

D/1/23-24

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

Simpson

v

Unite the Union

(on remission from the Employment Appeal Tribunal)

Date of Decision

23 May 2023

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Decision

1. Upon application by Mr Tom Simpson (“the applicant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the Act”) and the remission of Mr Simpson’s Complaint 2 by the Employment Appeal Tribunal I make the following declaration:

I do not uphold Mr Simpson’s complaint that there was an appearance of bias by way of pre-determination arising from Mr Gillespie’s involvement in the early stages of the disciplinary hearing and the disciplinary panel itself.

Reasons

2. Mr Simpson first contacted my office in November 2018. He told me that Unite the Union (“Unite” or “the Union”) had breached its rules when it took disciplinary action against him following the investigation of complaints made by him about two other members. Following correspondence with my office, Mr Simpson confirmed three complaints which were listed for a Hearing in January 2021. I gave my decision on 18 February 2021 (CO/23-25/20-21). I did not uphold any of the complaints.
3. Mr Simpson appealed to the Employment Appeal Tribunal (EAT). HHJ J Tayler’s judgment was handed down in two judgements. The first dated 12 October 2022 and the second 11 November 2022 (EA 2021 000455BA). In the latter judgment he remitted one matter in relation to one complaint back to me.
4. I have set out below the relevant parts of HHJ J Tayler’s ’s judgment:

12 October 2022 (paragraphs 74 to 76)

“74. The specific facts of this case are somewhat unusual. As set out above, in the context of a trade Union, it is not surprising that all those involved in the disciplinary process were acting on behalf of the union. Mr Simpson’s particular complaint is about the repeated involvement of Mr Gillespie. This is not a case in which Mr Gillespie merely sat on the committee that decided

that there was a case to answer and then chaired the disciplinary panel. The process started with Mr Simpson raising a complaint of harassment and ended with him being expelled from the Union. Mr Gillespie chaired the F&GP Committee that, after a private session, decided that Mr Simpson's complaints should be dismissed and that there was "something amiss in the complaint having been put forward by Mr Simpson" as a result of which an investigation should be initiated. He did not conduct the investigation but then chaired the F&GP Committee that accepted Mr Deans' recommendation and decided that Mr Simpson should be charged. When asked to recuse himself he did not reply to the letter or tell his fellow committee members about the letter. Mr Gillespie then chaired the disciplinary panel that decided that Mr Simpson should be expelled from the Union. While this process may not have been expressly prohibited by the Rules, the Certification Officer correctly concluded that the rules must be applied in a manner that accords with natural justice. The real question was whether Mr Gillespie's involvement at various stages of the process before chairing the disciplinary panel, was such that a "a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that Mr Gillespie had predetermined the matter", or put another way, would the fairminded and informed observer consider there was a real risk that Mr Gillespie did not approach the disciplinary hearing with an open mind.

75. I do not consider that the Certification Officer properly directed herself as to the law and identified this as being the question that she needed to answer in determining the primary complaint. Accordingly, I consider that she erred in law. I accept the Union's argument that it was the primary complaint that was properly before the Certification Officer, rather than the secondary complaints, although the way Mr Gillespie dealt with Mr Simpson's letter asking that he recuse himself from the disciplinary panel is properly to be seen as a component of the material that would have been known to the fair-minded and informed observer, and so is relevant to the

primary complaint. To the extent that the Certification Officer considered the test for apparent bias it was in respect of the secondary complaints.

76. Having concluded that the Certification Officer erred in law, which is the test appropriate to this appeal, I have requested submissions from the parties as to disposal; if there is only one possible answer I may substitute a decision, I could determine the matter if the parties agree; or I could remit it to the Certification Officer.”

11 November 2022 (full judgment)

“I have considered the parties submission on disposal. The respondent does not consent to my determining the matter. Accordingly, I could only determine the matter myself if there is only one possible outcome on a proper application of the law. I concluded that the certification officer erred in law by failing to consider and apply the relevant law to the question of whether the disciplinary process adopted in this case gave rise to an appearance of bias by way of pre-determination. As this specific issue was not considered by the certification officer it is possible that further evidence might be required, although it will be important to keep in mind the distinction between actual and apparent bias by way of predetermination. I also consider that it will be appropriate for the parties to make further submissions. I accept that there is not only one possible determination that can be reached. Accordingly, the matter will be remitted to the certification officer for redetermination.”

