

Neutral Citation Number: [2024] EAT 143

Case Nos: EA-2021-001398-AT
EA-2022-000696-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2024

HIS HONOUR JUDGE JAMES TAYLER
PROFESSOR ANDREW ROWLAND
MR ANDREW MORRIS

Between :

PAUL MORLEY

Appellant

- and -

UNISON THE PUBLIC SERVICE UNION

Respondent

JESSE CROZIER and JOHN PLATTS-MILLS (instructed through Direct Access) for the
Appellant

STUART BRITTENDEN KC (instructed by Thompsons Solicitors) for the **Respondent**

Hearing date: 20 August 2024

JUDGMENT

SUMMARY

The Certification Officer did not err in law in striking out two complaints about an election for the position of secretary of the Lancashire branch of UNISON in February 2021. The appeal against a decision that the Certification Officer had no jurisdiction to consider a complaint concerning the cessation of the appellant's membership of UNISON, shortly before the branch secretary election in 2022, which had the consequence that he was not eligible to stand, was conceded by the respondent and is remitted to the Certification Officer to be determined.

HIS HONOUR JUDGE JAMES TAYLER

Introduction to the appeals

1. These appeals are against two decisions of the Certification Officer. The first, dated 13 October 2021, struck out two complaints about an election for the position of secretary of the Lancashire branch of UNISON in February 2021. By the second decision, in a letter dated 25 April 2022, the Certification Officer held that she had no jurisdiction to consider a complaint concerning the cessation of the appellant’s membership of UNISON, shortly before the branch secretary election in 2022, which had the consequence that he was not eligible to stand.

Relevant Law

2. Certain complaints about breaches of the rules of a Trade Union can be made to the Certification Officer.

3. Section 108A of the **Trade Union and Labour Relations (Consolidation) Act 1992** (“**TULR(C)A**”) provides:

108A.— Right to apply to Certification Officer.

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are—

- (a) the appointment or election of a person to, or the removal of a person from, any office;
- (b) disciplinary proceedings by the union (including expulsion);
- (c) the balloting of members on any issue other than industrial action;
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
- (e) such other matters as may be specified in an order made by the Secretary of State. ...

4. Section 108B **TULR(C)A** sets out the possible remedies:

108B.— Declarations and orders.

(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.

(2) If he accepts an application under section 108A the Certification Officer—

(a) shall make such enquiries as he thinks fit,

(b) shall give the applicant and the union an opportunity to be heard,

(c) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made,

(d) may make or refuse the declaration asked for, and

(e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.

(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements—

(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

...

5. Section 108C **TULR(C)A** provides for appeals from the Certification Officer to the EAT:

108C. Appeals from Certification Officer.

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

6. The parties agreed that Eady J correctly and succinctly summarised the approach to the construction of Trade Union rules in **Embery v Fire Brigades Union** [2023] EAT 134:

19. Having regard to the relevant case-law (set out more fully by the Court of Appeal in *Kelly v The Musicians' Union* [2020] EWCA Civ 736), we approach our task on this appeal with the following principles in mind:

(1) A trade union's rulebook is in law a contract between all of its members from time to time (*Heatons Transport (St Helens) Ltd v Transport General Workers Union* [1972] IRLR 25, [1972] ICR 308; *Evangelou and ors v McNicol* [2016] EWCA Civ 817, paragraph 19; *Kelly*, paragraph 36(1))

(2) As such, it must be interpreted in accordance with the principles which

apply generally to the interpretation of contracts (*Evangelou*, paragraph 20; *Kelly* paragraph 36(2)).

(3) Nevertheless, context is important. Trade union rule books are not drafted by parliamentary draftsmen and should not be read as if they were. Further, unlike commercial contracts, it is not to be assumed that all the terms of the contract will be found in the rule book alone (particularly as regards the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf) and may be informed by custom and practice developed over the years (*Heatons Transport per Lord Wilberforce* at pp 393G-394C; *Kelly*, paragraph 36(3)).

