Neutral Citation Number: [2025] EAT 143

Case No: EA-2022-001324-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 October 2025

Before:

THE HONOURABLE MRS JUSTICE EADY DBE

- -

Between:

EVANS (2)

Appellant

- and –

(1) PROSPECT
(2) CERTIFICATION OFFICER
(3) **ACAS**
(4) **SECRETARY OF STATE FOR BUSINESS AND TRADE**

Respondents

- -
- -

Andrew Evans (Appellant) in person
Melanie Tether (instructed by Pattinson & Brewer Solicitors) for the **First Respondent**
Mathew Purchase KC (instructed by Government Legal Department) for the **Second Respondent**
Adam Heppinstall KC (instructed by Government Legal Department) for the **Third Respondent**
Robert Moretto (instructed by Government Legal Department) for the **Fourth Respondent**

Hearing dates: 22 and 23 July 2025

- -

JUDGMENT

© EAT 2025

SUMMARY

Certification officer – appeal against strike out and non-acceptance of application – bias

Mr Evans was a member and officer of Prospect. After complaints were made against him by a union employee, he was suspended from office pending investigation. He made complaints to the Certification Officer ("CO") regarding his suspension and also complained about a statement issued by the union President regarding the re-election of the General Secretary (Mr Clancy). The CO struck out both complaints as having no reasonable prospect of success and refused to accept a further complaint which again related to Mr Evans' suspension. Mr Evans appealed; contending that the CO had erred in law and, more generally, that her decisions were vitiated by bias.

Bias. Although permission was limited to the question of apparent bias, Mr Evans expanded his arguments to include allegations of actual and/or automatic bias; absent permission to amend, that was not an appropriate course. In any event: (i) the evidence did not support allegations of actual bias; (ii) having regard to how the CO was appointed, the term of office, the existence of safeguards against outside pressures, and whether the CO presented an appearance of independence (***BEG SPA v Italy*** (application no. 5312/11) 20 August 2021 at paragraph 128), this was not a case of automatic bias; (iii) equally, there was no appearance of bias - having considered all the facts, the fair-minded and informed observer (***Porter v Magill*** [2002] 2 AC 357 HL) would not conclude there was a real possibility that the CO was biased; (iv) in any event, having regard to the subject matter of the decision, the manner in which it was arrived at, and the content of the dispute, the right of appeal to the EAT ensured full jurisdiction by an independent judicial body (***R (Ali) v SoS for Justice*** [2013] 1 WLR 3536). The appeal on this ground was dismissed.

Strike out of suspension complaints. Mr Evans had been suspended from office as a precautionary measure to allow for a disciplinary investigation; this did not breach the requirements for a disciplinary suspension from membership. The ability to impose a precautionary suspension fell within the powers expressly afforded to the NEC under the rules. In the alternative, the power of

© EAT 2025

precautionary suspension was incorporated by necessary implication. The CO's reasoning was not based on any finding as to custom and practice; no such finding was necessary. The CO correctly concluded the complaint had no reasonable prospect of success and was properly to be struck out; the appeal in this respect was dismissed.

Strike out of General Secretary election code of conduct complaints. The CO had erred in her approach to the code, wrongly concluding it would only be engaged when there were two or more candidates for election. That was inconsistent with the express terms of the rules (and the CO was unable to make any finding as to any alternative custom and practice given this was a strike out on the papers) and, properly understood, with the purpose of the code. The appeal on this point was allowed and this application remitted to the CO for consideration afresh.

Non-acceptance of a further complaint regarding suspension. The CO had erred in purporting not to accept Mr Evans' further application regarding his suspension (***Chandra v UCU*** [2025] EAT 70). This aspect of the appeal would be allowed but, given its apparently vexatious nature, the application would be struck out unless, by written representations received by the EAT within 21 days of the handing down of judgment, Mr Evans could show cause why such an order should not be made.

© EAT 2025

Introduction 1-5

Bias (ground 13): preliminary observations 6-8

Bias: the legal framework 9

Overview 9-16

The appearance of bias: applying the Porter v Magill test 17-24

Bias/fair hearing and structural and/or funding arrangements of the relevant decision-making entity 25-29

Waiver 30-31

Bias: the facts 32-33

A. Links between the CO and ACAS/Mr Clancy, and between the CO and trade unions more generally, and other structural/funding issues said to go to the CO's independence and impartiality 34-50

B. Allegations of actual bias said to be evidenced by how the CO has dealt with Mr Evans' complaints 51-63

C. Applications to the CO, the nature of the CO's decision and the right of appeal afforded from that decision 64-69

Bias: analysis and conclusions 70

A. Links between the CO and ACAS/Mr Clancy, and between the CO and trade unions more generally, and other structural/funding issues said to go to the CO's independence and impartiality 71-77

B. Allegations of actual bias said to be evidenced by how the CO has dealt with Mr Evans' complaints 78-79

C. Applications to the CO, the nature of the CO's decision and the right of appeal afforded from that decision 80-86

Conclusion 87-89

The substantive appeal (grounds 1, 2, 5, 6, and 10): the background facts and the CO's decision 90-91

The factual background 92-101

The CO's decisions 102-105

The substantive appeal: the parties' positions 106

Grounds 1, 2, 5 and 6 106-108

Ground 10 109-110

The substantive appeal: the legal framework and the rules and provisions in issue 111

The powers of the CO and the approach of the EAT on appeal 111-113

Construction of Prospect's rules 114-117

The rules and provisions in issue 118-128

The substantive appeal: analysis and conclusions 129

Grounds 1, 2, 5 and 6 129-136

Ground 10 137-142

Grounds 11 and 12 and the CO's decision not to accept a new complaint 143

© EAT 2025

The background and the parties' submissions 143-148
The relevant legal framework 149-154
Analysis and conclusions 155-158
Disposal 159

© EAT 2025

THE HONURABLE MRS JUSTICE EACY DBE:

Introduction

1. The questions raised by this appeal fall under two heads: (1) whether, in striking out complaints brought by a trade union member, the Certification Officer ("CO") erred in her approach; (2) whether the CO's decision was, in any event, tainted by bias such that it must necessarily be set aside. The appeal is brought by Mr Evans, a member of the trade union Prospect ("Prospect"). The decisions under challenge are those of the CO of 1 July 2022, by which Mr Evans' applications were struck out as having no reasonable prospect of success.

2. At an earlier preliminary hearing before Judge Stout, Mr Evans was given permission to pursue the following grounds of appeal: (1) the CO erred in striking out complaints regarding his suspension, which Mr Evans said was in breach of Prospect's rules (grounds 1, 2, 5 and 6); (2) the CO erred in striking out complaints regarding a statement made by Prospect's President regarding the candidature of Mr Mike Clancy for re-election as General Secretary, which Mr Evans claimed amounted to a breach of Prospect's election code of conduct (ground 10, second part); and (3) more generally, the decisions were vitiated by apparent bias due to links between the CO and the Advisory, Conciliation and Arbitration Service ("ACAS"), and trade unions generally, in particular arising from the position of Mr Clancy as both General Secretary of Prospect and a member of the ACAS Council (ground 13).

3. Although not the subject of the grant of permission, it was further directed that Mr Evans could address the EAT on an additional point, advanced under grounds 11 and 12, whereby he contends that the CO erred in refusing to accept a new complaint (a decision communicated by letter of 1 July 2022); this point was listed for hearing on a "rolled up" basis.

4. Having permitted ground 13 ("apparent bias") to proceed, it was subsequently directed that the CO, ACAS, and the Secretary of State for Business and Trade ("the Secretary of State")

© EAT 2025

should be joined as respondents to the appeal. Their involvement has been limited to the issues raised by ground 13.

5. Adopting the same approach as the parties, I have first addressed Mr Evans' arguments on bias, before turning to consider the grounds of appeal relating to the CO's decision of 1 July 2022, and then the proposed additional grounds. For completeness, I record that, prior to the hearing before me, Mr Evans made an application that I should recuse myself from dealing with this appeal, on the ground of bias. I refused that application for reasons set out in my order seal dated 18 July 2025, which, for ease of reference, is attached to this judgment.

Bias (ground 13): preliminary observations

6. Ground 13 of Mr Evans' notice of appeal was stated to raise the question: "*Would the fair-minded and informed observer, having considered the facts conclude that there was a real possibility that the [CO] was biased? ... Was there apparent bias?*" Explaining this ground in his notice of appeal, Mr Evans observed that Mr Clancy was both General Secretary of Prospect and a member of the ACAS Council, and he considered there were links between ACAS and the CO, and the CO and trade unions more generally, such that, informed of these matters, the fair-minded observer would consider there was a real possibility of bias. At that stage, the links between ACAS (and/or Mr Clancy and/or trade unions more generally) and the CO were identified as: (a) co-location, both have been located in the same building since 2020, with staff using an open plan office and shared facilities; (b) Mr Clancy's name having appeared in the ACAS annual report, as had that of the CO ("*in the latest edition Mr Clancy is mentioned four times and [the CO] three times*"); (c) ACAS's statutory responsibility for the accommodation, equipment and staffing of the CO; (d) the statutory requirement that the ACAS Council should include three members who represent workers; (e) that (Mr Evans contended) it was highly likely that Mr Clancy had been consulted on the appointment of the

© EAT 2025

CO (in 2018) and on the move of the CO to its present location in 2020 (and the CO would have been aware of this). It was Mr Evans' case that:

> "it appears there would be a personal and professional interest in the Certification Officer making an adverse finding against someone on the board of ACAS as General Secretary of the respondent union. ... ACAS and the Certification Officer are so interlinked that it is not possible for the Certification Officer to make decisions about a member of the ACAS Council and/or their union without apparent bias."

7. In permitting this ground to proceed, Judge Stout understood it to be Mr Evans' case that "*the CO's decision is vitiated by apparent bias*". The limited nature of the ground thus permitted to proceed was subsequently emphasised by Judge Stout in an order seal dated 16 July 2025.

8. In setting out his case in his witness statement of 7 June 2024 and in his skeleton argument for this hearing, however, Mr Evans seemed to be suggesting this might be a case of automatic or actual bias, and/or that the structural and funding arrangements for the CO gave rise to a denial of his right to a fair hearing such as would amount to a breach of article 6 of the European Convention of Human Rights ("ECHR"), requiring the matter to be referred to the Court of Appeal for a declaration of incompatibility; these were points that Mr Evans then developed in oral argument. In thus seeking to expand upon his case, Mr Evans has made a number of allegations, as follows (I summarise): (i) the CO acted as a "*rubber stamp*" for decisions made by her staff, and the actual decision-taker was unclear; (ii) further evidence of the CO's bias was demonstrated by her statement that she had "*a professional and trusting relationship with ... leading unions*" and by the CO's "*direct financial relationship with both ACAS and the unions*"; (iii) the CO demonstrated actual bias, wilfully avoiding dealing with Mr Evans' complaints, failing to comply with statutory requirements, and adopting a predetermined approach; (iv) the CO's staff were also involved in acts of bias; (v) the fact that the CO does not take a judicial oath, and is not required to have legal training, meant Ms Bedwell was "*less likely to follow the law*"; (vi) there is no recusal mechanism for the CO, or

© EAT 2025

any Assistant COs ("ACOs"); (vii) the Secretary of State's involvement in the CO's appointment was "*objective evidence of bias*", as the CO "*could be put under pressure*"; (viii) an acceptance of a "*real possibility of bias*" and/or that the CO was not "*an independent and impartial tribunal established by law*" was demonstrated by the existence of a right of appeal to the EAT and by the fact that Parliament had changed the bases of appeal from the CO in 2016; and (ix) Mr Clancy supported the same football club as Sir Brendan Barber (ACAS Chair 2014-2020) and they had both been involved in the "*Remain*" political campaign in 2016.

Bias: the legal framework

Overview

9. In approaching the complaint of bias in this case, I take as my starting point the principle that, in the determination of his complaints to the CO, Mr Evans was entitled to a fair hearing by an independent and impartial tribunal. That is a basic principle of common law and is a right enshrined by article 6 of the ECHR; as the point was expressed in ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [1999] EWCA Civ 3004, [2000] QB 451:

> "2. ... All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case."

10. In its skeleton argument for the appeal, it was submitted on behalf of ACAS that, where a decision-taker is bound to make a decision for procedural reasons, that decision will not be rendered void by reason of apparent bias. Thus, in ***Dimes v The Proprietors of the Grand Junction Canal*** (1852) 3 HL Cas 759, although the Lord Chancellor would have been disqualified as a judge by virtue of a pecuniary interest (see below), that did not invalidate his

© EAT 2025

decision to enrol an appeal, which could not be done without his signature; that was "*a case of necessity, ... where ... the objection of interest cannot prevail*" (per Baron Parke, at p 787). I am not, however, persuaded that provides an apt analogy in the present case; it certainly would not address Mr Evans' article 6 ECHR concerns.

