Neutral Citation Number: [2025] EAT 70

Case No: EA-2023-000365-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 May 2025

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

DR VIKAS CHANDRA

Appellant

- and –

THE UNIVERSITY AND COLLEGE UNION

Respondent

- -
- -

The Appellant appeared in person
Mr TOM BROWN, Counsel for the **Respondent**

Hearing date: 7 May 2025

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JUDGMENT

SUMMARY

CERTIFICATION OFFICER & TRADE UNION RIGHTS

The Certification Officer erred in law by refusing to accept a series of applications made by the Appellant, deciding that they were not arguable. The case did not fall within the limited circumstances in which the Certification Officer may refuse to accept an application under section 108B of the Trade Union and Labour Relations (Consolidation) Act 1992 because internal procedures have not been exhausted, and it was common ground that the circumstances were not such that the case could have been struck out under section 256ZA of that Act.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This is an appeal against a decision (or decisions) taken by the Certification Officer (CO) on or around 13 March 2023, refusing to accept a series of complaints made by the Appellant against the Respondent, the University and College Union (UCU).

2. Although the word "complaint" has been used throughout the case to describe those matters, in this judgment I shall use the word "application" in order to differentiate those proceedings from the matter described in the next paragraph.

3. At the time of the relevant events, the Appellant was Chair of the London School of Economics (LSE) branch of the Respondent. Although I have not seen evidence about the underlying events, he explained some of the background at the hearing and, for present purposes, issue was not taken with it. The events occurred after the Appellant became branch Chair. Following a difference of opinion over the appointment of a health and safety officer, a Regional Officer made a (first) complaint of bullying against him. During the Covid pandemic there was an issue about when the branch would hold its annual general meeting. When chairing an EGM of the branch, he did not permit a motion for an AGM to be put, and 27 individuals then made a (second) complaint about that decision. In a note to an LSE Director the Appellant included some information about three managers who he said had been disrupting meetings, and the three made a (third) complaint about a breach of their data protection rights. The three complaints were investigated. On 13 December 2021 they were upheld by an NEC Panel of the Respondent. The Appellant appealed to the Respondent's Appeal Panel but his appeal was dismissed on 8 June 2022.

4. The Respondent's relevant Rules are the following:

> "6.1 All members and student members have an obligation to abide by the Rules of the University and College Union, and shall refrain from conduct detrimental to the interests of the Union, from any breach of these Rules, Standing Orders or directions (properly made in accordance with these Rules or Standing Orders) and from all forms of harassment, prejudice and unfair discrimination whether on the grounds of sex, gender identity, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age, or other status or personal characteristic.
>
> …
>
> 13.1 The National Executive Committee shall (by the same procedure as it establishes its own Standing Orders) establish a procedure to censure or bar a member from holding any office for a specified period not exceeding three years or suspend from membership for a period not exceeding 1 year or expel a member from membership if it finds their conduct to be in breach of the Rules or is deemed to be a matter of significant detriment to the interest of the Union. The procedure, inter alia, shall include an appeals process."

5. The Respondent has also published a written procedure for dealing with disciplinary complaints under Rule 13, of which paragraph 1.6 states that "this Procedure does not form part of the rules of UCU".

6. On 6 September 2022 the Appellant submitted a set of 9 applications to the Certification Officer, alleging that the disciplinary procedure applied in his case had been unlawful in a number of ways.

7. Correspondence between the Appellant and a Ms Halai, an Operations Manager who was exercising delegated powers on behalf of the Certification Officer, including her "initial assessment" of the 9 applications, gave rise to a "reformatting" of the applications by the Appellant on 7 December 2022. The original applications were numbered 1-9 and there were additional new applications numbered 10-12. At Ms Halai's request the Appellant re-sent applications 10-12 on 7 March 2023 and said that he would await an "initial assessment" of those too, so that they could similarly be reformatted.

8. However, on 13 March 2023 the Appellant received a decision by Ms Halai on all 12 applications. She found that they fell within the CO's jurisdiction, that some had been made in time and some not, and that none of them was arguable. She informed him that the Assistant Certification Officer (ACO) had therefore decided that they "could not be accepted" by the CO's office.