(4) It is also important to recall that what falls to be construed in this context is in substance the constitution of a trade union. Although in law its status is that of a multilateral contract, it is the document which sets out the powers and duties of a trade union (*Evangelou*, paragraph 19; *Kelly*, paragraph 36(4)).

(5) The rules of a trade union should thus be given an interpretation which accords with what the reasonable trade union member would understand the words to mean; a court should be slow to adopt a construction which, on the face of it, is contrary to what both the members and common sense would have expected. (*Jacques v AUEW* [1986] ICR 683 per Warner J, at p 692A-B; *Coyne v Unite the Union* (D/2/18-19) per HHJ Jeffrey Burke QC (acting as a CO), paragraph 30; *McVitae and ors v Unison* [1996] IRLR 33 per Harrison J, paragraph 57; *Kelly*, paragraph 39).

7. The Certification Officer has powers to manage proceedings:

256.— Procedure before the Certification Officer.

(1) Except in relation to matters as to which express provision is made by or under an enactment, the Certification Officer may regulate the procedure to be followed—

(a) on any application or complaint made to him ...

8. Section 256ZA **TULR(C)A** provides a specific power for the Certification Officer to strike out complaints:

256ZA Striking out

(1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may—

(a) order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived, ...

(4) Before making an order under this section, the Certification Officer shall send notice to the party against whom it is proposed that the order should be made giving him an opportunity to show cause why the order should not be made. ...

(7) An appeal lies to the Employment Appeal Tribunal on any question of law arising from a decision of the Certification Officer under this section.

9. In **Embery** Eady J held that a similar approach should be adopted to strike out by the Certification Officer as is adopted by an Employment Tribunal:

20. When exercising her power to strike out an application on the basis that it has no reasonable prospects of success or is otherwise misconceived, we consider that the CO's approach should be akin to that of an Employment Tribunal, exercising its power under rule 37(1) schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It would, thus, not be appropriate to strike out an application involving a crucial core of disputed facts, as may arise (for example) where there is an issue as to custom and practice relevant to the interpretation of a particular rule. That said, the CO would be entitled to move to strike out an application where its prospect of success is "merely fanciful" (*Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 per Maurice Kay LJ at paragraph 26), or to effectively proceed to summary judgment upon an application where the CO has all the evidence necessary to resolve the issue before her or to determine the particular point of law or construction raised (see in the context of an application for summary judgment under the Civil Procedure Rules, *Easycare Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) per Lewison J at para 15 (vii)).

10. The principles that apply to strike out in the Employment Tribunal are well settled and were concisely summarised by Linden J in **Twist DX Limited v Abbott (UK) Holdings Limited and others** UKEAT/0030/20/JOJ:

43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:

- a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, *Tayside Public Transport Company Limited v Reilly* [2012] IRLR 755 at para... 30.
- b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment of the Court of Appeal in the *Ezsias* case (supra).
- c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of *Ezsias*.

d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, *Campbell v Frisbee* [2003] ICR 141 CA.

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it “may” do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see *Soo Kim v Yong* [2011] EWHC 1781.

g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in *Hassan v Tesco Stores Limited* UKEAT/0098/16 and *Mbuisa v Cygnet Healthcare Limited* UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

11. The appellant relied on, and the respondent accepted as accurate, the summary in **Cox v Adecco Group UK & Ireland and others** [2021] ICR 1307 including the reference to the importance of understanding the nature of the complaint:

28 From these cases a number of general propositions emerge, some generally well understood, some not so much:

(1) No one gains by truly hopeless cases being pursued to a hearing. ...

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant’s case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can’t decide whether a claim has reasonable prospects of success if you don’t know what it is.

Appeal 1

Ground 1(a)

12. This ground challenges the strike out of the appellant’s complaint that the incumbent branch secretary had sought to enhance her campaign by increasing the number of emails that were sent with her signoff.