11. The right to a fair hearing by an independent and impartial tribunal in the determination of an individual's rights and liabilities is made clear by article 6 ECHR, which provides:

> "(1) In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

12. Most obviously, if such a decision is influenced by partiality or prejudice, that will amount to a denial of this most basic of principles, depriving the litigant of their fundamental right to a fair hearing; as was observed in ***Locabail*:**

> "3. ... Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given."

13. Such cases are said to be instances of "actual bias", where the decision-maker has allowed their decision to be influenced by partiality or prejudice. Instances of actual bias are rare (and difficult to prove), but the importance of the principle is such that its protection is further ensured by other means.

14. Where the decision-maker has an interest in the outcome of the case bias will automatically be presumed: "automatic bias". Thus, in ***Dimes***, owning a substantial shareholding in the respondent was held to vitiate orders made by, and on behalf of, the Lord Chancellor; but the principle will also extend to cases where there is no link to a party but where the outcome of the case could, realistically, still affect the judge's interest (see ***Clenae Pty Ltd and ors v Australia and New Zealand Banking Group Ltd*** [1999] VSCA 35, cited in ***Locabail*** at

© EAT 2025

paragraph 8), even if that is something other than a pecuniary interest (***R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*** *(No 2)*[1999] 2 WLR 272).

15. Even where there is no actual or automatic bias (or such forms of bias are not capable of proof), the protection of the right to an impartial and unprejudiced tribunal will extend to cases where the relevant circumstances are such as to give rise to the appearance of bias: "apparent bias". The principle that underpins this approach is that justice must not only be done, but must be perceived to be done, see per Lord Hope in ***Davidson v Scottish Ministers*** [2004] UKHL 34 at paragraph 46; it is the same principle that applies when determining whether the right to an independent and impartial tribunal has been afforded for article 6 ECHR purposes, see ***BEG SPA v Italy*** (application no. 5312/11) 20 August 2021 at paragraph 132.

16. The test for apparent bias, which applies to all relevant decision-takers, is an objective one; as stated by Lord Hope at paragraph 103 ***Porter v Magill*** [2002] 2 AC 357 HL:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

*The appearance of bias: applying the **Porter v Magill** test*

17. The recent judgment of the Supreme Court of Ireland in ***Kelly v University College Dublin, National University of Ireland (The Law Society of Ireland and the General Council of the Bar of Ireland intervening)*** [2025] IESC 6 provides practical guidance as to how a court should approach a challenge on the basis of apparent bias. Summarising the relevant principles to be drawn from the case-law, the Court noted there were three components to the test, which are to be assessed together: (1) there must be a reasonable and informed observer, who has (2) a reasonable apprehension of (3) bias.

© EAT 2025

18. In respect of the first component, this imports an objective standard. As for the attributes of a fair-minded and informed observer, these were considered by Lord Hope in ***Helow v Home Secretary*** [2008] 1 WLR 2416:

> "2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, ... Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
> 3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

19. As for the second and third components, it was said in ***Kelly*** that the apprehension necessary is akin to the standard of reasonable doubt and must be reasoned and cogent (paragraphs 102-104), and that objective bias (the third component) is best understood as a reasonable apprehension that the case will not receive a fair and impartial hearing (paragraphs 105-106); the Court emphasised that:

> "10. … There must be a cogent and rational link between the issue raised and its capacity to influence the decision to be made; it is not to be determined by some precautionary consideration that it might have been better not to sit, or some wise after-the-fact assessment that a problem might have been avoided by not sitting. The legal test must remain connected to the question of bias, and a judge is only disqualified where a reasonable person would have a reasonable apprehension of bias, or that the decision in the case would be influenced by factors other than an assessment of the evidence and the law…"

Further explaining:

© EAT 2025

> "162. ... (ix) It is necessary to show a rational, cogent and logical connection between a factor identified and the apprehension that the case will not receive a fair and impartial hearing ... ; (x) While the standard is one of reasonable apprehension, and is, and is intended to be, less than proof on the balance of probabilities, the matter apprehended is by definition both unusual and exceptional. Therefore, the test is a strict one, which must be rigorously applied, and is not easily satisfied. Too low a standard will damage, rather than promote, public confidence. ..."

20. The determination of the test for apparent bias will, however, always be fact sensitive; see ***Locabail*** at paragraph 25, where it was observed:

> "Everything will depend on the facts, which may include the nature of the issue to be decided."

And, as Lord Fairley P noted in ***Swansea City & County Council v Abraham and ors*** [2025] EAT 93 at paragraph 38:

> "... Much will depend upon a careful examination of the whole facts viewed in the context of the particular decision before the judge. ..."

21. Although fact-specific, a finding of apparent bias is not a matter of judicial discretion but requires a binary determination as to whether an objective appraisal of the material facts would cause the fair-minded and informed observer to consider there was a real possibility of bias. Thus, in ***AWG Group Ltd v Morrison and anor*** [2006] 1 WLR 1163, the Court of Appeal concluded that - in circumstances in which a witness who was, whether or not he actually gave evidence, "*involved in the case*" and was a long-standing (30 years) personal acquaintance of the trial judge - the judge ought to have recused himself, notwithstanding his concerns about the repercussions for the trial (which would have to be re-listed) if he did so.

22. There are, however, some circumstances which could not give rise to an objection, such as the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the decision-maker, and yet other factors which would not *ordinarily* base an objection, such as a decision-maker's social, educational, service or employment background or history,

© EAT 2025

previous political associations, previous judicial decisions or extra-curricular utterances in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers, although this may depend on the particular facts of the case (***Locabail***, paragraph 25). Moreover, while the fact that a decision-taker has taken a judicial oath will be a relevant consideration, it is not determinative: it is "*an important protection*" not "*a sufficient guarantee to exclude all legitimate doubt*"; per **Lord Reed in *Starrs v Ruxton*** [1999] ScotHC HCJ 259, [2000] UKHRR 78 (cited by Lord Bingham at paragraph 18 ***Davidson***).

23. As I have set out above, Mr Evans' submissions on the issue of bias have been wide ranging and have expanded as the proceedings have continued. He has, however, not applied to amend ground 13, either to add alternative bases for his bias challenge or to rely on additional facts, contending this is unnecessary as it is for the court to investigate all circumstances relevant to the question of bias. In this regard, Mr Evans relies on the observation of Lord Phillips MR in ***Re Medicaments*** *(No. 2)* [2001] ICR 564 at paragraph 85, as follows:

> "The court must first ascertain all the circumstances... then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility… of bias."

24. Accepting that the facts material to the question of bias may not be limited simply to those apparent to the complainant, but will extend to those ascertained upon investigation by the court (per Lord Phillips MR in ***Re Medicaments*** at paragraph 83), the role of the court must be to step into the shoes of the fair-minded observer, taking the trouble to inform itself on all matters that are relevant and adopting a balanced approach to any information it is given (per ***Helow***). In fulfilling that role, however, the court does not become an inquisitor for the complainant; the court must retain its objectivity and consider the facts before it with appropriate detachment. In the present case, directions were given to enable the relevant facts to be investigated, joining additional parties and providing for witness and documentary evidence to be available at the final hearing. Maintaining the objectivity of the court, however,

© EAT 2025

it cannot be for the judge to descend into the arena to decide what points should be taken by the complainant or how they should advance their case. Where, therefore, a party seeks to change the way they advance an appeal on bias grounds, and/or to rely on additional matters in support of that challenge, that should properly be the subject of an amendment, so that other interested parties can be given the opportunity to respond. Ultimately, as Lord Fairley observed in ***Abraham***, at paragraph 47:

> "... The onus of establishing a duty to recuse nevertheless still rests upon the applicant (***President of the Republic of South Africa v South Africa Rugby Football Union*** 1999 (4) SA 147, quoted with approval in ***Locabail***)."

Bias/fair hearing and structural and/or funding arrangements of the relevant decision-making entity

25. In the case-law of the European Court of Human Rights ("ECtHR"), it has been held that, in order to ascertain whether a decision-taker can be considered to be independent for the purposes of article 6 ECHR, regard must be had to how the person/s concerned are appointed, their term of office, the existence of safeguards against outside pressures, and the question whether the decision-making entity concerned presents an appearance of independence; see ***BEG SPA v Italy*** at paragraph 128. Such a decision-taker must be independent not just of the parties but also of the executive and legislature, although the mere fact that they are appointed or funded by the State, or could be removed by the State, will not give rise to an objective appearance of bias or breach of article 6 ECHR. Thus, in ***Campbell and Fell v UK*** (1985) 7 EHRR 165, a complaint regarding the independence of a prison board of visitors was rejected notwithstanding that the members of the board were appointed for relatively short terms (three years) by the Home Secretary, who was responsible for the administration of prisons and could also issue guidelines as to the board's performance of its duties. Similarly, in ***Lithgow and ors v UK*** (1986) 8 EHRR 329, where the complaint related to an arbitration tribunal that adjudicated upon compensation claims made by companies which had had interests nationalised by the government, while two of the tribunal members were appointed by the

© EAT 2025

Minister, who was a party to any proceedings, this was held not to undermine the tribunal's independence (the appointments were made after consultation and the tribunal adopted a similar process to a court, allowing for the possibility of an appeal).

26. Even where the funding of a tribunal derives from entities that may themselves be parties before it, this will not, of itself, be sufficient to mean that the objective, informed observer would consider there to be a real possibility of bias. Thus, in ***Mutu v Switzerland*** (applications nos. 40575/10 and 67474/10) 4 February 2019, relating to the Court of Arbitration for Sport ("CAS") which is financed by sports bodies, the majority of the Court ruled:

> "151. As regards the financing of the CAS by sports bodies, the Court notes, like the Government (see paragraph 130 above), that national courts are always financed by the State budget and yet this fact does not imply that those courts lack independence and impartiality in disputes between litigants and the State. By analogy, the CAS cannot be said to lack independence and impartiality solely on account of its financing arrangements."

27. In ***R (oao Sandhar) v Office of the Independent Adjudicator for Higher Education*** [2011] EWCA Civ 1614, an objection to the independence and impartiality of the Office of the Independent Adjudicator for Higher Education ("OIA") was similarly rejected. Although the OIA was funded by subscriptions from higher education institutions ("HEIs") and five of its 14 directors represented HEIs, this would not cause the fair-minded informed observer to consider there was a possibility of bias, given that the directors were duty bound to act in the interests of the OIA not their own nominators (and there was no evidence that any had acted in breach of that duty (paragraph 30)), there was no link between the funds paid by HEIs and the outcome of complaints (paragraph 33), and, in any event, it was the independent adjudicator – appointed by the OIA board under Nolan principles - who was responsible for the adjudication of individual cases (paragraph 32).

© EAT 2025

28. The position of the OIA in ***Sandhar*** can be contrasted with that of the Turkish Football Federation's ("TFF's") Arbitration Committee in ***Ali Riza v Turkey*** (2024) 72 EHRR 25. Having found that the TFF's Board of Directors – largely comprised of members or executives of football clubs – exerted "*vast powers*" over the organisation and operation of the Arbitration Committee, in the "*absence of adequate safeguards*", the ECtHR concluded there was "*legitimate reason to doubt*" that the Committee could approach its task with the necessary independence and impartiality.

29. Even where the relevant decision-making entity fails to comply with article 6 ECHR in some respect, however, there will have been no violation of a complainant's fair hearing rights if the proceedings are "*subject to subsequent control by a judicial body that has full jurisdiction and does provide [article 6] guarantees"*: see ***Tsfayo v UK*** (2009) 48 EHRR 18, at paragraph 42, ***Bistrović v Croatia*** (application no. 25774/05) 31 May 2007 at paragraphs 51-53, and ***Nunes de Carvalho SÁ v Portugal*** (applications nos. 55391/13, 57728/13 and 74041/13) 6 November 2018 at paragraph 132. In assessing the sufficiency of the "*subsequent control*", it will be necessary to have regard to the subject matter of the decision under challenge, the manner in which that decision was arrived at, and the content of the dispute, including the grounds of appeal, see ***Bryan v UK*** (1995) 21 EHRR 342 at paragraph 45, and the observations of Lord Hoffmann in ***R (Alconbury Developments Ltd) v SoS for the Environment, Transport and the Regions*** [2003] 2 AC 295 at paragraph 87, and in ***Runa Begum v Tower Hamlets LBC*** [2003] 2 AC 430 at paragraph 33; as the Divisional Court summarised the position, in ***R (Ali) v SoS for Justice*** [2013] 1 WLR 3536 at paragraph 70:

> " ... in general, the composite procedure of administrative decision by the minister or public official designated by statute, together with access to the court, will be sufficient [to comply with article 6] if the court has "full jurisdiction" over the administrative decision. "Full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case. All that is needed is jurisdiction to deal with the case "as the nature of the decision requires"..."