9. The Appellant made comments by emails dated 15 and 16 March 2023. On 20 March 2023 he received a reply by email from the ACO, a Mr Price, rejecting his comments and reiterating the decision.

10. The Appellant submitted an appeal to this Tribunal.

11. At a preliminary hearing on 23 April 2024, Andrew Burns KC (sitting as a Deputy High Court Judge) gave permission for 9 of the 15 grounds of appeal to proceed to a full hearing. Grounds 5-8 were dismissed and grounds 10 and 13 were dismissed upon withdrawal.

Legal framework

12. The relevant parts of sections 108A, 108B and 108C of the Trade Union and Labour Relations (Consolidation) Act 1992 provide:

> **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—
> …
> (b) disciplinary proceedings by the union (including expulsion);
>
> …
> (6) An application must be made—
> (a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or
> (b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).
> (7) Those days are—
> (a) the day on which the procedure is concluded, and

(b) the last day of the period of one year beginning with the day on which the procedure is invoked.

(8) The reference in subsection (1) to the rules of a union includes references to the rules of any branch or section of the union.

…

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.

…

(5) Where the Certification Officer requests a person to furnish information to him in connection with enquiries made by him under this section, he shall specify the date by which that information is to be furnished and, unless he considers that it would be inappropriate to do so, shall proceed with his determination of the application notwithstanding that the information has not been furnished to him by the specified date.

(6) A declaration made by the Certification Officer under this section may be relied on as if it were a declaration made by the court.

…

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.

13. Further provision is made by sections 256 and 256ZA:

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,

…

…

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,

(b) order anything in the application or complaint, or in any response, to be amended or struck out on those grounds, or

(c) order the application or complaint, or any response, to be struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant or complainant or (as the case may be) respondent has been scandalous, vexatious, or unreasonable.

(2) The Certification Officer may order an application or complaint made to him to be struck out for excessive delay in proceeding with it.

(3) An order under this section may be made on the Certification Officer's own initiative and

may also be made—

> (a) if the order sought is to strike out an application or complaint, or to amend or strike out anything in an application or complaint, on an application by the respondent, or
> (b) if the order sought is to strike out any response, or to amend or strike out anything in any response, on an application by the person who made the application or complaint mentioned in subsection (1).

(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.
(5) Subsection (4) shall not be taken to require the Certification Officer to send a notice under that subsection if the party against whom it is proposed that the order under this section should be made has been given an opportunity to show cause orally why the order should not be made.
(6) Nothing in this section prevents the Certification Officer from making further provision under section 256(1) about the striking out of proceedings on any application or complaint made to him.
(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.
…

14. In *Embery v Fire Brigades Union* [2023] EAT 134 at [20], Eady J gave this guidance on the application of section 256ZA:

> "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 " (*Eszias 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, *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) per Lewison J at para 15 (vii))."

15. *Embery* was followed in *Morley v UNISON* [2024] EAT 143, where Judge Tayler also referred to the requirement that when an ET is considering whether to strike out a case but facts need to be established by evidence, it "should not conduct a mini-trial of the facts".

The nature of the grounds of appeal

16. Granting permission to appeal, the Deputy Judge referred at [16] to guidance published by the CO. The guidance states that, on receipt of a complaint, "the CO's team will assess whether your

complaint falls within the CO's powers, is within the time limits and whether a rule can have been broken in the way you have described" and that the complaint "might not be accepted" if any of those questions is answered in the negative. The Deputy Judge added at [17]:

> "I note that this list of three is non-exhaustive and so suggests that there may be other grounds for why a complaint may not be accepted. It is arguable that the guidance for what complaint will be accepted on a preliminary assessment of the merits does not reflect the statutory provisions that I have quoted in section 108A and 108B or the strike out test in section 256ZA as explained in the *Embery* case. It is arguable the statute expressly makes provision for when a complaint may not be accepted in section 108B. It is arguable that it is impermissible to refuse to accept an application under section 108A where the Certification Officer is satisfied that the claimant has exhausted the internal complaints procedure. It is therefore arguable that the Certification Officer cannot regulate procedure in the way that she has - to reject complaints on the merits, or on the arguable merits, as this would arguably contradict the other statutory provisions in the 1992 Act. Therefore this matter should go forward on those umbrella grounds to a full hearing before a judge."