5. The issue which has been remitted back to me is, as stated by HHJ J Tayler, whether the disciplinary process adopted in this case gave rise to an appearance of bias by way of pre-determination.
6. I listed this matter for a Hearing on 19 April 2023 and invited both parties to make submissions, submit any new documentary evidence and to indicate whether they wished to call witnesses to give oral evidence. The Union asked that I refer to the bundle of documents which had been submitted for the original hearing in January

2021 and indicated that they would not call any witnesses to give oral evidence. Mr Simpson submitted a bundle of legal authorities but did not indicate that he would call any witnesses to give oral evidence. Both the Union and Mr Simpson provided written submissions which were exchanged between the parties ahead of the listing date.

7. I invited both parties to consider whether it was necessary to hold a hearing, as no witnesses would be attending, or whether I could consider the issue on paper. I explained that, if there was not to be a hearing, I would seek further submissions from each party so that they could respond to any points which had been made in the initial submissions. The Union agreed to this.
8. Mr Simpson sought an oral hearing for a number of reasons. The first was to enable him to challenge the Union's arguments which were set out in their skeleton argument and the second was to enable public scrutiny and satisfy the public interest. The third was to enable him to put questions to Mr John Gillespie, who had been a witness for the Union at the original Hearing.
9. I decided that it was appropriate for me, notwithstanding Mr Simpson's comments, to consider this matter on paper. It is a practice I have followed in dealing with complaints where there are no witnesses and both parties have made written submissions. Indeed, it is a practice I adopted when dealing with a previous complaint made by Mr Simpson. The process allows each party to respond to the initial submissions in writing before I make my decision. It also enables me to seek additional information or argument, from both parties, where I feel it necessary. All submissions and correspondence are copied to both parties so that the process is transparent and fair. My decision is published on my website, and it is open to either party to make an appeal to the Employment Appeal Tribunal as would be the case if there had been an oral hearing. I am, therefore, satisfied that it provided the opportunity to challenge, which Mr Simpson seeks and that it satisfies the public interest and is open to public scrutiny.

10. As to witnesses the Union have been clear that they did not intend to call Mr Gillespie as a witness. I have no powers to require the attendance of a witness and so the decision as to whether Mr Gillespie gave oral evidence rested with the Union. Mr Simpson asked me to request the Union to call Mr Gillespie to evidence; however, my practice, like my predecessors, has been to expect each party to take responsibility for the presentation of their own case rather than for me to request the attendance of individual witnesses. Consequently, even if I had taken the decision to consider this case at a Hearing it would have been the Union's decision as to whether Mr Gillespie would attend to give oral evidence. I was, therefore, satisfied that I could consider the case on paper without any prejudice to either party.
11. As to submissions I have received the following submissions from each party:
 - a. 24 March 2023 Mr Simpson
 - b. 20 March 2023 Oliver Segal KC on behalf of the Union
 - c. 17 April 2023 Mr Simpson
 - d. 13 April 2023 Mr Segal

Findings of fact

12. My decision dated 18 February 2021 set out the agreed facts which related to the disciplinary process followed by the Union. These facts are attached at Annex A of this decision. In addition, HHJ J Tayler helpfully set out, at paragraph 71 of his judgment, Mr Gillespie's role in those disciplinary procedures as follows:
 71. The disciplinary process, having specific regard to Mr Gillespie's involvement, was as follows:
 - (1) Mr Simpson made the initial complaints
 - (2) Ms Dougall conducted the investigation
 - (3) Ms Dougall wrote the investigation report. She considered there was no evidence to substantiate both complaints but recommended that a F&GP panel be convened to determine if Mr Simpson had himself breached the Rules.
 - (4) Mr Gillespie chaired the F&GP Committee on 4 September 2018:

- (a) to whom Ms Dougall presented her complaint;
 - (b) that questioned her about the report;
 - (c) was satisfied by her answers;
 - (d) went into private session to consider the paperwork;
 - (e) rejected Mr Simpson's complaints;
 - (f) decided it was possible that Mr Simpson had malicious or vexatious intent being of the view that "there was something amiss in the complaint having been put forward by Mr Simpson";
 - (g) instructed that an investigation take place (considering Mr Simpson should have a chance to answer the allegation); and
 - (h) instructed that Mr Simpson should be suspended (noting that was not to be seen as an implication of guilt).
- (5) Mr Deans investigated the issue raised by the F&GP Committee.
- (6) Mr Gillespie chaired the F&GP Committee on 9 October 2018 when Mr Deans was instructed to continue the investigation and to seek a meeting with Mr Simpson.
- (7) Mr Deans wrote the investigation report and recommended that a Rule 27 panel be put together.
- (8) Mr Gillespie chaired the F&GP Committee on 12 March 2019 and:-
- (a) agreed with the view of the investigating Officer that the matter should proceed to a disciplinary hearing (which meant that Mr Simpson would be charged with a breach of the Rules by the Union).
 - (b) decided that the disciplinary hearing would be before a panel of 3 members of the F&GP Committee, of which he would be the chair.
- (9) Mr Simpson wrote to Mr Gillespie on 30 April 2019 and asked that he should not be on the disciplinary panel. Mr Gillespie did not reply to the letter or share it with the other members of the committee.
- (10) Mr Gillespie chaired the disciplinary panel and with the other two members decided that Mr Simpson should be expelled from the Union.
- (11) Mr Gillespie gave evidence at the appeal hearing before a sub-committee of the Executive Council.