© EAT 2025

Waiver

30. Although the existence of bias – whether actual, automatic, or apparent – will give rise to an irresistible right to object to the decision-maker in question, it is nonetheless open to a party to waive that right, although any such waiver must be clear and unequivocal, made in full knowledge of all relevant facts (see ***Locabail*** at paragraph 15). As the Court of Appeal observed in ***Locabail*:**

> "26. ... If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so. ..."

31. Where, moreover, a person chooses voluntarily to waive their right to bring a claim before a court of law, choosing instead to enter into a form of voluntary arbitration that would not meet the requirements of article 6, provided that choice is made in a free, lawful and unequivocal manner, no issue will arise under the ECHR, see ***Mutu & Pechstein v Switzerland*** (applications nos. 40575/10 and 67474/10), 4 February 2019, at paragraphs 94-96.

Bias: the facts

32. As I have already observed, the various factors relied on by Mr Evans in support of the bias challenge have expanded over the course of the proceedings. Although (for the reasons explained at paragraph 24 above) I do not accept this is a legitimate approach, I have, in any event, addressed each of the matters referenced (those raised in argument in addition to those identified in the original notice of appeal). In addition, for the respondents, reliance is placed on the choice made by Mr Evans in deciding to pursue his complaints before the CO (said to amount to a waiver of any entitlement to otherwise object), and on nature of the CO's decision and the right of appeal afforded from that decision.

© EAT 2025

33. To carry out the required appraisal of these matters, it is first necessary to set out the facts relevant to the issues raised. In this section of the judgment, I have recorded what I have found to be the relevant facts under the following headings: A. Links between the CO and ACAS/Mr Clancy, and between the CO and trade unions more generally, and other structural/funding issues said to go to the CO's independence and impartiality; B. Allegations of actual bias said to be evidenced by how the CO has dealt with Mr Evans' complaints; C. Applications to the CO, the nature of the CO's decision and the right of appeal afforded from that decision.

A. Links between the CO and ACAS/Mr Clancy, and between the CO and trade unions more generally, and other structural/funding issues said to go to the CO's independence and impartiality

34. The CO is a statutory office, initially established by section 7 of the Employment Protection Act 1975, now as provided by section 254 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992"). The functions of the CO are prescribed by statute (the office has no inherent jurisdiction) and centre on the regulation of trade unions and employers' associations; some are administrative in nature (such as keeping the lists of trade unions and employers' associations, see sections 2 and 123 TULRCA), others quasi-judicial; the latter will (relevantly) include the determination of applications by those who claim that there has been a breach, or threatened breach, of the rules of a trade union in respect of specified matters, see section 108A TULRCA.

35. By section 254(2) TULRCA, it is provided that the CO:

> "... shall be appointed by the Secretary of State after consultation with ACAS but is not subject to directions of any kind from any Minister of the Crown as to the manner in which he is to exercise his functions."

36. At the relevant time, Ms Sarah Bedwell held the office of CO. Ms Bedwell was first appointed with effect from 1 January 2018, after a public recruitment exercise overseen by the Office of

© EAT 2025

the Commissioner of Public Appointments. The evidence before me is that consultation with ACAS about the appointment of the CO would normally be done by writing to the ACAS Chair but on this occasion Sir Brendan Barber (then ACAS Chair) was on the selection panel so that was unnecessary. Ms Bedwell's term was subsequently extended by six months (ACAS was not consulted about this) and she was then re-appointed in 2023 when, as the documents demonstrate, the Chair of ACAS (Ms Clare Chapman) was duly consulted. There is no evidence to suggest this was an issue that went to the ACAS Council on either occasion, and Mr Clancy's statement in these proceedings confirms that he had no opportunity to express any view about Ms Bedwell's appointment or re-appointment, and there is no evidence to suggest that he was at any stage consulted in this regard.

37. The CO's letter of appointment makes clear they can only be removed from office by the Secretary of State by reason of bankruptcy, incapacity (physical or mental), or if otherwise unfit to discharge the duties of the office. As a matter of fact, no CO has ever been removed from office. Moreover, by her statement in these proceedings, Ms Bedwell has confirmed that at no point during her terms of office was she subject to direction of any kind by any Minister of the Crown; although she would agree her high level objectives with the Director of Labour Markets at the Department for Business and Trade, those did not direct her in her statutory functions. Had there been any attempt to direct her, or otherwise interfere with her work, Ms Bedwell has made clear that she would have resisted this, referring to the statutory protection of her independence provided by section 254(2) TULRCA.

38. In terms of the funding of the CO, sections 254 and 255 TULRCA go on to provide as follows:

> "254 ...
> (5) ACAS shall provide the [CO] the requisite staff (from among the officers and servants of ACAS) and the requisite accommodation, equipment and other facilities. (5A) .. ACAS shall pay to the [CO] such sums as he may require for the performance of any of his functions.
> 255 ...

© EAT 2025

> (1) ACAS shall pay to the [CO] and any [ACO] such remuneration and travelling and other allowances as may be determined by the Secretary of State. ..."

39. Although the funding of the CO is thus provided through ACAS, from 1 April 2022 those costs are recovered by way of a levy imposed on trade unions and employers' associations by virtue of the Trade Union (Levy Payable to the Certification Officer) Regulations 2022 (SI 2022/252). The 2022 Regulations, made by the Secretary of State pursuant to section 257A TULRCA, make provision for the CO to impose a levy on trade unions and employers' associations to cover the CO's expenses, the total amount of which, over any three-year period, must not exceed the expenses incurred; in this context *"expenses"* are defined by section 257A(3)(a) to include *"expenses incurred by ACAS in providing staff, accommodation, equipment and other facilities under section 254(5)"*.

40. ACAS is an independent Crown Executive non-departmental public body funded by the Department for Business and Trade. It was originally established by section 1 of the Employment Protection Act 1975 and continues, pursuant to section 247 TULRCA, as a body corporate of which the corporators are the members of its Council (section 247(2)). As for the CO, by virtue of section 247(3) TULRCA, ACAS is expressly not:

> "… subject to directions of any kind from any Minister of the Crown as to the manner in which it is to exercise its functions under any enactment."

41. By section 248(1) TULRCA it is provided that ACAS shall be directed by its Council, which will consist of nine ordinary members and a Chairman appointed by the Secretary of State, who will consult representatives of employers before appointing three of the ordinary members and representatives of workers before appointing a further three. The Secretary of State is also responsible for determining the remuneration of ACAS Council members (section 248(2)) and is required to pay ACAS such sums as approved by HM Treasury as appropriate

© EAT 2025

for the purpose of enabling ACAS to perform its functions (section 252). Mr Clancy, General Secretary of Prospect, has been a member of the ACAS Council since May 2016.

42. In accordance with HM Treasury's handbook "*Managing Public Money*", a Framework Document has been agreed by the Secretary of State and ACAS which sets out the broad governance framework within which ACAS operates (a copy of the Framework document is available on the ACAS website). As this makes clear, the Council is responsible for "*establishing the strategic aims and objectives of ACAS*"; it is the Chief Executive, as Accounting Officer, who is "*personally responsible for safeguarding the public funds for which they have charge ... and for the day-to-day operations and management of ACAS*". The Chief Executive heads up the ACAS Executive Board, which is responsible for reviewing ACAS performance and delivery and ensuring effective management. In his witness statement for these proceedings, the Chief Executive of ACAS, Mr Daniel Ellis, explains:

> "3. The governance of ACAS is split across the Executive Board, which I head, and the Council. In broad terms, my role (and the role of the Board) is executory and 'hands on', while the Council's role is advisory and strategic. The Board is comprised of senior civil servants and carries out ACAS' daily functions stemming from our statutory duties, while the Council acts as a supervisory body which sets long-term strategy and assesses the Board's performance against its targets."

43. As for decisions regarding funding and resource issues, these are made by the ACAS Finance and Audit Committee; Mr Clancy is not a member of this committee, and, although it reports to the ACAS Council, no operational details are reported.

44. The day-to-day operation of the relationship between the Secretary of State, ACAS and the CO, is described in a Memorandum of Understanding ("MoU"), which is publicly available on the CO's website. The ACAS Chief Executive acts as the CO's Accounting Officer and the CO is thus accountable to the ACAS Chief Executive in relation to the CO's governance and finances, but not otherwise (see paragraph 3.4 of the MoU). The CO is required to provide

© EAT 2025

an annual report of their activities both to ACAS and to the Secretary of State (section 258 TULRCA, and MoU paragraphs 3.5 and 12.1), but, as the MoU makes clear, the functions of the CO are carried out independently of ACAS, and it is the CO who determines the most efficient means of delivering those functions and how to use the resources available in so doing, subject to the objectives and key targets they have set (MoU paragraphs 3.3 and 4.2). As for the reference to the CO within the ACAS annual report, this relates to the remuneration and pension interests of the CO (the report making clear that the salaries of the ACAS Chair and the CO are set by the Prime Minister following independent advice from the Senior Salaries Review Body).

45. By section 254(3)-(4) TULRCA, it is provided that the CO may appoint one or more ACOs and may delegate to an ACO "*such functions as he considers appropriate*"; decisions regarding the appointment, and number, of ACOs, and as to the functions to be delegated, are thus entirely for the CO. Throughout her appointment, Ms Bedwell had one full-time ACO, who handled the day-to-day management of the office and (relevantly) exercised the delegated function of deciding whether to refuse to accept applications. From 2018 to August 2020, the ACO was Mr Gerald Walker; from July 2020 to April 2023 this role was filled by Mr Thomas Price; thereafter Mr Michael Kidd acted as ACO. As Ms Bedwell has explained, Mr Kidd was formerly a member of Prospect and, accordingly, this fact was disclosed to Mr Evans and Mr Kidd has had no involvement with any of Mr Evans' complaints.

46. More generally, although the CO's (six) staff are provided through ACAS, which provides HR and administrative support, the CO selects and recruits their own staff, operates their own Investors in People accreditation, and those working for the CO will be subject to the Civil Service Code, which requires them to act with honesty, integrity and impartiality. As envisaged by section 37B TULRCA (which relates to investigations into the financial affairs of trade unions), the CO can appoint inspectors to carry out particular work, and such

© EAT 2025

inspectors may be appointed from the CO's existing staff or may be external appointees. There is no evidence that this has ever given rise to any financial issues for the CO, and Ms Bedwell has explained that, if not drawn from the CO's existing staff, this is likely to be funded from the CO's budget for professional services or, to the extent necessary, by approaching the Department for Business and Trade or through an ACAS underspend. An additional concern expressed by Mr Evans relates to the CO's use of the Government Legal Department for legal advice (the CO does not need to be legally qualified), when that entity will also be used by the Secretary of State; as the evidence before me makes clear, however, different legal teams will be used for these purposes. More generally, although the CO's office uses the ACAS IT system, Ms Bedwell has confirmed that no ACAS employees (still less Council members) will have access to emails to and from the CO's office unless they are specifically working for the CO (or dealing with an IT service issue).

47. At the time of the decision under challenge, the CO's office was located at Windsor House on Victoria Street, where ACAS was based. Subsequently, both have been located in the same building in Stratford. The two offices were previously co-located at Euston Tower (on the Euston Road), although there was also a period when the CO was based apart from ACAS, at Fleetbank House (off Fleet Street). Within Windsor House, the staff working for ACAS and the CO were located in the same pass-controlled open plan area, albeit they did not share desks - the CO's team worked at a specific bank of allocated desks within that area. There is no evidence to suggest that the ACAS Council – still less Mr Clancy – was instrumental in any decision regarding the location of the CO.

48. As for the presence of ACAS Council members at the London office used by ACAS, as Mr Ellis has explained, the Council has five meetings a year, which will either take place in the office or by hybrid means; members of the Council do not have offices or desks at ACAS and will attend meetings in rooms separate from the pass-controlled area where the CO's office is

© EAT 2025

located. More specifically, it is Mr Clancy's evidence that he met Ms Bedwell once (on 30 July 2019) in his capacity as General Secretary of Prospect, and he recalls that she attended an ACAS Council meeting on one occasion "*on an introductory basis*" following her appointment. Other than recalling a possible further meeting as part of Mr Price's induction as ACO, Ms Bedwell's evidence is consistent with that of Mr Clancy; she observes that she would otherwise have only come across Mr Clancy or other members of the ACAS Council by happenstance, as and when they were arriving or leaving a meeting. Ms Bedwell has herself never been a member of the ACAS Council and it is apparent that her interactions with Mr Clancy have, as described in the evidence, been minimal.

49. More generally, in her statement for this appeal, Ms Bedwell has confirmed that she has met with other trade union General Secretaries, "*on a range of issues*"; as she explains:

> "51. ... As my role involves making decisions in respect of union matters, I consider it to be entirely appropriate that I foster professional and trusting relationships with those leading unions."