17. I will therefore begin by considering the "umbrella grounds".

18. There are also the 9 numbered grounds for which the Deputy Judge granted permission. Although they raise points of legal principle, they are more closely concerned with the facts of the disciplinary case and the disciplinary proceedings. As I explain below, at this hearing I was not in a position to deal satisfactorily with those grounds but, as it transpired, I did not need to do so.

The "umbrella grounds"

19. Appearing in person, Dr Chandra argued that:

a. the CO has no power to refuse to accept an application other than for the reason identified in section 108B;

b. the procedural powers under section 256 could not extend to creating additional grounds for striking out an application on the ground that it was without merit, that ground being expressly covered by section 256ZA(1); and

c. if and when the CO struck the application out under section 256ZA, she appears to have conducted a mini-trial by making a decision on the merits.

20. For the Respondent, Tom Brown of counsel argued that the CO made a lawful use of the power in section 256ZA(6) to make "provision" under section 256(1) for striking the applications out, separate from the striking out provisions in section 256ZA(1).

21. In making that argument, Mr Brown conceded or agreed that the CO's decision (1) was not made under section 108B and (2) was not a decision to strike out under section 256ZA(1), not least because no "show cause" notice was sent under section 256ZA(4).

22. Mr Brown contended that it was permissible for the CO to apply her published guidance so that, in this case, she considered whether the applications were arguable and decided that they were not. Her decision to "not accept" them on that basis was consistent with the clear statutory objective that the CO forum should be relatively informal, low cost and quick. That process bears comparison with those by which this Tribunal, or the Employment Tribunal, filters out cases which cannot succeed.

23. Conversely, he contends that if the Appellant is right and the express strike out provisions in section 256ZA(1) have the effect that there can be no further provision for a procedure having the effect of striking out, then the power in section 256ZA(6) becomes a dead letter.

24. My analysis of the statutory provisions is as follows.

25. Section 108B requires the CO, on receipt of an application, to satisfy herself that "the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union". If she is not so satisfied, she may (rather than must) "refuse to accept" the application.

26. I note in passing that the effect of such a refusal may simply be to postpone the application to the CO until after the completion of internal procedures. The refusal is not necessarily analogous to striking an application out.

27. The 1992 Act imposes only a few specific procedural requirements as to how an application will be dealt with. The main ones are in section 108B(2), and they expressly apply only "if he accepts an application". In context, "accepts" appears to be in contradistinction to the power to "refuse to accept" in subsection (1).

28. Therefore, the effect of a refusal to accept the application is that the CO need not "make such enquiries as he thinks fit" or "give the applicant and the union an opportunity to be heard" as section 108B(2) would otherwise require.

29. Section 108B(1) does not state that the CO may refuse to accept the application if she is not satisfied that internal procedures have been exhausted. Instead it states that she may refuse to accept it "unless she is satisfied" that the internal procedures have been exhausted.

30. That form of words, read literally, indicates that if she is so satisfied, she may not (i.e. cannot) "refuse to accept" the application. If that is the true meaning of section 108B(1), then the minimum requirements of section 108B(2) will apply to all applications in which internal procedures have been exhausted, and the CO must "make such enquiries as he thinks fit" (which could, in an appropriate case, be no enquiries) and must give the parties an opportunity to be heard.

31. If that is right, then, where internal procedures have been exhausted, the only way in which the CO can cut short a vexatious or misconceived case is by striking it out.

32. If it is to be struck out under section 256ZA(1), there must first be a "show cause" notice under section 256ZA(4). But no other "opportunity to be heard" need be provided under section 108B(2)(b), because section 256ZA(1) can be applied "at any stage" of proceedings.

33. Conversely, if some other power to strike out were being used, section 108B(2)(b) would require the parties to be given "an opportunity to be heard".