The complaint

13. The Certification Office described the complaint:

Complaint 1

Rule breached: 11.4 page 66 (under week 3) Code of Good Branch Practice

I was nominated to the role of branch secretary of UNISON Lancashire branch. As there were 2 nominees a ballot needed to take place. It is normal for the branch admin team to send emails out to groups of branch members around a range of day-to-day matters. There are 3 branch admin staff who use the WARMS membership database to send out these emails. **In the run up to the ballot the branch admin staff sent an unusual amount of emails that were signed off by the incumbent branch secretary Elaine Cotterell (who was the other member nominated for election of branch secretary). Under normal circumstances some/most of these emails topics were not usually signed off by Elaine Cotterell. I investigated a similar time period the year before (when no ballot) and the amount of emails signed off by Elaine Cotterell was considerably less. I believe a deliberate effort was made to bring Elaine Cotterell's name to the forefront of branch member’s minds** in order to increase the number votes for her. [emphasis added]

The rule

14. The Certification Officer set out the relevant rule:

Existing post holders should not use branch facilities or time off arrangements to enhance their campaign, if these facilities are not made to other candidates.

The Certification Officer’s decision

15. The Certification Officer decided:

6. Mr Morley’s complaint is that a significant number of emails were sent by Elaine Cottrell (the recently re-elected Branch Secretary) during the election period and that this resulted in a breach of a rule in the Code of Good Branch Practice which

requires that, “Existing post holders should not use branch facilities or time off arrangements to enhance their campaign, if these facilities are not made to other candidates.”

7. **He told my office that the amount of emails sent out from the branch, which were signed by Ms Cottrell, considerably increased during the campaign period.** Also, that there were emails signed by Ms Cottrell during this period, which had previously been unsigned and by signing them Ms Cottrell appeared to raise her profile. He argued that the details of the emails that were not signed by her in a similar period the year before when no ballot was taking place which again demonstrated that she was raising her profile. **Taken together he believed that her actions, in issuing the emails, demonstrated an attempt to enhance Ms Cottrell’s campaign.** He also explained that he did not have the ability or access to sending out similar emails.

8. Mr Morley has not, however, provided any documents which support his assertion that the Rule was breached. **He has not, for instance, provided any evidence which supports his view that the emails were designed to enhance Ms Cottrell’s campaign; nor has he provided any evidence that the emails in question enhanced her campaign.** In particular, I have not seen copies of the emails which Mr Morley believes breached Rule 11.4. I have, however, seen a schedule of the emails, produced by Mr Morley, which gives a description of their content. I have also noted that, in considering Mr Morley’s complaint to them, **the Union identified that the emails were not campaigning emails and that it was reasonable for the Branch Secretary to have sent them.** Mr Morley has not provided any evidence which contradicts that finding.

9. Mr Morley has explained that he does not, in his view, need to provide evidence to support his view that the campaign was enhanced by the emails to show that the Rule was breached. **I agree with him that the Rule appears to prevent attempts to enhance a campaign; however, I have not seen any documents which support Mr Morley’s belief that there was such an attempt. If this complaint were to proceed to a Hearing Mr Morley would need to demonstrate that it was more likely than not that the emails in question breached Rule 11.4. As he has been unable to provide any documents which support his view that this was the case I believe that this complaint has no reasonable prospect of success.**

10. Mr Morley **has not been able to demonstrate with evidence or with any supporting documents that the increased number of emails sent by Ms Cottrell during the election was intended to enhance her campaign or that it did enhance her campaign.** Nor has he been able to show any detriment to him as a result of the emails. On that basis it is difficult to see how the rule can have been breached, whether or not he was in a position to send out emails to branch colleagues.