There is no evidence that the CO has, however, demonstrated bias in the decisions she has made relating to complaints against trade unions, and, as was pointed out in argument, recently upheld a complaint against Unison, the largest trade union in Great Britain (the General Secretary of which is also a member of the ACAS Council), see ***Sartin v Unison*** D/2/23-24.

50. In his arguments for the appeal, Mr Evans has sought to place reliance on the arrangements for the funding of the CO and on Mr Clancy's role as a member of the ACAS Council and of its People and Remuneration Committee; as Mr Evans puts the point: *"... Mr Clancy is in fact in charge of remuneration for the [CO]. Is this not a significant conflict of interest?*" (Mr Evans' witness statement at paragraph 25). The (publicly available) evidence, however, is that the remit of the ACAS People and Remuneration Committee extends only to review of the performance of senior civil servants, and their pay and rewards (including any awards and

© EAT 2025

bonuses); none of those working in the CO's office fall within this category and their remuneration is negotiated via collective bargaining with recognised trade unions and determined under the Civil Service pay remit.

B. Allegations of actual bias said to be evidenced by how the CO has dealt with Mr Evans' complaints

51. In developing his case on bias, Mr Evans' has complained of "*Urgent strike-outs without full evidence*", of "*Constructed defences on Prospect's behalf*" and "*Pre-emptive rejection of financial irregularities ...*", submitting:

> "Taken together, these facts support the conclusion that the CO's handling appears bias and protecting her boss, Mr Clancy – structurally, procedurally, and institutionally ..."

I have already examined the structural arrangements existing between ACAS and the CO; there is no basis for the assertion that Mr Clancy was ever the CO's "*boss*".

52. Mr Evans' allegation of bias on the part of the CO in dealing with his complaints further extends to staff within the CO's office, who he says were "*involved in the decision-making process*", relying in this regard on correspondence from one of the CO's operations managers, Ms Hirji, of 24 January and 13 April 2022; from the ACO, Mr Price, of 1 February 2022; and from the CO herself of 24 March and 12 April 2022. Mr Evans says there was "*no consistent application of law*"; that Mr Price "*rejected a financial complaint for lack of jurisdiction ... then admitted he wasn't familiar with that part of the legislation*"; that another operations manager, Mr Goldstein, "*reversed his legal conclusion without explanation"*; and that Ms Hirji "*imposed extra-statutory condition for admissibility*" and sent "*letters and decisions*" that "*repeatedly misstate the law*".

53. An allegation of bias will not be properly founded where it is simply based on a disagreement with the decision reached. Even if the decision-taker is subsequently found to have erred in

© EAT 2025

their approach to the decision in issue, without more, that would not evince bias. In the present case, the decisions in issue relate: (1) to the striking out of Mr Evans' application, the CO exercising the power afforded to her under section 256ZA TULRCA, and (2) to the CO's refusal to admit a further application that Mr Evans had sought to submit. I address the arguments relating to these decisions when dealing with the other grounds of appeal below; the question for me at this stage is whether there is anything that reveals predetermination or a closed mind, or would, more generally, cause the informed, fair-minded observer to consider there was a real possibility of bias.

54. Mr Evans makes the point that, in the CO's annual report for 2023, Ms Bedwell made the following observation:

> "We have continued to develop the processes we follow when we receive complaints from members. This is to ensure that there is a reasonable prospect of success before a case reaches a hearing. We recognise that some complainants have found this difficult and we have seen an increase in appeals to the Employment Appeals Tribunal. We will monitor the impact of this over the coming year to ensure that the balance is right. We believe, however, that it is right that unions should only face the expense of a hearing where the complainant has demonstrated that there is a case to answer. ...."

It is Mr Evans' submission that this suggests that the CO had "*applied a policy filter to shield unions from scrutiny*" and that there was a failure to apply the correct legal test, as explained in ***Embery v Fire Brigades Union*** [2023] EAT 134, at paragraph 20.

55. If the evidence did indeed demonstrate a systemic misuse of the strike out power afforded by section 256ZA TULRCA, I would agree with Mr Evans: the fair-minded, informed observer would be likely to conclude there was a real possibility of bias. The passage from the CO's 2023 annual report on which Mr Evans relies does not, however, establish this point. By saying that a respondent (here, a trade union) should only face the expense of a hearing where there is a case to answer, the CO was doing no more than stating that which is inherent in

© EAT 2025

allowing that there should be a power to strike out an application which has no reasonable prospect of success; of itself, the statement in the 2023 annual report takes matters no further.

56. Mr Evans says evidence of bias is, however, provided by an increase in the number of applications struck out by the CO; by his calculations, he has said that this has risen from "*around 10% to over 50%*". Even if I accept those figures (which are not agreed), I would still need to place this in context. Having reviewed the way in which the CO dealt with Mr Evans' applications, it is apparent that a process is applied whereby a complaint is not simply assessed on its face, as first presented, but, to the extent necessary, is clarified with the complainant so there is a proper understanding of how the application is put. Thus, the CO does not simply move to strike out an application that fails to properly particularise the complaint (for example, by failing to identify the relevant breach of rule), but provides the complainant with further opportunity to correct omissions and to set out the case they wish to advance. The evidence further shows that the CO will look at any prior response from the relevant trade union and, anticipating the points that might then be taken in a reply, seeks the views of the applicant as to the adequacy and/or merit of that response. Finally, and as required by section 256ZA(4) TULRCA, the CO sends notice to the complainant to provide an opportunity to show cause why the application should not be struck out.

57. Section 256ZA TULRCA expressly envisages that the CO might act on her own initiative in striking out an application (see section 256ZA(3)), and that, allowing that this might be "*at any stage of proceedings*", this might take place before any hearing. More generally, by section 256, save as otherwise provided, the CO is entitled to regulate the procedure to be followed on the receipt of any application or complaint. Having developed the processes followed on the receipt of an application in the way I have described, it may well be that the CO has been able to identify a larger number of applications that can properly be said to have no reasonable prospects of success. Adopting, as I am required to do, an informed and fair-

© EAT 2025

minded approach to the statistical data Mr Evans seeks to rely on, I do not consider this gives rise to an appearance of bias.

58. As for whether such an inference should be drawn from the CO's decision on Mr Evans' applications, I note that the complaint in this regard is that the CO moved to strike out the complaints with a degree of urgency and without hearing evidence. Looking at the relevant chronology, however, I am unable to see this would support the contention that there was any urgency to the CO's decision. The complaints in issue were submitted by way of application to the CO on 5 December 2021, 30 January and 22 March 2022. An iterative process ensued, with efforts made to clarify how Mr Evans was putting his complaints and to ensure he had the opportunity to fully explain his case, mindful of the arguments Prospect had intimated it would take. Having subsequently received Prospect's response to the complaints, the CO reached a preliminary view that the applications had no reasonable prospect of success. Having explained that provisional assessment to Mr Evans, he was given further opportunity to make representations as to why his complaints should progress. Having received those representations, it was on 1 July 2022 that the CO made her decision. As for the failure to hear evidence, that was because the CO reached her view on the basis of her interpretation of the relevant rules; on the CO's approach, that gave rise to a pure question of construction. I address the merits of Mr Evans' challenge to the CO's reasoning below, but, duly informed of that approach, the fair-minded observer would not consider that the failure to receive evidence suggests a real possibility of bias.

59. As for the refusal to accept Mr Evans' further application, this had been submitted on 8 June 2022 and again related to his suspension. The CO's decision not to admit this application was communicated to Mr Evans by letter of 1 July 2022, explaining: (1) the application "*effectively duplicates the issues raised in your previous complaints*", and (2) the application did not set out "*which Rule you believe the Union breached when adopting the Standing Orders*

© EAT 2025

introducing the power to impose a precautionary suspension". Referring me to the ruling of the EAT in ***Chandra v UCU*** [2025] EAT 70, Mr Evans says that, given that the reasons provided did not fall within section 108B TULRCA and that the CO thus had no power to refuse to accept his application (or to strike it out without first giving him notice to show cause), this gives rise to the appearance of bias.

60. Again, I have addressed the merits of the proposed challenge relating to this further decision below. Acknowledging the ruling of Bourne J in ***Chandra***, however, I do not read this as suggesting the CO's approach, in erroneously purporting to not accept an application, gave rise to an appearance of bias. Moreover, given that ***Chandra*** pre-dated the decisions in issue in the present case, I am unable to see that it assists Mr Evans in respect of his appeal under ground 13: assuming the CO did indeed err in her approach (per ***Chandra***), that would not be sufficient to lead the informed and fair-minded observer to conclude there was a real possibility that this was due to bias (as opposed to a mistaken view of the powers afforded to the CO under the relevant provisions of TULRCA).

61. As for the various matters raised relating to communications with various members of the CO's staff, much of the correspondence relied on arises in respect of complaints other than those with which this appeal is concerned. Thus, the correspondence referenced from Messrs Goldstein and Price related to complaints regarding access to accounting records and allegations of financial irregularities, not the alleged breaches of the rules leading to the decisions under appeal. Even if I assumed, however, that this could be relevant (in an attempt to show some general animus directed towards Mr Evans), I am satisfied that a fair-minded, non-partisan, reader would draw no adverse inference from these communications. That, in an email of 2 August 2021, Mr Price volunteered he was not very familiar with a particular part of the legislation does not, viewed objectively, suggest a real possibility of bias. Mr Price was replying to a detailed analysis of the statutory provisions in Mr Evans' email of 30 July

© EAT 2025

2021 and his response can only fairly be construed as indicating a preparedness to look at the point further; far from suggesting pre-judgment or prejudice, the natural inference is that Mr Price was looking at the points raised by Mr Evans with an entirely open-mind. As for the letters from Mr Goldstein, I do not agree these show he "*reversed his legal conclusion without explanation*". The first letter referenced, of 23 November 2021, raised a question with Mr Evans as to the applicability of section 30 TULRCA, with an explanation as to why Mr Goldstein had thought this to be relevant in a subsequent letter of 29 November 2021. When Mr Evans wrote (also on 29 November 2021) clarifying the point he was making (refuting Mr Goldstein's understanding), this led to a further letter, of 6 December 2021, addressing this different basis for the complaint. Assuming the fair-minded reader had properly informed themselves as to the correspondence as a whole, the objective inference to be drawn would be that the CO's staff were seeking to clarify Mr Evans' complaint, correcting their understanding of how it was being put as this was made clearer to them.

62. As for the letter of 24 January 2022 from Ms Hiji (which does, at least in part, relate to one of the complaints in issue in these proceedings), that was doing no more than advising Mr Evans of the potential ways in which the matter might be taken forward. Ms Hirji thus explained that if she accepted the complaints were arguable, she would then progress the matter by seeking Prospect's response, before putting the case before the CO for a decision. On the other hand, if she did not consider the complaints were arguable, it would be for Mr Evans to indicate whether he still wished to pursue the matter; if so, it would then be put before the CO for a decision on admissibility. Ms Hirji was expressly not usurping the decision-making functions of the CO, but was making clear the different routes by which the matter might be put before the CO.

63. Separately, Ms Hirji's letter of 23 February 2022 is relied on by Mr Evans as demonstrating that she had a closed mindset and/or had predetermined the complaint because (as he submits)

© EAT 2025

she had "*suggested, without basis, that the election Code of Conduct only applies where there is more than one candidate*". That, however, is a mischaracterisation of Ms Hirji's letter, which set out what she understood to be Prospect's position on the point (as discerned from earlier correspondence), then asking for Mr Evans' response. The fair-minded inference to be drawn from this communication is that Ms Hirji wanted to make sure Mr Evans had been given the opportunity to properly explain his case; that does not suggest predetermination. The subsequent letter of 13 April 2022 was written after Mr Evans had responded, and confirmed that the complaints relevant to the present appeal had been accepted, explaining the process that was then to be followed. On 26 May 2022, having received Prospect's response and after all the papers had been put before the CO, Ms Hirji wrote to Mr Evans pursuant to section 256ZA(4) TULRCA, to give notice of the CO's preliminary view that the complaints had no reasonable prospect of success, and inviting him to show cause why they should not be struck out.

C. Applications to the CO, the nature of the CO's decision and the right of appeal afforded from that decision

64. By section 108A TULRCA, a trade union member is afforded the right to apply to the CO where they claim that "*there has been a breach or threatened breach of the rules of a trade union*" in relation to any of the matters mentioned in subsection 108A(2), which include:

> "(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);
> ...."

Where an application is made under section 108A, the CO may refuse to accept it unless satisfied that all internal steps have been taken to resolve matters (section 108B(1)); if an application is accepted, however, the CO is required to (a) make such enquiries as they consider fit; (b) give both sides an opportunity to be heard; (c) ensure, so far as reasonably

© EAT 2025

practicable, the application is determined within six months; and (d) give written reasons for their decision (section 108B(2)).

