

50. The FBU have offered no evidence to support their case as to the views of the relevant individuals who would be affected by the publication of the accounting records. I have been told that the vile correspondence referred to at 19 above was written over a printed copy of a tweet from Mr Embery which related to his recent employment tribunal claim. I have not, however, seen the letter. Nor have I been given any witness evidence which describes the impact of that letter.

51. The FBU consider it likely that Mr Embery will disclose some, or all, of the relevant accounting records to others. They first expressed this concern to my office in a letter dated 25 June 2021 from Mark Rowe, the FBU's National Officer, when he explained:

> I hold what I believe to be a legitimate belief that Mr Embery will post the information onto social media as he has done in the past with other items of correspondence between himself and the union and therefore I believe my concerns, as detailed within correspondence, under GDPR are well founded.

52. Subsequently, their concern led them to seek a confidentiality agreement from Mr Embery. When he refused to sign that agreement Mr Rowe

explained to him, on 27 October 2021, that the FBU would be happy to consider amending the draft agreement but that if he refused to sign an agreement they would:

> "draw the obvious inference that you do intend to be in breach of your obligations as a member under the Rule book and FBU's obligations under DPA/GDPR"

53. For his part, Mr Embery submitted that he had never expressed an intention to disclose any of the records. His refusal to sign the confidentiality agreement was based on what he perceived to be poor drafting and his reluctance to give up his rights should he feel the need to disclose any document in extreme, circumstance such as whistleblowing. I note, however, that Mr Embery has not told me that he does not intend to disclose any of the records, merely that he has not expressed an intention to do so. Similarly, he did not take up the FBU's offer to reach agreement on a revised wording.

54. It seems clear to me that it is possible that Mr Embery will disclose some of the relevant accounting records outside the FBU. I have not, however seen any evidence about the potential impact of such a disclosure on the named individuals. In the absence of such evidence it is difficult for me to conclude that any such disclosure would justify the restriction of Mr Embery's rights to access those records.

55. Consequently, I consider it appropriate to make an Order requiring the FBU to make the relevant records, in unredacted form, available to Mr Embery. I do not consider it appropriate to make a conditional Order which would, effectively, require him to sign a confidentiality agreement before being given access to the records.

56. Mr Embery has asked that, given the passage of time since his request, he be given the opportunity to access the records within 14 days. Mr Segal has

indicated that the documents, in unredacted form, could be available at short notice. It, therefore, seems appropriate to meet Mr Embery's request.

Observations

57. At paragraph 40 I recorded that, in the absence of submissions from both parties as to the relevance of Article 6(1)(c) of UK GDPR, I would rely on the balance of interest test required by Article 6(1)(f). Had I concluded that the balance of interests lay with those individuals named in the relevant records I would have sought submissions from both parties on the relevance of Article 6(1)(c) and Article 6(3). Having found in Mr Embery's favour, however, I do not believe that I need to do so.

58. In making my Order, I recognise that Mr Embery may decide to place some of the relevant records in the public domain. I strongly encourage him to take into account his personal obligations under any relevant legislation, including UK GDPR, and the FBU Rules before doing so.

Sarah Bedwell

The Certification Officer

Appendix

The items in Mr Embery's request of 9 April 2021 as set out in the Union's letter to Mr Embery of 7 January 2022

1. Records of expenses claims and credit card returns (individual transactions, not merely aggregated totals) made by current executive council members and head office officials.

2. Records of donations to external organisations or individuals. These should include (but be not limited to) payments made in respect of affiliation fees and payments made from the Union's political fund.

3. Records of payments to any law firm or legal representative other than Thompsons Solicitors. This will, for reasons of member confidentiality, be a single figure for each law firm or legal representative – save that you also wish to see any records specifically relating to you.

4. Records of payments to Thompsons Solicitors (past 24 months only). For reasons of member confidentiality this will be provided as a total figure broken down into two 12 monthly payments – save that you also wish to inspect any payments made specifically in relation to matters concerning you.

5. Records of payments to individuals as part of any severance, redundancy or similar agreement upon them leaving the employment of the Fire Brigade's Union, Names and the year, month and circumstances of departures will be redacted.

6. Records of payments (for example, mortgage, rent, utility bills) in respect of any residential or commercial property with the exception of head office and regional office.