(12) The sub-committee of the Executive Council dismissed the appeal.

The Relevant Statutory Provisions

13. 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;

The Relevant Rules of the Union

14. The rules of the Union which are relevant for the purposes of this application are as follows:-

RULE 27. MEMBERSHIP DISCIPLINE

27.1 A member may be charged with:

27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.

27.1.2 Being a party to any fraud on the Union or any misappropriation or misuse of its funds or property.

27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.

27.1.4 Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, religion, age, gender, disability or sexual orientation.

27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers.

27.1.6 Obtaining membership of the Union by false statement material to their admission into the Union or any evasion in that regard.

27.1.7 Breach of the Union's policies on diversity, bullying and harassment in the workplace, which will include cyber bullying and harassment.

27.2 Disciplinary Hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice.

27.3 A charge under this rule may be heard by a Branch, Branch Committee (where so determined by the Branch), Regional Committee or the Executive Council. The Executive Council may delegate to a sub-committee of the Executive Council. It would be usual practice that

disciplinary charges would be heard at branch level in the first instance. Disciplinary charges deemed to be of a serious nature may be initiated by the Regional committee or Executive Council.

27.3.1 Serious allegations of breach of Clauses 27.1.1. to 27.1.7 may be referred directly to the General Secretary. The General Secretary will appoint a senior employee of the Union to conduct an investigation which may lead to disciplinary charges being laid on behalf of the Executive Council.

27.3.2 Allegations of serious breaches of clauses 27.1.1 to 27.1.7 which are subsequently shown to be vexatious, malicious or defamatory may be considered a breach of Rule and liable to be referred to this disciplinary procedure.

27.4 The Executive Council or the relevant Regional Committee may suspend a member charged under this rule from holding any office or representing the Union in any capacity pending its decision. A member shall be given written notice (or, if the member was informed verbally confirmation in writing) of any such suspension as soon as is reasonably practicable. In cases of a serious nature, as a precautionary measure, a member under investigation prior to disciplinary charges being laid may be suspended from holding office or representing the union in any capacity.

27.4.1 A member under disciplinary investigation or charged with a disciplinary offence, including workplace representatives or branch officers suspended from holding office, may not attend:

- Meetings of his/her own branch;
- Meetings of other branches of the Union; or,
- Constitutional committee meetings of the Union

Other than as part of the disciplinary process as set out in this Rule.

27.4.2 If allegations against a member are proven to be unfounded they will be restored in good standing. If appropriate, their credentials will be restored.

27.5 The range of disciplinary sanctions shall include the following:

27.5.1 censure;

27.5.2 withdrawal of workplace credentials;

27.5.3 removal from office;

27.5.4 barring from holding office and

27.5.5 expulsion.

27.6 The full range of disciplinary sanctions shall be available to the Executive Council and Regional Committees; however the range of disciplinary sanctions for other bodies shall be limited to the following:

27.6.1 Branch, shall have the power to censure;

27.7 Appeals

27.7.1 A member shall have the right to appeal against any disciplinary sanctions.

27.7.2 In the case of a sanction imposed by a Branch, or Branch Committee, the appeal shall be to the Regional Committee, whose decision shall be final.

27.7.3 In the case of a sanction imposed by a Regional Committee the appeal shall be to the Executive Council, whose decision shall be final.

27.7.4 In the case of disciplinary action initiated by the Executive Council the appeal shall be to an Appeals Committee elected from the Policy Conference, whose decision shall be final. Such an Appeals Committee shall be constituted on the basis of at least one delegate from each Region, under a procedure to be agreed by the Executive Council. There shall be an eligibility criterion to serve on the Appeals Committee of at least 5 years continuous membership of the Union.