65. The rules of a trade union constitute a contract between all of its members from time to time (***Heatons Transport (St Helens) Ltd v TGWU*** [1973] AC 15 HL; ***Evangelou v McNicol*** [2016] EWCA Civ 817, paragraph 19; and ***Kelly v The Musicians' Union*** [2020] EWCA Civ 736, paragraph 36(1)). As such, it would be open to a trade union member to pursue a complaint regarding an alleged breach of the rules by way of a claim of breach of contract before the civil courts. The ability to apply to the CO in this regard does not remove the member's right of access to the courts, but pursuing such a claim will mean the member cannot then make an application to the CO in relation to the same breach, whereas (contrariwise) making an application to the CO will mean that the same claim cannot then be made to the court (see section 108A(14)-(5) TULRCA). TULRCA thus provides for an alternative means by which trade union members can seek a determination regarding alleged breaches of union rules in certain contexts, but requires them to make a choice as to which forum they wish to use.

66. In the present case, Mr Evans' complaints to the CO were that Prospect had – in suspending him and in the statement regarding Mr Clancy's re-election – acted in breach of the union's rules. Each of the complaints thus gave rise to a question of construction in relation to the rules in issue. The CO's reasoning is addressed in more detail below, but her decision was that Mr Evans' complaints had no reasonable prospects of success and she therefore considered his applications were to be struck out, pursuant to section 256ZA(1)(a) TULRCA. Where an application to the CO is thus struck out, by section 256ZA(7) it is provided that:

> "An appeal lies to the Employment Appeal Tribunal on any question of law arising from a decision of the [CO] under this section."

© EAT 2025

67. Where an application to the CO is not struck out pursuant to section 256ZA TULRCA but is then the subject of a decision of the CO under chapter VIIA TULRCA (the chapter, headed "*Breach of Rules*", which contains section 108A), by section 108C it is provided that:

> "An appeal lies to the Employment Appeal Tribunal on any question arising in proceedings before or arising from any decision of the [CO] under this Chapter."

This right of appeal was previously limited to "*any question of law*" but was amended by the Trade Union Act 2016, as from 1 April 2022, in relation to relevant decisions of the CO made on or after that date. The background to the amendment is explained in the witness statement of Mr James Silcox, for the Secretary of State. Mr Silcox is Deputy Director, Trade Union and Collective Rights within the Department for Business and Trade; he explains how this broadening of the supervisory function of the EAT – allowing for appeals on questions of fact as well as law – was a response to concerns (expressed by a former CO and by various trade unions) about the extension of the CO's powers under the Trade Union Act 2016.

68. When concerned with an appeal from a strike out decision of the CO under section 256ZA TULRCA, the approach the EAT will adopt was made clear at paragraph 20 ***Embery***:

> "… It would … 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" ... 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 ..."

69. For the purpose of disposing of an appeal, section 35 of the Employment Tribunals Act 1996 provides that the EAT may:

> "(a) exercise any of the powers of the body or officer from whom the appeal was brought, or (b) remit the case to that body or officer."

© EAT 2025

Bias: analysis and conclusions

70. Having thus investigated the relevant facts, I now return to the concerns expressed by Mr Evans, again addressing the competing arguments under the headings previously identified, before stating my conclusion on this ground of appeal.

A. Links between the CO and ACAS/Mr Clancy, and between the CO and trade unions more generally, and other structural/funding issues said to go to the CO's independence and impartiality

71. The primary focus of Mr Evans' complaint of bias relates to the fact that the General Secretary of Prospect – the trade union against which his complaints to the CO were made – was a Council member of ACAS, when ACAS, pursuant to sections 254 and 255 TULRCA, is the entity that is required to provide the CO's staff, accommodation, equipment and other facilities, and is otherwise bound to fund the CO. A subsidiary point, which also relates to the relationship between ACAS and the CO, is raised in respect of the representation of trade unions on the ACAS Council (not a statutory requirement as such, but a practical consequence of the Secretary of State's obligation to consult with workers' representatives when appointing three of the Council members). Mr Evans has identified various issues arising from the structural and financial relationship between ACAS and the CO which he says gives rise to the appearance of bias. The question (per ***Kelly***) is whether this gives rise to a cogent and rational link to any apprehension that Mr Evans' complaints to the CO would not receive a fair and impartial determination: having ascertained all the circumstances, I must thus ask whether those circumstances would lead a fair-minded and informed observer to conclude that, in dealing with Mr Evans' complaints, there was a real possibility that the CO was biased (per **Re Medicaments** and **Porter v Magill**).

72. Fully informed as to the relevant facts (set out in the preceding section of this judgment), the fair-minded observer would, I am satisfied, find that the CO's office is run independently of

© EAT 2025

ACAS. It is the CO who determines whether to delegate any functions (and, if so, what) to an ACO, and who decides who should be appointed to that role. Relevantly for present purposes, the CO chose to appoint a full-time ACO to handle the day-to-day management of the office and to carry out certain delegated decision-making functions in relation to complaints, including whether to accept applications. More generally, it is the CO who selects and manages the staff who will support that office, and those individuals, even when co-located in the same open-plan environment as those working for ACAS, will have their own desks and means of communication, and will be subject to the Civil Service Code, which requires them to act with honesty, integrity and impartiality. As for the ACAS People and Remuneration Committee (of which Mr Clancy is a member), this is concerned with the performance, pay and rewards of senior civil servants employed by ACAS; none of those working in the CO's office fall into that category.

73. While it is right that the ACAS Chief Executive acts as the CO's Accounting Officer, the fair-minded observer would understand this is a necessary governance requirement for this publicly funded office, noting that the MoU makes clear that the functions of the CO are to be carried out independently of ACAS. Moreover, having investigated the governance arrangements, the fair-minded observer would further appreciate that the CO's annual reporting requirements are part of the way in which public accountability is ensured, and would see that the reference to the CO in the ACAS annual report relates to the remuneration and pension entitlements of the CO, again providing transparency in the public funding of this statutory role. Thus informed, the fair-minded observer would not see these matters as providing any cogent and rational link to an apprehension that Mr Evans' complaints would not receive a fair and impartial determination.

74. I am further satisfied that the fair-minded observer would not be concerned to learn that the CO obtains legal advice from the Government Legal Department, an entity also used by

© EAT 2025

ACAS and the Secretary of State, but which will provide different individuals to give the different types of advice required. Similarly, that observer would not change their view on learning that the CO might appoint inspectors to carry out particular tasks, either using their professional services budget to pay for this or by seeking additional funding from ACAS or from the Department for Business and Trade; the fair-minded recipient of this information would bear in mind that the decision on such an appointment would be a matter for the CO, who could simply opt to appoint one of their existing staff members to act as an inspector in such circumstances. More generally, the objective observer would not speculate as to what might happen if the CO required additional funds to carry out their functions, but would look to see what has happened in practice. Doing so, they would note that there is no evidence that any issues over the financing of the office have ever arisen, and that, since 1 April 2022, the costs incurred by ACAS in funding the CO are recovered from a levy imposed on trade unions and employers' associations, which operates in a way that protects the CO from any direct dealings with trade unions in this regard: the CO's finances may ultimately be partly derived from trade unions but there is no direct financial link between the unions and the CO's office.

75. Looking at the CO's relationship with trade unions more generally, Mr Evans has expressed concern about Ms Bedwell's statement in these proceedings, in which she confirmed meeting with General Secretaries of various trade unions "*on a range of issues*", viewing this as part of her role. Mr Evans sees a further link in this respect arising from the relationship between ACAS and the CO, given that three members of the ACAS Council are likely to be trade union representatives, which may include union General Secretaries. In considering this evidence, the fair-minded observer would note that a large part of the CO's role is concerned with administrative matters relating to trade unions and employers' associations, and would understand the need to maintain "*professional and trusting relationships*" in this regard. Nonetheless, this observer would not be complacent (per ***Helow***), and would look to see

© EAT 2025

whether the maintenance of such relationships has impacted upon the CO's independence and impartiality when determining complaints against trade unions. Having investigated the material available, however, the fair-minded observer would find no evidence to suggest that the CO had demonstrated a biased approach, even where complaints have been brought against the largest trade union, with a General Secretary who is an ACAS Council member.

76. Returning to the potential influence that Mr Clancy (as General Secretary of Prospect and a member of the ACAS Council) might exert over the CO, the informed observer would be alert to the fact that the CO is appointed by the Secretary of State only after first consulting with ACAS (section 254(2) TULRCA) but would, fair-mindedly, look beyond that headline (per ***Helow***) to again see what has happened in practice. So doing, they would note that there is nothing to suggest the ACAS Council had any involvement in Ms Bedwell's appointments and that, more particularly, Mr Clancy was at no stage consulted. Because this observer would not be complacent, however, they would also inform themselves of any interactions between Mr Clancy and the CO, but, objectively considering the evidence in this regard (allowing for the fact there might have been an additional meeting (as part of Mr Price's induction) that Mr Clancy had not remembered), I am satisfied that the fair-minded recipient of this information would find these interactions gave rise to no cogent or rational link with any apprehension that Mr Evans' complaints might not receive a fair hearing, concluding there was no relationship that would begin to suggest a possibility of bias. As for Mr Evans' suggestion that it might be relevant that both Mr Clancy and the former Chair of ACAS had supported the Remain campaign in 2016 and/or might support the same football team, I do not consider a fair-minded observer would see this as having any relevance to the question whether there was an appearance of bias relating to the decisions of the CO on Mr Evans' complaints.

77. More generally, the fair-minded observer would note the constraints on the removal of a CO from office (not a matter on which ACAS is required to be consulted) and the fact that no CO

© EAT 2025

has been so removed. They would have regard to the protection of the CO's independence provided by section 254(2) TULRCA, and to Ms Bedwell's evidence as to how she would have relied on this provision had there ever been any attempt to direct her or otherwise interfere with her work (which there was not). Aware that the CO is not required to be legally qualified and does not take a judicial oath, the informed observer would understand these safeguards are relevant but not determinative (see ***Starrs v Ruxton***), and would, I am satisfied, find no evidence to suggest the independence and impartiality of the CO's decision-making had been impaired as a result. Moreover, and significantly, the fair-minded and informed observer would note that there is no involvement in the CO's adjudication of complaints by anyone outside that office; specifically, there is no involvement by the ACAS Chief Executive or any other staff who work for ACAS, still less by the ACAS Chair or its Council.

B. Allegations of actual bias said to be evidenced by how the CO has dealt with Mr Evans' complaints

78. My findings of fact relevant to Mr Evans' allegations of actual bias in the handling of his complaints are set out at paragraphs 51-63 above; there is no evidence to support the allegations made, either as to the time taken to consider Mr Evans' applications or as to the approach adopted by the CO, the ACO, or by other members of the CO's staff.

79. To support his case in this respect, Mr Evans also relied on various allegations of actual or apparent bias in the way the CO approaches complaints against trade unions more generally, arguing that, in using the strike out power afforded by section 256ZA TULRCA, the CO has applied a "*policy filter to shield unions from scrutiny*", and that this has led to a significant increase in the number of complaints that have been struck out. I have, however, not found any systemic misuse of the CO's strike out powers, nor any evidence of a bias in favour of protecting trade unions from valid complaints. The evidence does not support a finding of actual bias, nor, adopting the viewpoint of the informed and fair-minded observer, can it be considered that the circumstances give rise to a real possibility of bias.

© EAT 2025

C. Applications to the CO, the nature of the CO's decision and the right of appeal afforded from that decision

80. In making his applications to the CO, Mr Evans was contending that Prospect had acted in breach of its rules (as to his suspension, as to the President's statement regarding Mr Clancy's re-election as General Secretary, and in its response to his complaint about that statement). As such, he had a choice whether to pursue a civil claim for breach of contract (a union rule book being a contract between the members, per ***Heatons Transport***) or to apply to the CO (section 108A(14)-(15) TULRCA). In choosing to pursue applications before the CO (on 5 December 2021, 30 January 2022, and 22 March 2022), Mr Evans was aware of Mr Clancy's membership of the ACAS Council and of the structural and financial arrangements between ACAS and the CO (matters of public record, with the relevant documentation largely available on the CO and ACAS websites): he started to identify concerns in this regard in late June/early July 2021 and, by 5 December 2021, had engaged in extensive correspondence raising many of the points he has relied on in these proceedings, expressing his view that these gave rise to questions as to the CO's independence and impartiality.

81. For the respondents, it is said that, thus fully aware of the relevant facts, by choosing to pursue his complaints by way of application to the CO, rather than through the courts, Mr Evans was clearly and unequivocally waiving his right to object to the CO's decisions on the ground of bias; this, it is said, being analogous to the decision to agree to voluntary arbitration that the ECtHR had to consider in ***Mutu***. I am not entirely persuaded by this argument as there are important distinctions between the choice exercised by Mr Evans and a contractual arbitration clause such as that in issue in ***Mutu***. Certainly many trade union members might consider the costs implications of pursuing a claim before the civil courts effectively removes this as a practical option, limiting their "choice" to the making of an application to the CO. Ultimately,

© EAT 2025

however, given my view as to the absence of bias (actual, automatic, or apparent), this is not a question I need to determine in this case.