11. Consequently, Mr Morley has not provided me with any evidence to support his assertion that rule 11.4 was breached in the manner that he has described. On that basis I am satisfied that Mr Morley’s complaint to me has no prospect of success. [emphasis added]

The grounds of appeal

16. The appellant asserted the following grounds of appeal:

1: The CO misunderstood Mr Morley’s alleged breach of para. 11.4 of the Unison Code. Mr Morley’s complaint rested on the inference to be drawn from the relative volume of emails and the use of Ms Cotterell’s email signature, and not on the substance of the emails themselves;

2-3: The CO failed to act in accordance with principles of natural justice in striking out Complaint 1, limb (a) and failed to consider the proportionality of this approach – these grounds were not pursued

4: The CO conflated the proper approach to striking out a complaint under s. 256ZA with the evidential exercise to be undertaken at final determination of a complaint on the merits.

Analysis

17. We reject the respondent’s contention that the appeal is academic because there have been subsequent elections. Section 108B **TULR(C)A** provides that the Certification Officer may make a declaration and issue an enforcement order. A candidate who establishes that there was a breach of a rule in a past election could obtain a declaration and/or an enforcement order to prevent such an infringement in the future.

18. We do not accept that the Certification Officer misunderstood the appellant’s complaint. She clearly understood it was about the increase in email traffic with Ms Cotterell’s email signoff that the appellant asserted was designed to enhance her profile. In describing the complaint the Certification Officer stated that it was that “the branch admin staff sent an unusual amount of emails that were signed off by the incumbent branch secretary Elaine Cotterell” and that he believed that “a deliberate effort was made to bring Elaine Cotterell’s name to the forefront of branch members’ minds in order to increase the number votes for her”. In analysing the complaint the Certification Officer stated that the appellant “told my office that the amount of emails sent out from the branch, which were signed by Ms Cotterell, considerably increased during the campaign period” and that “he believed that her actions, in issuing the emails, demonstrated an attempt to enhance Ms Cotterell’s campaign”.

19. The Certification Officer also understood that the appellant asserted that the rule applied to attempts to “enhance” a campaign stating “Mr Morley has explained that he does not, in his view, need to provide evidence to support his view that the campaign was enhanced by the emails to show

that the Rule was breached. I agree with him that the Rule appears to prevent attempts to enhance a campaign”. She went on to state, “however, I have not seen any documents which support Mr Morley’s belief that there was such an attempt”.

20. While the Certification Officer considered whether the emails sent with Ms Cotterell’s email signoff arguably enhanced her campaign, that was in addition to consideration of the specific complaint that the increased number of emails was designed to do so. The Certification Officer stated that the appellant “has not been able to demonstrate with evidence or with any supporting documents that the increased number of emails sent by Ms Cotterell during the election was intended to enhance her campaign or that it did enhance her campaign.”

21. On a fair reading of the reasoning of the Certification Officer it is clear that the Certification Officer concluded that the complaint was fanciful and had no real prospect of success. That was a valid basis for strike out. The Certification Officer clearly understood the test for strike out and concluded that it had been met. The grounds of appeal in respect of this complaint fail.

Ground 1(b)

22. This ground challenges the strike out of the appellant’s complaint that the scrutineer for the election was not independent.

The complaint

23. The Certification Officer accurately set out the complaint:

Rule breached: 11.4 on page 64 of Code of Good Branch Practice

I was nominated to the role of branch secretary of UNISON Lancashire branch. As there were 2 nominees a vote needed to take place. This vote was to be taken by the branch members and as highlighted in the Code of Good branch practice in section 11.4 on page 64 an independent scrutineer should have been appointed to oversee the ballot process. The ballot process was actually overseen by James Rupa who is a Regional Organiser who is a paid employee of UNISON. Further to this Lancashire branch is one of the branches that James Rupa is employed by UNISON to oversee and manage. James Rupa has a vested interest in who is appointed as Lancashire Branch Secretary as this could directly affect his employment and workload. Although I have no indication that James Rupa had any unfair influence in the outcome I don't believe he can be classified as an independent scrutineer.