27.8 An employee may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union. Complaints against employees shall be investigated under the Members' Complaints Procedure agreed by the Executive Council and if disciplinary action is deemed appropriate this shall be executed under the procedures negotiated with employees' representative bodies for that purpose.

15. The Union's Executive Committee has issued guidance on the implementation of this Rule. This is attached at annex B.

Considerations

16. In his original complaint to me Mr Simpson raised a number of arguments about real and perceived bias by those involved in the disciplinary action against him. I found no evidence of real bias nor any perceived bias; however, HHJ J Tayler found that I did not explicitly consider whether Mr Gillespie's involvement in the earlier stages of the disciplinary process demonstrated a real risk of, or gave rise to, an appearance of bias by way of predetermination. That issue has, therefore, been remitted back to me. In doing so, HHJ J Tayler indicated that there was more than one possible determination which could be made, and that additional evidence and submissions may be required. In other words, he did not feel that the evidence or argument which had been provided to him was sufficient to determine whether there was a risk of real bias arising from Mr Gillespie's involvement in the earlier stages of the disciplinary proceedings.

17. Mr Simpson's position is that Mr Gillespie's involvement in his complaint and the disciplinary action taken against him gives rise to the real possibility that Mr Gillespie did not approach the allegations against him with an open mind. In considering this I am limited by HHJ J Tayler's judgment and can only consider the single issue which has been remitted back to me. That is whether Mr Gillespie's involvement at various stages of the process before chairing the disciplinary panel, was such that a "a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that Mr Gillespie had predetermined the matter", or put another way, would a fair minded and informed observer consider there was a real risk that Mr Gillespie did not approach the disciplinary hearing with an open mind. It is worth noting here that Mr Simpson has asked that I consider evidence related to Mr Gillespie's political affiliations. This issue was considered in my earlier decision and has not been remitted back to me and I cannot, therefore consider evidence which relates solely to Mr Gillespie's political affiliations.

18. HHJ J Tayler helpfully set out Mr Gillespie's involvement (see paragraph 12 above). As Chair of F&GP he was steering the Committee which considered Ms Dougall's investigation report. That Committee agreed with Ms Dougall that there was no evidence to substantiate the allegations made by Mr Simpson and took no action on Mr Simpson's complaints. Ms Dougall had, however, made a further recommendation arising from her view about Mr Simpson's reasons for bringing the complaints. I described this in my previous decision:

"Ms Dougall took the view, however, that Mr Simpson had acted in an inappropriate and unjustified manner and that his actions, in bringing the complaints may be construed as vexatious. She recommended that a Finance and General Purposes Committee Panel be convened to determine if Mr Simpson had breached Rule 27."

19. The F&GP did not, however, accept this recommendation in full. They found that, in Mr Gillespie's words "something was amiss" with the complaints but wanted to

ensure that Mr Simpson had the opportunity to respond to the issues raised in Ms Dougall's report before reaching a decision as to whether to proceed to a disciplinary hearing. In my view this shows that, at this stage in the proceedings, Mr Gillespie and the F&GP had not closed their minds to whether Mr Simpson had acted in the manner set out by Ms Dougall and that they wanted to hear from him before reaching a decision. I believe that the impartial, informed and fair-minded observer described in paragraph 17 would agree with this. That observer would be familiar with the Union's Rules and so would understand that F&GP could have proceeded straight to a disciplinary hearing. They would also be aware that the Union appointed a second investigator, Mr Deans, rather than relying solely on Ms Dougall's findings.

20. I have noted that HHJ J Tayler referred to the fact that the F&GP, including Mr Gillespie, undertook part of their consideration in private. In my experience, it is normal practice for those considering union disciplinary complaints to conduct part of their deliberations in private. Provided that the F&GP explain the reasons for their decision and ensure that all parties have an opportunity to be heard then I cannot see that this, in itself, would lead to a fair-minded observer seeing a real risk of bias. At the same time as commissioning the second investigation the F&GP also decided to suspend Mr Simpson from membership of the Union pending that investigation. Rule 27.4 enables the F&GP to suspend a member ahead of a disciplinary charge being made in serious cases. I have seen no evidence which suggests that F&GP did not consider that the issues raised by Ms Dougall were serious before reaching a decision to suspend Mr Simpson. I can only conclude, therefore, that they considered the issues to be serious. This does not, however, undermine my conclusion that, at this stage, there was no real risk that Mr Gillespie and the F&GP Committee were acting with a closed mind and had already reached a decision. The Rules are clear that there is a power to suspend in serious cases and the F&GP explained, when communicating their decision, that suspension should not be considered to imply guilt.