82. The respondents make the further point that, regardless of any structural shortcomings to the process before the CO, the question whether Mr Evans has been provided with access to "*an independent and impartial tribunal established by law*" requires a composite approach, considering not just the CO's adjudication but also the appeal rights afforded under either section 108C TULRCA (where a substantive determination has been made by the CO) or section 256ZA(7) (where, as here, an application has been struck out): see the case-law cited at paragraph 29 above. Accepting the process is to be viewed holistically, Mr Evans objects, however, that his appeal rights are limited, given that section 256ZA(7) only allows for an appeal to the EAT on a question of law. It is Mr Evans' case that his applications to the CO raised factual disputes as to custom and practice within Prospect relevant to the rules in issue, and that, by striking out his complaints, the CO effectively denied him access to a supervisory tribunal with the jurisdiction required by article 6 ECHR: as the EAT can only adjudicate on questions of law on appeals under section 256ZA(7), it cannot undertake what he says is the necessary factual review sufficient to remedy the failings of the CO.

83. As is common ground, in considering complaints – whether of automatic or apparent bias – arising from the arrangements put in place for the determination of a civil right or obligation, it is necessary to have regard to the entirety of the process available. Adopting that approach, although I have not found that the process before the CO breached Mr Evans' article 6 rights, if there were any shortcomings in the means by which his complaints were adjudicated at first instance, those would, I am satisfied, be remedied by his right of appeal to the EAT. This is not a point that is undermined by the limited nature of the appellate jurisdiction under section 256ZA(7) TULRCA. The question is whether the supervising court has the jurisdiction to deal with the appeal as the nature of the case requires, considering the subject matter of the

© EAT 2025

decision under appeal, the manner in which that decision was reached, and the content of the dispute (see ***Bryan***, paragraph 45; ***Runa Begum***, paragraph 51; ***Ali***, paragraph 70).

84. Here, the grounds of challenge permitted to proceed require the EAT to determine whether the CO erred in striking out Mr Evans' complaints. The question of law thus identified does not require any finding of fact: pursuant to the guidance provided in ***Embery***, if it were considered that the CO had erred by striking out an application involving a crucial core of disputed facts (as may arise where there is an issue of custom and practice relevant to the interpretation of a particular rule), unless the claim being made was "*merely fanciful*", the decision could be set aside and the matter remitted to the CO for substantive determination. The limited nature of the EAT's jurisdiction under section 256ZA(7) is apposite given the limited nature of the decision under appeal; no findings of fact have been made by the CO and the EAT has full jurisdiction over the decision it is required to review (per ***Ali***).

85. Mr Evans makes the further complaint, however, that remission back to the CO would not be appropriate if the appeal were upheld on bias grounds; given there is no mechanism for recusing the CO, the limited nature of the EAT's jurisdiction would mean he would be left without a remedy.

86. I disagree. First, I do not accept that there is no means by which the CO might not be recused from determining a case where it is considered that they are unable to do so with the required independence and impartiality. As I have already observed, the CO has the power to appoint one or more ACOs and to delegate "*such functions as he considers appropriate*" (section 254(3)-(4) TULRCA); such an ACO could be charged with the determination of a case where the CO was unable to fulfil this function. Secondly, and in any event, for the purpose of disposing of an appeal, the EAT may either remit the case to the CO or may "*exercise any of the powers* of that office (section 35 Employment Tribunals Act 1996). As such, notwithstanding the limited gateway under section 256ZA(7) TULRCA, if the appeal were

© EAT 2025

upheld, the EAT could then proceed to exercise the powers of the CO in determining the substantive merits of the application itself. Alternatively, if that were not considered appropriate, the EAT could remit the case with the express direction that it was to be determined by an ACO appointed for this purpose under section 254 TULRCA.

Conclusion

87. There is no evidence that any of the CO's interactions with Mr Clancy influenced her, or the ACO, in any dealing with Mr Evans' complaints. Moreover, applying the tests laid down in both domestic and ECtHR case-law (and, in particular, having regard to the factors identified in ***BEG SPA v Italy***, as set out at paragraph 25 above), I am satisfied there is no cogent or rational link arising from Mr Clancy's role on the ACAS Council - either relating to the structural and financial relationship between ACAS and the CO, or from the way in which that relationship operates in practice - and any apprehension that Mr Evans' complaints might not receive a fair hearing. More generally, I am clear that the fair-minded and informed observer would find no real possibility of bias on the part of the CO arising from any relationships between that office and trade unions. In my judgement, this is a case more akin to that under consideration in ***Sandhar*** than ***Ali Riza***.

88. Even if I was wrong in reaching that conclusion, however, and it was considered that the structural and financial arrangements that underpin the CO's office might be said to give rise to some possibility of bias, I am satisfied that the right of appeal to the EAT would fully address that risk.

89. For all the reasons provided, I therefore dismiss ground 13.

© EAT 2025

The substantive appeal (grounds 1, 2, 5, 6, and 10): the background facts and the CO's decision

90. By his appeal at grounds 1, 2, 5 and 6, Mr Evans complains that the CO erred in striking out his complaints regarding his suspension from office, which he said was in breach of Prospect's rules. By ground 10 (second part), he contends the CO further erred in striking out his complaint regarding a statement made by Prospect's President regarding the candidature of Mr Clancy for re-election as General Secretary, which he claimed amounted to a breach of Prospect's election code of conduct.

91. Before addressing the parties' submissions on the substantive appeal, I have first summarised the relevant factual background and the CO's decisions (and reasoning) under challenge.

The factual background

92. At the relevant time, Mr Evans was a member of Prospect and held office within the Broadcasting, Entertainment, Communications and Theatre Union ("BECTU"), a sector of Prospect. On 17 June 2021, Mr Evans was notified that there was to be a disciplinary investigation into a complaint that had been made against him by a female employee of the union, alleging a campaign of bullying, harassment and sex discrimination. On 23 June 2021, Mr Evans was informed that:

> "... the NEC disciplinary sub-committee convened today. They gave initial consideration to the process.
> They have reviewed the matters which are the subject of the complaint against you and concluded that you should be suspended from union office with immediate effect."

It was stated that the power of suspension had been exercised:

> "... in accordance with paragraphs 11-13 of the disciplinary standing orders regarding precautionary suspension."

A copy of the standing orders was provided.

© EAT 2025

93. On 5 December 2021, Mr Evans made an application to the CO relating to his suspension, complaining this was in breach of the rules.

94. Ultimately, the complaints of bullying and harassment were upheld against Mr Evans; the complaint of sex discrimination was not.

95. Meanwhile, on 15 September 2021, a circular was sent to union members which included the following message from Ms Eleanor Wade, President of Prospect:

> "Trade Union law requires our General Secretary to be the subject of election every five years. Therefore this is formal notice to members under the national rules that Mike Clancy is the nominee of your National Executive Committee (NEC) for the next five year term. That is a unanimous decision of the NEC taken at its March 2021 meeting. ...
> I think members should know that in preparation for the March NEC meeting I said:
> "I am sure we all reflect positively on how the union has grown in membership and influence during Mike's tenure as General Secretary and the strong relationships he has forged with the NEC and across the union. The last 12 months have been extraordinarily challenging and the fact that we are in such good shape organisationally and financially, illustrates the qualities of his leadership which will be invaluable as we hopefully move into recovery across the economy."
> I know Mike wants to devote his considerable energy and focus for another five years and your NEC welcomes his decision to stand again."

96. On 18 September 2021, Mr Evans complained to Prospect's Deputy General Secretary that this statement breached paragraph 7 of the code of conduct for General Secretary election ("the code"), which provides that union resources are not to be used to promote any candidate in the election.

97. The response from the Deputy General Secretary, on 20 September 2021, was that the code would only take effect when there was more than one candidate.

98. Nominations for the General Secretary election closed on 25 October 2021; Mr Clancy was the only candidate and, as such, his re-election was uncontested.

© EAT 2025

99. On 30 January 2022, Mr Evans submitted an application to the CO regarding the President's statement relating to Mr Clancy's re-election, contending this was in breach of the code.

100. On 22 March 2022, Mr Evans submitted a further application to the CO, relating to both his suspension and the statement regarding Mr Clancy's re-election. After clarification in correspondence, it was confirmed he was pursuing six complaints relating to his suspension, and two complaints in respect of the President's statement.

101. In relation to his suspension, it was Mr Evans' position that Prospect had no power to suspend under its standing orders: the only power to suspend a member was provided by regulation 1.3 appendix 1 of the rules, which required he first be given the opportunity to make representations to the National Executive Committee ("NEC"), which had not happened. Accepting the NEC was able to regulate its procedures and to delegate some of its functions to a sub-committee (rules 9.2(1) and 9.3), Mr Evans did not consider this extended to the imposition of a suspension without the safeguards set out in regulation 1.3 appendix 1. As for his complaints regarding the President's statement, Mr Evans argued that, by issuing the circular containing the statement, union resources had been used to promote Mr Clancy's candidature, which was in breach of paragraph 7 of the code, and had had the effect of discouraging other potential candidates from standing; he further contended that Prospect had then failed to follow the process set out within the code in dealing with his complaint.

The CO's decisions

102. By her written decision of 1 July 2022, the CO determined that Mr Evans' complaints had no reasonable prospect of success and should be struck out pursuant to section 256ZA TULRCA.

103. In respect of complaints 1-6, the CO considered that, as Mr Evans had provided no evidence that his suspension was under regulation 1.3 of appendix 1, the only conclusion was that it had been made under standing orders which enabled the disciplinary sub-committee to impose

© EAT 2025

a precautionary suspension without complying with regulation 1.3 appendix 1. As for Mr Evans' complaint that, because his suspension had not been made under Prospect's rules, the consequential restriction on his activities amounted to a breach of rule 2.5(1), the CO disagreed: the disciplinary procedure set out in the standing orders had been adopted by the NEC under rule 9, was well documented, and (following the approach laid down in ***Heatons Transport***) formed part of the rules. The CO considered the standing orders were clear: a precautionary suspension should only be imposed where the alleged behaviour was incompatible with the holding of union office or participation in union activities, and, as such, a precautionary suspension would have the purpose of limiting a member's participation in the union. Absent such a power, Prospect might be unable to impose a precautionary suspension even when in the interests of the union and its members; that, the CO concluded, could not have been intended, and she was satisfied that Prospect meant this to form part of the rules. Given her finding that Prospect had thus acted within its rules, the CO considered complaints 1-6 could have no reasonable prospect of success and would be struck out.

104. As for complaints 7-8, it was Prospect's case that the code was designed to ensure fairness and equality of opportunity between candidates (as made explicit in rule 10.5 and in paragraph 1 of the code); as such, it was relevant only when there was more than one candidate. Once two candidates were nominated, each would be required to give a written undertaking to abide by the code; as, however, Mr Clancy was the only candidate when the President's statement was circulated, the code did not apply and there could not have been a breach of paragraph 7. In response, Mr Evans submitted that a member was bound by the code as soon as they become a candidate, a construction he considered to be supported by paragraphs 3 and 4.

105. The CO accepted Prospect's submission as to the purpose of the code, observing that achieving fairness and equality of opportunity between candidates could not be fulfilled where there was only one candidate; that construction was further supported by the practice of

© EAT 2025

requiring an undertaking under paragraph 2 once two candidates were nominated, and by the references to "candidate*s*" (plural) in paragraphs 4 to 8 of the code. Acknowledging Mr Evans' point that paragraph 4 required all candidates to give a written undertaking to comply with the code when submitting their nomination, the CO noted that Prospect had apparently adopted a practice which required this only after two nominations were received; this was not, however, determinative, as it would not affect the stage at which the code would be engaged (i.e. only once there were two or more candidates). In the circumstances, the CO concluded this complaint could have no reasonable prospect of success, and Mr Evans' further objection – that Prospect failed to follow the process set out at paragraph 14 in relation to his complaint – was equally bound to fail as it depended on the code applying at the time of the circular. The application in respect of the President's statement was therefore also to be struck out.

The substantive appeal: the parties' positions

Grounds 1, 2, 5 and 6

106. Grounds 1, 2, 5 and 6 together make the point that paragraphs 11 and 12 of Prospect's standing orders are not part of its rules and could not provide a basis for the decision to suspend Mr Evans, which would have had to be under, and in accordance with, regulation 1.3 of appendix 1 of the rules. In this regard, it is common ground that, before the suspension in issue, Prospect did not comply with the regulation 1.3 requirement of first giving Mr Evans an opportunity to make representations to the NEC; Prospect says it did not need to do so, as this was a precautionary suspension under paragraphs 11 and 12 of the disciplinary sub-committee standing orders, approved by the NEC in November 2018, not a disciplinary sanction.