The rule

24. The Certification Officer set out the relevant rule:

11.4 page 64 (5 bullet point) Code of Good Branch Practice

Branch officers must ensure: an independent scrutineer is appointed to oversee the ballot process

The Certification Officer's decision

25. The Certification Officer decided that:

12. Mr Morley believes that the union breached Rule 11.4. of the Code of Good Branch Practice when it appointed Mr James Rupa as an independent scrutineer because, in Morley's view, he was not independent and had an interest in the outcome of the election. Mr Morley has also told my office that he has no indication that Mr Rupa had any unfair influence in the outcome of the election.

13. Mr Morley has not provided any evidence to suggest that Mr Rupa, in his role as independent scrutineer had an unfair influence on the outcome of the election. **Nor has he offered any evidence to support his assertion that Mr Rupa's role as a Regional Organiser and a paid employee of UNISON, meant that he was not independent.** He has, however, provided a copy of the Union's response, dated 3 June 2021, to his complaint on this issue. In that response the Union explains that Rule 11.4 requires that ballot papers should not be returned to branch officers involved in the elections and advises branches to seek assistance from the Region or from the Electoral Reform Society. The Union also advised that by using the Regional Organiser as the Scrutineer, which is common across Unison, the branch complied with the Rule 11.4.

14. Mr Morley has not provided any evidence to suggest that it is not common practice for Regional Organisers to act as scrutineer for branch elections. Nor has he offered any evidence that Mr Rupa was not independent of the branch or had any influence on the elections. He has explained, however, that he does not believe that he needs to demonstrate that Mr Rupa had unfair influence on the proceedings to demonstrate he was not independent. Instead, **Mr Morley appears to believe that ERS, or a similar body, should have been used as a scrutineer for this election. I agree with him that this would have been an option open to the Union; however, I cannot see that it is required by 11.4. On that basis, and because Mr Morley himself acknowledges that there is no evidence that Mr Rupa had any unfair influence on the elections. I consider that this complaint has no reasonable prospect of success.**

15. Consequently, Mr Morley has not provided me with any evidence to support his assertion that rule 11.4 was breached in the manner that he has described. On that basis I am satisfied that Mr Morley's complaint to me has no prospect of success. [emphasis added]

The grounds of appeal

26. The appellant asserts:

5. In striking out the claim the CO erred in its approach to the interpretation of ‘independent scrutineer’ within the meaning of the rules.
6. In striking out the claim the CO failed to act in accordance with principles of natural justice – this ground was not pursued.
7. In striking out the claim the CO failed to consider the proportionality of the sanction before imposing it – this ground was not pursued.
8. In striking out the claim the CO conflated the approach to be taken in relation to strike out on the basis of no reasonable prospects of success with the evidential exercise that takes place on final determination.

Analysis

27. We do not consider that the Certification Officer erred in law in holding that the appellant had no reasonable prospect of establishing that the Regional Organiser was not independent. While it is correct that the Certification Officer considered whether there was any evidence that Mr Rupa had sought to influence the election, and we agree that is not the relevant question, the Certification Officer also concluded that it was not arguable that Mr Rupa was not genuinely independent. We consider that a reasonable trade union member would understand the rule to require a scrutineer who is genuinely independent. It would not be sufficient that a scrutineer who lacked independence had not, in fact, sought to influence the election. The Certification Officer did not limit her consideration to the question of whether it was arguable that Mr Rupa had sought to influence the election. The Certification Officer also concluded that it was not arguable that Mr Rupa was not “independent of the branch”.