21. Mr Gillespie was next involved in the case when he chaired the F&GP which considered correspondence between Mr Simpson and Mr Deans. Mr Deans had been attempting to arrange an interview with Mr Simpson but had been unable to do so. The F&GP asked Mr Deans to continue with his investigation and his attempts to meet with Simpson before they reached a decision as to how to proceed. Mr Segal suggested that this demonstrates that the F&GP, chaired by Mr Gillespie, was giving Mr Simpson every possible opportunity to respond to the allegations against him. I have seen no evidence to suggest that this was not the case. In my view a fair minded and informed observer would take the view that, having initiated a second investigation and extended that investigation to enable Mr Simpson to respond to the concerns raised during the first investigation, Mr Gillespie and the F&GP were attempting to hear from Mr Simpson before they reached a decision as to whether to proceed to a disciplinary hearing. Indeed, it appears that the F&GP must have had the “open mind” which HHJ J Taylor described; had they not done so then it seems likely that they would have referred the matter forward to a Hearing at that stage
22. Mr Dean concluded his investigation, without having met Mr Simpson (Mr Deans had made several attempts to do so) and referred this to the F&GP for consideration at their meeting on 12 March 2019. In his witness statement for the original hearing before me Mr Gillespie explained that:

“The matter returned to us as a Committee in September of 2019 (sic) when Mr Deans produced a brief synopsis of his consideration of the matter. Mr Dean’s investigation was limited to the papers produced by Ms Dougall and the correspondence from Mr Simpson. He explained that he had concluded there was sufficient evidence to suggest there may have been a breach of our Rules and recommended a disciplinary process.

The panel deliberated on his report. We agreed with the view of the investigating Officer that the matter should proceed to a disciplinary matter.

It was agreed that a panel consisting of myself, Ms Tolmie and Mr Mann would hear the case and consider all of the evidence in the matter.”

23. At this stage the F&GP had received recommendations from two investigators that the matters raised against Mr Simpson should be referred to a disciplinary panel. Mr Simpson had not been willing to meet with the second investigator although he had entered into correspondence with Mr Deans. It is hard to see how Mr Gillespie, or the F&GP, could have taken a different decision at this stage.
24. In my view, Mr Gillespie and the F&GP acted appropriately in each of the stages which led, eventually, to the referral to a disciplinary hearing. I am satisfied that a fair minded and informed observer would agree, and that they would also agree that Mr Gillespie's actions do not provide the basis to conclude that any subsequent action taken had been pre-determined. The observer would be aware that the F&GP were responsible for the oversight of the investigations and the decision as to whether to refer the matter forward to the Hearing. They would also be aware that both investigators had recommended that the issues be referred to a disciplinary hearing and that Mr Simpson had been given several opportunities to meet with the second investigator but had declined to do so. They would also be aware that Mr Simpson would have a further opportunity, at the disciplinary hearing, to make his case and respond to the allegations. For the avoidance of doubt, I am also satisfied that, taking into account all of Mr Gillespie's, and the other members of the F&GP, involvement in the early stage does not amount to there being a real risk of apparent or perceived bias.
25. The remaining question, therefore, is whether, having participated in each stage of the proceedings up to the referral, Mr Gillespie should have participated in the disciplinary panel itself. It is worth noting here that this complaint relates only to Mr Gillespie; the other two panel members were also members of F&GP who would have participated in the earlier decision-making process. It is also worth noting that the argument put forward by Mr Simpson at the original hearing

before me related both to Mr Gillespie's political affiliations and to his role which he described as either a complainant or a prosecutor.

26. I considered both of these issues in my earlier decisions. As to Mr Gillespie, and the Committee's, role in the earlier stage of the proceedings I reached the following conclusion:

“77. The Rules clearly give the Committee oversight of the process. The Committee has the power to commission an investigation, consider whether a charge should be made and be the decision maker. Rule 8.8 is clear that the Committee may delegate that power. On that basis I do not agree with Mr Simpson that Mr Gillespie, or indeed the other panel members, raised the initial concern about Mr Simpson's conduct or undertook the investigation. Their role, ahead of the Hearing, was to oversee that process as part of the Committee and take decisions, under Rule 27 about whether the concerns should be investigated and whether Mr Simpson should be charged following that investigation.”