107. Mr Evans says that the CO was wrong to find his suspension was compatible with rule 2.5(1), which sets out the entitlement of members to participate in the activities of the union "*Subject to any restrictions imposed by these Rules*": rule 14.1 states that the rules may not be varied

© EAT 2025

save by a two thirds majority decision of national conference; as for the powers of the NEC, that body was a creature of the rule book, established by national conference and required by rule 9.1 to conduct business in conformity with national union policy, having the functions "*provided by these Rules"*. The suspension powers under standing orders conflicted with existing national policy (per regulation 1.3 appendix 1 of the rules), and were outside the functions of the NEC. Paragraphs 11 and 12 of the disciplinary sub-committee standing orders had not been presented to national conference, and exceeded the powers of the NEC; insofar as they purported to permit a suspension in circumstances otherwise prohibited by regulation 1.3 appendix 1 of the rules, they were void and of no effect. Moreover, as the CO had based her decision on custom and practice (per ***Heatons Transport***), she further erred in assuming, without evidence, that paragraphs 11 and 12 of the standing orders had been operated by Prospect in such a way as to have gained, by dint of custom and practice, a status as valid rules of the union; at the very least, that was a dispute of fact which could not properly be the subject of a summary determination (per ***Embery***).

108. For Prospect it is said that, while Mr Evans had advanced submissions on custom and practice below, it was wrong to suggest this formed any part of the CO's construction of the rules. That construction was correct: (i) the rule book was silent as to the procedure to be followed on a disciplinary investigation, but conferred broad powers on the NEC to interpret the rules and to regulate its own procedures; (ii) there was no express prohibition within the rule book precluding the NEC placing a member under precautionary suspension pending a disciplinary investigation; (iii) the disciplinary sub-committee standing orders did not vary appendix 1 as no disciplinary sanction was imposed – a precautionary suspension was an administrative act (see ***Lewis v Heffer and ors*** [1978] 1 WLR 1061 CA); (iv) the CO had correctly interpreted paragraphs 11 and 12 as being part of the union's rules, alternatively incorporation was necessary for efficacy reasons, providing for a power of precautionary suspension as an

© EAT 2025

administrative necessity not a disciplinary sanction; (v) conversely, there was no basis to imply a provision (as Mr Evans sought to do) precluding Prospect from having the power to place a member on precautionary suspension.

Ground 10

109. In challenging the decision to strike out his complaint regarding the statement made by the President of Prospect, Mr Evans submits that this again relied on a finding as to custom and practice within the union (as to the stage when candidates would be required to provide an undertaking to comply with the code) when this was a point in dispute, inapt for summary determination. Furthermore, the CO had misconstrued the code, which plainly applied to all "*candidates*", including those who had been, *and* those who might be, nominated; that was the way the word "*candidate*" was used throughout the code, in contrast to "*nominee*" (see, e.g., paragraphs 3, 4, and 7 of the code). If the position was as the CO considered it to be, it would mean that, if the NEC successfully used union resources to deter anyone else from nominating another candidate for election, it could do so without breach of the code.

110. For Prospect it is contended that the language of the code makes clear that the CO's construction was correct: (i) paragraph 1 makes plain the code's purpose, which would only make sense if there was more than one candidate; (ii) the code refers throughout to candidate*s* (plural); (iii) whether someone is a candidate is a binary and objective matter, and it would be a nonsense for the code to apply to those who *might* be candidates – until nominated, by definition, they are *not* candidates. In the alternative, even if the code could apply when there was only one candidate, the statement in issue gave rise to no breach: the purpose of paragraph 7 was to prevent electioneering; the NEC was entitled to inform members which candidate it had nominated and why (just as it would if it had decided *not* to nominate an incumbent General Secretary); that provided information supportive of union democracy, as did the

© EAT 2025

President's description of what she had said at an earlier NEC meeting (see the observations of Morison J in ***Douglas v GPMU*** [1995] IRLR 426 EAT).

The substantive appeal: the legal framework and the rules and provisions in issue

The powers of the CO and the approach of the EAT on appeal

111. The legal framework applicable to applications to the CO, and to appeals to the EAT from decisions of the CO, is summarized at paragraphs 64-69 above.

112. In the present case, Mr Evans appeals from the CO's strike out of his applications pursuant to section 256ZA TULRCA, which provides that:

> "(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, …"

113. The approach the CO is to take when considering whether to exercise the power afforded by section 256ZA is set out at paragraph 20 ***Embery*** (see paragraph 68 above). On appeal, the question for the EAT is whether the CO thereby erred in law (section 256ZA(7)). In answering that question, I bear in mind there has been no hearing before the CO, and the parties have not had a full opportunity to advance documentary and witness evidence, to cross-examine the other side's witnesses, or make submissions relating to the evidence.

Construction of Prospect's rules

114. When considering how a trade union's rule book is to be construed, the principles that can be distilled from the case-law were summarised in ***Embery***, at paragraph 19:

> "(1) A trade union's rulebook is in law a contract between all of its members from time to time ....
> (2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts (***Evangelou*** [[2016] EWCA Civ 817], paragraph 20; ***Kelly*** [[2020] EWCA Civ 736] paragraph 36 (2)).

© EAT 2025

> (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)."

115. In his submissions, Mr Evans has suggested that the CO's reliance on ***Heatons Transport*** demonstrates that, in determining that the disciplinary sub-committee's standing orders had been incorporated into the rules of the union, she was necessarily making a finding of fact as to custom and practice within Prospect. I do not, however, read the judgment in ***Heatons Transport*** as so limiting the possible ways in which terms might be incorporated within the rules of the union. Accepting that the intention of the parties to any agreement is to be understood in context – so, here adopting the perspective of the reasonable trade union member - there is no reason why different canons of construction should be applied than would be the case for any written document (see ***British Actors' Equity Association v Goring*** [1978] ICR 791 HL per Viscount Dilhorne). In ***Heatons Transport***, Lord Wilberforce described the approach that is to be adopted, as follows (see pp 100H-101B):

> "The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were, for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced

© EAT 2025

> members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects 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. ..."

Although going on to acknowledge the potential importance of custom and practice, it was not suggested that this was the only possible route to incorporation.

116. For Prospect, it is contended that the standing orders of the disciplinary sub-committee are properly to be seen as falling within the provisions of the rule book. To the extent that is found not to be the case, however, it is said that the incorporation of the relevant provisions would, in any event, be necessary to give efficacy to the membership contract. In this latter regard, the conditions for implication were considered in ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor*** [2015] UKSC 72, see, in particular, per Lord Neuberger at paragraphs 16-31; notably, the term in issue must be necessary to give business efficacy to the contract (no term will be implied if the contract is effective without it), must be so obvious that "*it goes without saying*", must be capable of clear expression, and must not contradict an express term of the contract.

117. In the present case, the standing orders in issue provide for a power of "*precautionary suspension*", allowing for the member in question to be suspended during a disciplinary investigation. Where this does not amount to a disciplinary sanction, such a possibility is recognised within the employment context, (see paragraph 8 ACAS Code of Practice on disciplinary and grievance procedures), and, provided it is not used for some ulterior purpose, has similarly been allowed to exist in relation to a member of an unincorporated association (see ***Lewis v Heffer*** [1978] 1 WLR 1061).

© EAT 2025

The rules and provisions in issue

118. Prospect's rule book at the relevant time was that produced in 2020. Part 1 sets out the objects of the union, which include the promotion and representation of its members' interests (rule 1.2(1)). Part 2 addresses issues of membership; by rule 2.5, the rights and duties of members are set out, providing (relevantly) as follows:

> "(1) Subject to any restrictions imposed by these Rules, a Working Member shall be entitled to take part in all the activities of the Branch to vote on any matter requiring decisions by ballot, and shall be qualified to hold any office in the Union, and shall be entitled to such benefits and privileges as are provided by these Rules or as may from time to time be determined in accordance with these Rules."
>
> "(5) Members shall be expected at all times to behave reasonably in dealing with fellow members and Prospect staff and to treat them with respect and courtesy. Any member deemed by the National Executive Committee to have behaved unreasonably towards another member or a Prospect staff member may be subject to the disciplinary regulations contained in Appendix 1."

119. Part 8 makes clear that it is the national conference that is the governing and policy-making body of the union, while part 9 makes provision for the NEC, which:

> "9.1(1) ... shall conduct the business of the Union in conformity with the policy from time to time laid down by National Conference and shall have other functions as are provided by these Rules.
> (2) ... shall between National Conferences be solely responsible for interpreting policy laid down by Conference and determining policy if no such policy exists. The [NEC] shall also be responsible for the interpretation of these Rules between National Conferences."

120. Rule 9.2 sets out the NEC's powers, providing (relevantly) as follows:

> "(1) The [NEC] shall have such powers, authorities and discretions as are necessary for or incidental to its functions and, without prejudice to the foregoing generality, shall have power: ... (j) to appoint from time to time such committees (hereafter in this Rule referred to as "Sub-Committees") as it may think necessary for the despatch of its business and to delegate to them such of its functions or refer to them such matters as it may in its discretion determine; ...."

© EAT 2025

> "(3) Any Sub-Committee shall conduct its business in accordance with such procedure as the Committee may direct or failing such a direction in accordance with such procedures as the Sub-Committee may itself decide."

121. By rule 9.15 it is further provided that the NEC:

> "(1) ... shall meet and conduct its business as it shall from time to time by resolution determine and shall have power to regulate its own procedure."

122. The position of General Secretary is addressed at part 10 of the rule book, which provides that the NEC shall appoint a General Secretary "*elected in accordance with, and on the terms referred to in these rules ...*" (rule 10.1(a)). By rule 10.2 it is provided that:

> "(2) The [NEC] may nominate any member, official or other employee of the Union or any other person ... provided that such nomination is approved by a majority of the voting members of the [NEC] ...
> (3) Not less than 12 months, nor more than 15 months prior, to the end of the General Secretary's term of office the [NEC] shall ascertain if the incumbent wishes to be nominated for a further term of office and, if so, they shall be its nominee ....
> ...
> (8) Those nominated shall indicate their acceptance of nomination in writing either at the time of nomination or within ten days of the closing of nominations. The acceptance shall in all cases be accompanied by an undertaking signed by the nominee to act in all respects in accordance with the code of conduct ...."

123. Rule 10.5 requires the NEC to lay down a code of conduct for the election of a General Secretary, "*... designed to ensure fairness and equality of opportunity between each candidate*".

124. If more than one nomination is received for the post of General Secretary, rule 10.3(1) requires the NEC to arrange a national ballot; there is no such requirement if the election is uncontested.

© EAT 2025

125. The code provided under rule 10.5 is annexed to the rule book, under the heading "*Code of Conduct for General Secretary election*"; relevant to the issues raised by this appeal, the code provides as follows:

> "1. This Code of Conduct is designed to ensure fairness and equality of opportunity between one candidate and another.
> 2. Each candidate will be given a copy of the Code and will be required to give a written undertaking that they will abide by the terms of the Code."
>
> "Nomination/Selection of Candidates
> 3. Rule 10.2(2) will operate where the [NEC] are not nominating an incumbent General Secretary, in which case the [NEC] shall select a candidate for their nomination in the election after advertising for candidates for such nomination to members of the Institution."
>
> "Election Campaigns
> 7. No Union funds or other resources shall be used by any candidate or by any candidate's supporters in the promotion of their nomination/candidacy, other than that required for the official circulation of the authorised candidate's election statement. Similarly, no Union funds or other resources shall be used by any candidate or candidate's supporters in denigrating any other candidates.
> 8. Candidates shall not spend any of their own funds, nor shall they or their supporters use any funds, or official resources, in any election campaign. ...
> 9. Candidates shall not attend Branch or workplace meetings for the purpose of canvassing for nominations or votes but this shall not prevent them carrying out their normal responsibilities as representatives of members.
> 10. Branches may advise their members of the name of the candidate in an election who has been nominated by that Branch. Branches may also advise members to participate in a ballot (to "use their vote"); but branches must not make any other comment on any other aspect of a candidate, whether nominated by them or not."
>
> "Breaches of the Code
> 13. Any member may complain of a breach of the Code.
> 14. Such complaints will be investigated by the Appeal Committee appointed by National Conference ..."

126. Returning to the body of the rule book, by part 14, it is provided that the rules of the union, or any part of them, may be revoked, altered or varied, and new rules may be made, by a decision of National Conference on a card vote with at least a two-thirds majority. To the extent any question arises as to the meaning or intention of the rules, part 15 provides that that question is to be decided by the NEC.

© EAT 2025

127. Appendix 1 of the rule book is headed "*Disciplinary Regulations*"; if the NEC considers a member has been guilty of wrong-doing, the regulations provide that:

> "1.1. Subject to the provisions of the Union's Rules the [NEC] may by resolution reprimand and/or fine and/or remove from office and/or prohibit from holding office for such specified period as it thinks fit or suspend from membership for such specified period as it thinks fit or expel from membership any member ..."