28. Although it was not relied upon in the arguments before the Certification Officer, it was asserted in this appeal that the term “independent scrutineer” in the rule should be interpreted in accordance with **The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993**. These regulations define those who may be scrutineers in certain types of Trade Union elections or ballots required by the **TULR(C)A** concerning matters such as membership of the executive, election of a president or general secretary, political resolutions, amalgamation of trade unions and ballots for industrial action. The regulations provide for scrutiny by solicitors and organisations such as the Electoral Reform Services Limited. The term of legal art used in

TULR(C)A is “qualified independent person”. We do not accept that the Certification Officer was required to interpret the term “independent scrutineer” in accordance with these regulations. The regulations deal with union-wide elections and ballots for which Parliament has chosen to provide specific safeguards, over and above those that are generally appropriate.

29. The Certification Officer was entitled to note that it is normal for Regional Officers to act as scrutineers and that it would be impractical to require nearly 1000 branches of UNISON to pay for a body such as the Electoral Reform Services Limited to scrutinise every annual election.

30. The grounds of appeal in respect of this complaint fail.

Appeal 2

The complaint

31. The Certification Officer described the complaint as follows:

Your complaint

I understand from your application form that your complaint is that the Union breached its rules in removing you from membership following you notifying the Union of a change in your employment. You also refer to elections for branch secretary stating that:

“By ceasing my membership Elaine Cotterell benefited as the ballot was null and voided and Elaine Cotterell was elected branch secretary unopposed.”

The rules

32. The appellant relied on the following rules:

5.5 Where the branch has reason to believe an applicant may be ineligible for membership, the applicant shall be given notice in writing by the branch secretary of the proposal to exclude or expel them and the reasons for that proposal; the individual will be given a fair opportunity to make representations in respect of that proposal, and those representations will be considered fairly.

Loss of eligibility

7.1 Any member ceasing to be eligible for membership within Rule C.1, and who does not fall within the classes of membership set out at Rule C.2, shall automatically cease to be a member unless: ...

Scope of Representation

1. The Union shall seek to represent:

1.1 those employed by any body, authority, company or corporation which has a public, charitable, educational, or statutory function, including those employed in the local government service, the health services, the electricity supply industry, the gas, transport and water industries, the education services, the police and justice sectors and in the voluntary and community sectors.

1.2 those employed in such other areas of work and such other persons as may be provided for in these Rules, and as the National Executive Council may from time to time determine.

2. Categories of membership

2.1 Membership shall be open to any person employed in the provision of public services and in such other employment as may come within the meaning of Rule C.1 above.

The Certification Officer's decision

33. The Operations Manager for the Certification Officer stated in a letter dated 25 March 2022:

The rules you have cited are C 5.5 and C7.1 & 7.1.1 which fall under Membership in the copy of Unison's rulebook you provided. Having read these rules and your description of the breach, I agree with Mrs Ubhi that the issue you have raised does not appear to fall under one of the four matters above. Therefore, my assessment is that this office cannot take your complaint forward.

34. The Certification Officer's determination was set out in a letter of 25 April 2022:

The Certification Officer's view is that your complaint is not within her jurisdiction. The reasons for this are set out in my letter to you of 25 March 2022.

In previous correspondence I had suggested that the Certification Officer may consider striking out your complaint. After discussing the matter with her, I am clear that strike out would not be appropriate in this instance because your complaint does not fall within her powers. She will, therefore, take no further action on your complaint. The practical effect of refusing to accept your complaint is the same as striking it out as your complaint will not proceed any further.

The grounds of appeal

35. The appellant asserts:

9. The CO erred in holding that it did not have jurisdiction.

10. The CO misinterpreted and / or misapplied s.108A(2)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992.

The issue

36. The issue was whether the complaint was that there had "been a breach or threatened breach of the rules of a trade union relating to" either "appointment or election of a person to, or the removal

of a person from, any office” or “disciplinary proceedings by the union (including expulsion)”.