27. I have seen no evidence, or argument, from Mr Simpson which undermines that finding. As will be clear from paragraphs 18 to 26 above, I have also found that an informed observer would also consider that there is no real risk that Mr Gillespie, or the Committee, approached their decision making with anything other than an open mind. Indeed, the evidence demonstrates that they sought to give Mr Simpson every opportunity to respond to the allegations against him. HHJ J Tayler noted that the informed decision maker would have been aware of Mr Simpson's letter to Mr Gillespie which asked him to recuse himself from the disciplinary hearing and of Mr Gillespie's handling of that letter. The letter, sent on 30 April 2019, also raised a number of procedural issues, not related to the matter which has been remitted back to me. I considered this letter in my earlier decision:

“43. The second letter was to Mr Gillespie, chair of the disciplinary panel. In this letter Mr Simpson sought confirmation that the documents and

video material he had supplied would be provided by the hearing and offered again to reply, in writing, to any question the panel had. He also noted that Mr Gillespie appeared to have connections, through the Union, and other organisations, to the two members about whom Mr Simpson had originally complained. Mr Simpson set out his concern about this as follows:

“It is my belief that the above compromises your position and ability to act impartially on the disciplinary panel through a conflict of interest. Please let me know if you also believe that the above factors compromises your position on the disciplinary panel due to a perceived or real conflict of interest and impartiality. If so I would ask that you recuse yourself from membership of the disciplinary panel due to a potential, perceived or real conflict of interest or lack of impartiality. “

44. When giving evidence Mr Gillespie told me that he did not reply to Mr Simpson’s letter nor share it with anyone. He did not consider himself to have a conflict of interest and saw no reason why he should stand down from the panel. He told me that he acted impartially throughout.“

28. Mr Simpson’s letter does not address the issues which have been remitted back to me. Mr Gillespie’s political affiliations, and whether they give rise to real or actual bias, are not, relevant to this decision. I considered Mr Gillespie’s handling of this letter in my earlier decision. I have set out my conclusions on this point below:

“83. When giving evidence Mr Gillespie drew my attention to the letter written to him by Mr Simpson on 30 April 2019 which asked Mr Gillespie to consider whether he should recuse himself from the Hearing. The text of that request is set out at paragraph 43 above. The reason for the request was set out by Mr Simpson as being common membership of some Unite Committees, and Unite Progressive Left

Scotland, with a Unite colleague who Mr Simpson describes as a supporter of one of the members about whom he had originally complained. Mr Simpson also noted that the other Member was on the management committee of an organisation who had hosted an event at which Mr Gillespie spoke; however, Mr Gillespie told me in evidence that he did not recall attending such an event.

84. In my experience it is not uncommon for Union Members and staff to also be a part of movements or organisations which are affiliated to, or linked with, the Union. I do not think, however, that this can be sufficient for the fair minded observer described at paragraph 81 above to believe that real or perceived bias could exist. Nor am I persuaded that the fact that Mr Gillespie sat on a Union Committee with a supporter of the person about whom Mr Simpson had originally complained, is sufficient to demonstrate real bias. On that basis I refuse to make the declaration requested by Mr Simpson.

85. I would add, however, that it would have been best practice for Mr Gillespie to have shared the letter written by Mr Simpson with the other members of the panel or with Mr Rafferty as Scottish Secretary. This would have ensured that they were comfortable with his decision as to whether he could be perceived as being biased and demonstrated a greater degree of transparency. I am conscious, however, that Mr Gillespie himself drew my attention to this letter and explained the actions he took and I make no criticism of him.”

29. Mr Simpson has not provided me with any evidence or argument which would cause me to revisit this decision. Nor has he provided any evidence or argument to suggest that, at this stage, anything happened which would lead the fair-minded observer to conclude that the matter had been pre-determined. I remain of the view that it would have been best practice for Mr Gillespie to have shared the correspondence.

Conclusions

30. In reaching my decision I am conscious that Unite's disciplinary procedures must comply with natural justice and, as recorded in my previous decision must, in the context of this case, be in a broad sense fair. That must be judged in a way which is consistent with the nature of a union's disciplinary process where an individual's liberty or livelihood is not affected and where the process is managed, and decisions are taken, by lay members of the Union.

31. The procedures which Unite followed in taking forward disciplinary proceedings were consistent with their Rules and gave Mr Simpson every opportunity to explain his position and respond to the allegations. It is clear that there was no separation of functions as would be required in a professional tribunal or court of law. This was not, however, a court of law or a professional tribunal, Mr Simpson's livelihood was not at risk. Those lay members, including Mr Gillespie, who sat on the disciplinary panel had also commissioned an investigation and decided to refer the matter to a disciplinary hearing. It is also clear that the F&GP, chaired by Mr Gillespie could have referred the matter to a disciplinary panel much earlier but decided not to do so to enable Mr Simpson's views to be heard.