34. Subject only to the "show cause" proviso, section 256ZA(1) creates a power to strike out anything that is "scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived".

35. Section 256(1) empowers the CO to make provision to "regulate the procedure to be followed" when dealing with applications. So, that power expressly concerns procedure, not substance. And, it does not apply to "matters as to which express provision is made by or under an enactment".

36. Despite that last exclusion, section 256ZA(6) states that the provisions of section 256ZA do not prevent the CO "from making further provision under section 256(1) about the striking out of proceedings on any application".

37. Nevertheless, I do not believe Parliament meant that, in respect of an application to which section 256ZA(1) applies, the CO can make a provision for striking out which is inconsistent with section 256ZA(1).

38. In my judgment, the true meaning of section 256ZA(6) is simply that the procedural provisions relating to striking out are not exhaustive. There is therefore a power under section 256(1)

to make further procedural provision in addition to the provisions already made in section 256ZA(1). So, subsection (6) is not a dead letter, but its scope is limited.

39. I need not decide whether such further "provision" could extend to empowering the CO to strike out applications in circumstances other than those described in section 256ZA(1). In any event, it is difficult to imagine what such a category would consist of. A time barred case will plainly have "no reasonable prospect of success", a repeat case will be "vexatious", and so on.

40. However, in my judgment the CO did not have the power to adopt a procedure by which, without a show cause notice or the parties having an opportunity to be heard, these applications were effectively struck out on the basis that they had no reasonable prospect of success (or, as she put it, they were not arguable). In particular, that was inconsistent with section 256ZA(4). It may also have done more than merely "regulate the procedure" under section 256(1).

41. This does not mean that the CO cannot deal quickly and efficiently with applications which, for any reason, are misconceived. For example:

a. If a purported application falls outside the CO's jurisdiction, it may be open to her to conclude that section 108A simply does not apply to it, in which case none of the other provisions mentioned above will apply to it.
b. If an application appears to be time-barred under section 108A(6), it may simply be necessary to ask the applicant why they say it is not time-barred. That process may or may not identify an issue which requires any further enquiry at all.

42. However, the CO's present practice, on receipt of an application, of also considering whether it is arguable and refusing to accept it if it is not, runs the risk of leading to the present situation.

43. I should add that, since there has not been a valid statutory striking out process, I have not decided, and am not in a position to decide, whether any part of this case would have been suitable for striking out or whether, as the Appellant contended, there was an impermissible "mini trial". If there is any consideration of striking out in future, it will always be necessary for the decision maker to consider whether material facts are in dispute so that evidence is needed.

44. For the reasons set out above, the appeal is allowed on the grounds described by the Deputy Judge when granting permission as "umbrella grounds".

The numbered grounds

45. During the argument at the hearing, both sides assisted me on the question of case management of the numbered grounds.

46. If I had not been persuaded by the umbrella grounds, it would have been necessary to hear the numbered grounds. However, neither side strongly dissented from the proposition that I lacked the factual or evidential material to enable me to do so. In particular, the bundle for this appeal did not include the documents containing:

a. The disciplinary complaints against the Appellant.
b. His response to the first complaint and correspondence about the others.
c. The decision of the NEC Panel.
d. The Appellant's appeal.
e. The decision of the Appeals Panel.

47. To a varying extent, the numbered grounds require consideration of the facts. For example, grounds 1-2 challenge the Respondent's decision on the sufficiency of the reasons given by the Appeals Panel (document e in the last paragraph), in the context of the Appellant's grounds of appeal

(document d) against the NEC Panel's decision (document c). At present this Tribunal does not have documents c-e.

48. If the umbrella grounds had not succeeded, it would therefore have been necessary to give case management directions to enable the rest of the appeal to continue at a further hearing.

49. Since the umbrella grounds have succeeded, that has not been necessary. It follows that the numbered grounds have not been determined by this Tribunal.

Conclusion

50. The applications/complaints must be remitted to the Certification Officer. It will be for her to decide what their future course should be. When doing so, she should bear in mind that this Tribunal has not made any final determination of the merits of those numbered grounds which the Deputy Judge found to be arguable.