The concession

37. UNISON conceded this appeal having regard to what was said by the then Certification Officer in **Dawes v Royal College Of Nursing** D/42-43/10-11:

47. The above provisions limit my jurisdiction in respect of claims of breach of rules of a trade union. A claim is only within my jurisdiction if it is of a breach or threatened breach of the rules relating to any of the matters mentioned in subsection (2). In the case of *Re UNISON* (D/11/00 - 16 June 2000) my predecessor stated at paragraph 23:-

“I do not have a general jurisdiction over breaches of union rules. Whilst I do not accept Mr Langstaff’s argument, that I have jurisdiction only over rules which are on their face concerned with the matters set out in 108A(2) - there may well be rules which are of general application but which in the context in which they are allegedly breached, clearly relate to one of those matters - I do not consider that the relationship is close enough in this case.”

In the case of *Lynch* I observed as follows at paragraph 48:-

“The Certification Officer had no jurisdiction to determine potential breaches of trade union rules prior to the Employment Relations Act 1999. By that Act, section 108A was inserted into the 1992 Act. This section gives the Certification Officer a limited jurisdiction over a restricted category of union rules. It also gives the Secretary of State power to extend the jurisdiction to breaches of other types of rule. In my judgment, the history and structure of section 108A demonstrates an intention by Parliament that my jurisdiction under this section should be viewed restrictively.”

Ms *Lynch* laid emphasis on the breadth of the word “relate”, as does Mr *Dawes* in the present case. In that connection, I further observed in the *Lynch* case at paragraph 49:-

“In my judgment, however, the use of the word “relate” does not have the effect of extending my jurisdiction to all those rules which touch upon, no matter how obliquely, the matters set out in section 108A(2). I find that the connection between the rule allegedly breached and the matters set out in section 108A(2) must be clear and direct. Whether a rule is one relating to a matter listed, in section 108A(2) is a matter of fact and degree to be determined in the circumstances of the particular case.”

In the case of *Finlay v. Unite the Union*, I observed that a variety of union rules may have an impact on the appointment, election or removal of a person from office but that does not automatically make them rules relating to such matters for the purposes of section 108A(2). I went on to comment at paragraph 49:-

“There is clearly a continuum of rules impacting on appointments and

elections, some of which are rules relating to appointments, and some of which are not. The decision on where the line is to be drawn falls to be decided in the context of the union rule book as a whole and custom and practice of the union.”

Most recently in *McDermott v. UNISON*, I observed at paragraph 47:-

“Whether a rule does relate to any of the prescribed matters is to be considered firstly on an objective reading of the rule, disregarding the facts of the instant case. If it does not objectively and obviously relate to any of the matters in subsection (2), I may exceptionally consider whether it is a rule which is so closely related with any of the prescribed matters that it can properly be found to “relate ” to one or more of them.”

Whilst Mr Ford did not dissent from this general approach, he respectfully submitted that I had wrongly applied the statutory provision to one aspect of Mr McDermott’s complaint of breach of rule, which complaint he considered to be within my jurisdiction on other grounds. I agree with the view expressed by Mr Ford that the use of a test for jurisdiction based upon whether a rule merely affects or impacts upon one of the listed matters would not be the correct approach to take. In this matter, I adopt the restrictive approach referred to in paragraph 48 of my decision in Lynch.

38. It is not entirely clear under which provision the Certification Officer refused jurisdiction in the determination that is subject of this appeal. It was expressly stated that the complaint was not struck out. It may be that the Certification Officer relied on the general power to regulate procedure provided by section 256 **TULR(C)A**.

39. Having considered the concession made by the respondent, we have concluded that the appropriate resolution of this appeal is for the matter to be remitted to the Certification Officer to hear full argument on whether there was a breach of any of the rules relied on by the appellant and, if so, whether the appellant had made out a complaint of a breach of a rule relating to the appointment or election of a person to, or the removal of a person from, any office and/or disciplinary proceedings by the union (including expulsion).

40. We consider it is important that the jurisdictional issue be decided after the facts have been determined and upon the matter being properly argued. All of the relevant authorities about the proper construction of section 108A **TULR(C)A** should be brought to the attention of the Certification Officer.