32. For the reasons set out above I am satisfied that Mr Gillespie's involvement in the earlier stage of the proceedings did not give rise to a real risk of bias at the disciplinary panel stage. Nor do I think his failure to respond to Mr Simpson's letter asking him to recuse himself from the panel gives rise to such a risk.

I do not uphold Mr Simpson's complaint that there was an appearance of bias by way of pre-determination arising from Mr Gillespie's involvement in the early stages of the disciplinary hearing and the disciplinary panel itself.

33. Finally, I am aware that some unions have introduced a separation between the Committee which oversees a disciplinary process and the disciplinary panel. Whilst I do not consider this necessary in all circumstances unions may wish to

consider whether it is best practice in cases such as this where a complainant is already aggrieved by the process which has been followed by the Union or where he or she believes that there are potential conflicts of interest.

A handwritten signature in black ink that reads "Sarah Bedwell". The signature is written in a cursive style with a long horizontal flourish at the end.

Sarah Bedwell

The Certification Officer

Annex A

Mr Simpson was a member of the Community Branch of Unite the Union.

On 2 March 2018 Mr Simpson made a complaint to the Union about two members of the Union. On 7 March 2018 Mr Pat Rafferty, Scottish Regional Secretary, asked Ms Elaine Dougall, Regional Coordinator in the Scotland region, to investigate Mr Simpson's complaint.

Ms Dougall produced a report of her investigation. In her report she explained that she found no evidence to support Mr Simpson's complaint. She took the view, however, that Mr Simpson had acted in an inappropriate and unjustified manner and that his actions, in bringing the complaint may be construed as vexatious. She recommended that a Finance and General Purposes Committee Panel be convened to determine if Mr Simpson had breached Rule 27 (regarding membership discipline and set out in full later in this Decision).

Ms McDougall's report was considered by the Finance and General Purposes Committee on 4 September 2018. The Committee took no action on Mr Simpson's complaint.

Mr Rafferty wrote to Mr Simpson on 7 September 2018. He explained that the Committee had not upheld Mr Simpson's complaint and that no action would be taken against the two members complained about.

Mr Rafferty also explained that the Committee needed to take into account whether there was any malicious intent by Mr Simpson when bringing the complaint. He explained that a Senior Officer would be appointed to investigate this and that Mr Simpson would be suspended, with immediate effect, from any lay elected positions within the Union and from attending any lay committees including his branch committee.

Mr Rafferty appointed Mr Stephen Deans, Regional Coordinating Officer within the Scotland Region, to investigate the Committee's concerns. Mr Deans' report recorded that he concurred with Ms Dougall's report and recommended a disciplinary panel be convened to consider whether Mr Simpson's actions were vexatious and malicious.

The Finance and General Purposes Committee considered Mr Dean's report on 12 March 2019. They agreed that a disciplinary panel should be formed and agreed that Mr John Gillespie and two other named members should form the panel.

On 3 April 2019 Mr Rafferty wrote to Mr Simpson and explained that a disciplinary panel would go ahead on 8 May 2019 to consider charges that Mr Simpson had lodged and pursued complaints which were subsequently found, following investigation, to be without merit. The panel would consider whether those complaints were potentially malicious vexatious and/or defamatory. Mr Rafferty provided, with the letter, the documents which the panel would consider.

On 26 April 2019 Mr Rafferty replied to subsequent correspondence from Mr Simpson dated 21 April 2019. This letter was provided to the panel which considered the disciplinary charges against Mr Simpson. The panel met on 8 May 2019. Mr Simpson did not attend the hearing.

On 22 May 2019 Mr Rafferty wrote to Mr Simpson with the results of the disciplinary panel. He explained that the panel had concluded that Mr Simpson's conduct 6 breached the Union's rules. They expelled Mr Simpson from the Union. Mr Simpson appealed the Panel's findings. The appeal panel upheld the disciplinary panel's sanctions.

Annex B

EC Guidance on the implementation of rule revised consequential to 2nd Rules Conference. Updated to June 2018

RULE 27. DISCIPLINE OF MEMBERS: EC DIRECTIONS

Rule 27.2 provides that disciplinary hearings shall be organised and conducted under directions issued by the Executive Council. This document sets out those directions and must be read in conjunction with Rule 27.

The Disciplinary Process

The disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice. These directions are designed to ensure that this is the case.

Investigation and Charge

A member may be charged with one OR more of the offences detailed in Rules 27.1.1 to 27.1.7. A member may not be charged with any matter falling outside of these rules, and at the end of these directions a general statement is provided concerning the law in this area. If there is any doubt as to the matter under consideration, then the body proposing to deal with the matter should seek legal advice from the union's Director of Legal Services.

Rule 27.3 provides that charges are to be heard by a Branch (or Branch Committee), a Regional Committee or the Executive Council (or a sub-committee of the Executive Council). Where the charge is to be heard by a Branch (or Branch Committee) the charge shall be brought by the Branch. When the charge is to be heard by the Regional Committee, the charge shall be brought by the Regional Committee. Where the charge is to be heard by the Executive Council (or a sub-committee of the Executive Council) the charge shall be brought by the Executive Council (or a sub-committee of the Executive Council) or the General Secretary.

If the union receives notice of a matter which may lead to a disciplinary charge against one more members, then the situation should be investigated to determine if there should be a charge. The means of investigation shall be determined by a body referred to in Rule 27.3 or by the General Secretary. Notice of the fact of an investigation being undertaken shall be sent to the office of the General Secretary.

The investigation shall be completed as soon as is practicable in the circumstances and the outcome of the investigation shall be recorded in writing. The investigation shall report to the body (or the General Secretary) which commissioned the investigation with a recommendation as to whether there is a charge to answer.

After receipt of the investigation report, there shall be no unreasonable delay before a member is charged.

If a charge is to be brought, a letter shall be sent to the member setting out the circumstances (in outline form) giving rise to the charge and specifying the rule which it is alleged has been breached. The member shall also receive a copy of the investigation report and any associated documents. A copy of the letter of charge shall be sent to the office of the General Secretary.

Suspension

A member charged may be suspended in accordance with Rule 27.4. In cases of a serious nature, as a precautionary measure, Rule 27.4 allows that a member under investigation prior to charges being laid may be suspended from holding office or otherwise representing the union. The General Secretary may also suspend a member under delegated powers if this is deemed by the General Secretary to be in the interests of the union.

Under the terms of Rule 27.4.1 members under disciplinary investigation or charged with a disciplinary offence may not attend:

- meetings of their own branch
- meetings of other branches of the Union
- constitutional committees of the Union

other than in connection with the disciplinary process.

Members under investigation shall not communicate (particularly by way of social media) matters relating to such investigation to fellow members whilst the disciplinary process remains in process.

Preparation for the Disciplinary Hearing

The Union shall ensure that any documents to be relied upon in support of the charge should be sent to the member at least 4 weeks before the disciplinary hearing is to take place. If the union is to allow witness evidence, then witness statements shall be prepared and sent to the member at least 4 weeks before the hearing.

The member must ensure that any additional documents upon which they wish to rely in their defence are received by the body or individual which has charged them at least 2 weeks before the disciplinary hearing is to take place. If the member is to rely on witness evidence, witness statements must be prepared and sent to the body or individual which has charged them at least 2 weeks before the disciplinary hearing.

The body hearing the charge shall arrange for the disciplinary hearing to take place within a reasonable period of the charges being brought. The body hearing the charge shall decide and give the member at least 4 weeks' notice of the date, time and place for the hearing.

At the Disciplinary Hearing

The member may be accompanied and/or represented by another member of the union who is not an employee of the union.

The conduct of the hearing including in relation to attendance of witnesses and cross examination of witnesses shall be in the absolute discretion of the body hearing the case. This can include a decision to rely upon the receipt of witness statements only. After the Hearing The body which heard the charge shall write to the member notifying them whether the charge has been upheld, and if it has, any disciplinary sanction imposed in accordance with Rule 27. Reference should be made to Rules 27.5 and 27.6. A copy of the document confirming the outcome of the disciplinary hearing shall be sent to the office of the General Secretary.

Appeal

Rule 27.7 provides that a member has a right of appeal against any disciplinary sanction imposed and sets out general provisions for how the appeal must be conducted. If a member wishes to appeal, notice of the appeal must be received in writing by the relevant body within 14 days of the date on which the result of the disciplinary hearing was sent to the member. The notice of appeal must set out the grounds of the appeal. The relevant body will then send a copy of the appeal to the office of the General Secretary. The union aims to conclude an appeal no later than 10 weeks after it was submitted save in exceptional circumstances.