Albeit that any such resolution:

> "1.3 ... may be passed only after the person shall have been informed of the complaint and afforded an opportunity of making representations on the matter to the [NEC]; and in accordance with such other procedure as the [NEC] may determine."

And further protections are then afforded, including a right of appeal (regulations 1.4 and 5.1), pending the determination of which the resolution will not take effect, save that a member subject to expulsion will be suspended from membership in the interim (regulation 1.5).

128. In November 2018, pursuant to rules 9.2(1)(j) and 9.15(1), the NEC determined to delegate certain of its functions to a disciplinary sub-committee and provided that the sub-committee should "*operate in accordance with the following Standing Orders introduced by the NEC pursuant to Appendix 1 Regulation 1.3*". The standing orders were stated to:

> "2. ... apply to situations where serious disciplinary concerns are raised involving a breach of the Rule Book or behaviours inconsistent with the values or Objects of the Union, where the matter is not appropriate to be addressed on an informal basis ..."

The standing orders make provision for the composition of the sub-committee and set out the powers delegated to it, which include the power to investigate a disciplinary concern and to suspend a member on a precautionary basis; it is thus provided:

> "11. The Sub-Committee shall have the power to suspend a member on a precautionary basis where this is considered to be appropriate and necessary in

© EAT 2025

> the interests of the member, or the Union generally, or to enable the matter to be investigated expeditiously.
> 12. This power is to be exercised sparingly, where the alleged behaviour of the member is incompatible with their holding of Union office or other position, or participation in Union affairs or activities (for example in cases involving alleged misappropriation of Union resources or in cases of discrimination or harassment). The Sub-Committee shall review the appropriateness of any precautionary suspension at four week intervals. It shall inform the NEC of any exercise of this power and the NEC has the power to end or modify any such suspension as it considers appropriate.
> 13. Precautionary suspension will continue until the conclusion of both the investigation process and any resulting disciplinary process, unless otherwise stated. Precautionary suspension is in no way conclusive of any allegations or evidence to be considered in the subsequent disciplinary process."

The standing orders also set down the process for any disciplinary hearing, record the powers of the sub-committee on such a hearing, and explain the appeal procedure.

The substantive appeal: analysis and conclusions

Grounds 1, 2, 5 and 6

129. Grounds 1, 2, 5 and 6 relate to Mr Evans' suspension, as communicated to him on 23 June 2021. This was not a suspension from membership but from union office; it was a decision taken by the NEC's disciplinary sub-committee and was said to be a "*precautionary suspension*", pursuant to paragraphs 11-13 of the sub-committee's standing orders. Mr Evans' complaint was that the failure to first allow him an opportunity to make representations to the NEC meant his suspension was a breach of regulation 1.3 of the disciplinary regulations set out at appendix 1 of Prospect's rule book. That was, however, not the case: Mr Evans had not been suspended from membership and there had been no disciplinary sanction imposed by resolution under regulation 1.1 such as to engage the regulation 1.3 requirement in issue.

130. Notwithstanding the difficulty of characterising his suspension as a breach of regulation 1.3 appendix 1, Mr Evans contends it nevertheless fell outside the rules of the union, which provided for no power of precautionary suspension, and thus gave rise to a breach of the rights

© EAT 2025

of membership afforded him under rule 2.5. Considering the complaint through the prism of rule 2.5, the question is whether the precautionary suspension amounted to a restriction "*imposed by these Rules*".

131. The answer to that question is that the precautionary suspension was a permissible exercise of the NEC's powers under the rules. As rule 2.5(5) made clear, it was for the NEC to determine whether a member had acted unreasonably towards another member or in their dealings with employees of the union; rule 9.2 provided the NEC with "*such powers, authorities and discretions as are necessary for or incidental to its functions*"; and, by virtue of rule 9.15, the NEC had a broad discretion in how it conducted its business, with the power to regulate its own procedure. In carrying out the function required of it under rule 2.5(5), the NEC had chosen to exercise the power afforded under rule 9.2(1)(j), delegating its disciplinary function to a sub-committee established for that purpose. In thus exercising this delegated function, the disciplinary sub-committee was duly bound to carry out its duties as determined by the NEC; the parameters of that delegation were set out in the disciplinary regulations at appendix 1 of the rule book, but those expressly provided that any resolution passed under regulation 1 would be subject to such procedure as the NEC might determine (see regulation 1.3). The NEC had chosen to lay down the procedures to be followed by the disciplinary sub-committee in the standing orders it approved in 2018 (expressly introduced under regulation 1.3 appendix 1), which allowed for the power to suspend a member on a precautionary basis where that was considered to be "*appropriate and necessary*" in the interests of the member or the union or to allow for the expeditious investigation of the allegation in issue (see paragraphs 11-13 of the disciplinary sub-committee standing orders).

132. Mr Evans argues, however, that the disciplinary sub-committee standing orders – or, at least, the power of precautionary suspension under paragraphs 11 and 12 of those standing orders – could not properly be made under regulation 1.3, as the conjunctive "*and*" after the semicolon

© EAT 2025

would only permit the making of procedural rules that were additional or supplementary to the procedure laid down in that regulation. I cannot, however, see that this would be how the reasonable trade union member would read this provision. While regulation 1.3 lays down the basic right of a member to make representations to the NEC before any disciplinary sanction can be imposed by resolution under regulation 1.1, it otherwise allows a broad discretion as to the disciplinary procedure to be followed, in particular as to the process of investigation; as thus allowed by regulation 1.3, in 2018, the NEC adopted standing orders setting out the detailed procedure, which included the right of precautionary suspension.

133. On a straightforward reading of the rule book, I am satisfied that Mr Evans' precautionary suspension was a restriction "*imposed by these Rules*" for the purposes of rule 2.5. That, I am clear, would be the understanding of the reasonable member of Prospect, considering how the NEC was to go about its function of investigating disciplinary allegations, having regard to the broad discretion afforded to that body. The precautionary suspension was not a disciplinary sanction, suspending Mr Evans from membership, such as to engage the right to make representations to the NEC under regulation 1.3 of appendix 1, but amounted to a permissible exercise of the NEC's powers under the express rules of the union.

134. Even if there were any question as to the NEC's power to impose a precautionary suspension under the express terms of the rule book (although I do not agree that a sensible reading of the rules would lead to that conclusion), I would, in the alternative, be satisfied that such a term would necessarily be implied in order to give efficacy to the contract of membership. As the case-law makes clear, there is no presumption that all the terms of that contract will be contained within the rule book, particularly as regards the discretion afforded to union committees or officials in the ways in which they might act on the union's behalf (***Heatons Transport***; ***Kelly***; ***Embery***). Where (as here) allegations are made of bullying and harassment on the part of an official against an employee of a trade union, it may well be both appropriate

© EAT 2025

and necessary to suspend the official on a precautionary basis while an investigation is carried out; as recognised in ***Lewis v Heffer***, to the extent such a power is not expressly provided, where a suspension would be necessary to allow for the fair investigation of allegations without risk of further complaint, this would need to be implied (hence the acknowledgement of such a possibility in the employment context; see paragraph 8 of the ACAS Code). In these circumstances, the need for such a power can be said to be so obvious that it "*goes without saying*" (***Marks and Spencer v BNP Paribas***), and, as set out within the standing orders in issue, it is capable of clear expression.

135. Notwithstanding the generally recognised need for a power to suspend pending a disciplinary investigation into allegations of bullying and harassment, Mr Evans seeks to contend that such a right could not be implied in the present case as this would contradict the express provision under regulation 1 of appendix 1. That, however, is to mistake an administrative necessity (the removal from the workplace of the person against whom the allegations have been made for such period as required to ensure a fair investigation can be carried out) with a disciplinary sanction; Mr Evans' complaint related to the former, not the latter.

136. Thus considering the complaint before the CO, it is clear Mr Evans' application could have no reasonable prospect of success. There had been no breach of the requirement he relied on under regulation 1.3 of appendix 1 of the rule book, and his suspension was a restriction properly imposed "*by these Rules*" for the purposes of rule 2.5. The ability to suspend on a precautionary basis during a disciplinary investigation did not contradict any national policy of the union, and required no variation or amendment to the rules as approved by national conference; this was a straightforward exercise of the powers expressly afforded to the NEC within the terms of the union rule book. Even if I was wrong about this, however, for the reasons I have explained, I would, in any event, find the power of precautionary suspension was incorporated by necessary implication. The CO's reasoning was not based on any finding

© EAT 2025

as to custom and practice within Prospect, and no such finding was necessary. Considering the complaint before her, the CO correctly concluded that it had no reasonable prospect of success and was properly to be struck out under section 256ZA TULRCA. Mr Evans' appeal in this regard is similarly without merit and grounds 1,2, 5 and 6 are duly dismissed.

Ground 10

137. Mr Evans' appeal under this ground relates to the CO's striking out of his complaints regarding the statement of Prospect's President about Mr Clancy's candidature for re-election as General Secretary. Mr Evans considered the use of union resources involved in circulating the statement amounted to a breach of paragraph 7 of the code of conduct for General Secretary elections; he further considered that the Prospect's failure to then address his complaint gave rise to a separate breach of paragraph 14 of the code. The CO concluded, however, that the code was not engaged unless and until there were at least two candidates for election; as the statement in issue had been circulated at a time when Mr Clancy was the only candidate, the code did not apply and there could, therefore, be no breach of its provisions.

138. While it is correct that the purpose of the code is stated to be to "*ensure fairness and equality of opportunity between each candidate*" (see rule 10.5, as repeated at paragraph 1 of the code), I do not consider that is the same as saying that its provisions will only come into play as and when more than one candidate is nominated for election. On this point, I consider there is force in Mr Evans' challenge to the summary striking out of his complaints.

139. First, I consider the CO's conclusion – that the code will only apply as and when there are two more candidates – is contradicted by the requirement under rule 10.2(8) (arguably, reinforced by paragraph 2 of the code) for any candidate nominated for election to provide a written undertaking to comply with the code when accepting that nomination; a requirement not stated to be subject to there being another candidate at the time. Although the CO seemed

© EAT 2025

to consider that rule 10.2(8) might have been modified by a practice of only requiring the undertaking to be given when more than one candidate had been nominated, she was not in a position to make a finding of fact to that effect. Taking rule 10.2(8) at face value, it could not be said Mr Evans' complaint, made in reliance on the code, could have no reasonable prospect of success.

140. Second, I do not consider the stated purpose of the code, or the various references to candidate*s* (plural), necessarily limits its application as the CO reasoned. Mr Evans' complaint related to an alleged use of union resources to promote a candidate prior to the closing of nominations; at that point, it could not be said there would not be other candidates and I cannot see why it would be contrary to the purpose of the code to seek to ensure fairness and equality from the outset. Certainly, the prohibition at paragraph 9, on attending branch or workplace meetings for the purpose of canvassing for *nominations*, suggests an intention to ensure a level playing field from the beginning of the process. As for the prohibition against using union resources to promote a candidate (paragraph 7), or the bar relating to the funding of election campaigns (paragraph 8), it would seem to contradict the purpose of the code if those provisions only came into play once a second nomination was received, by which stage the original candidate may have already gained precisely the unequal and unfair benefit the code seeks to avoid.

141. For Prospect it is nevertheless contended that the President's statement was merely providing information, consistent with the requirements of trade union democracy (see ***Douglas v GPMU***), and this could not be said to give rise to a breach of the code. That, it seems to me, must be a matter for further argument before the CO. I note that rule 10.2 makes provision for how the NEC is to nominate a candidate for the office of General Secretary but is silent as to any communications that might then be sent to members regarding that nomination. The code does not seem to take matters much further, although I note the restriction placed on

© EAT 2025

branches in terms of any comments regarding a candidate nominated by a branch (see paragraph 10). I do not know whether this is an issue on which the rules are further informed by custom and practice, but it is not a matter that can be resolved on the materials before me.

142. On ground 10, I therefore uphold Mr Evans' appeal: the CO erred in her construction of Prospect's code of conduct for General Secretary elections and in assuming the code could not apply in circumstances in which only one candidate had been nominated; in consequence, the CO was wrong to conclude that Mr Evans' application could have no reasonable prospect of success and to strike out his complaints. That decision will be set aside and this application remitted to the CO for determination afresh. Given my conclusions on Mr Evans' bias appeal, it would be unnecessary for me to provide further direction on remission at this stage: it will be for the CO to determine the process by which this application is to be heard.

Grounds 11 and 12 and the CO's decision not to accept a new complaint

The background and the parties' submissions

143. Grounds 11 and 12 relate to the CO's decision not to accept a further application made by Mr Evans on 8 June 2022, which again related to his suspension; the non-acceptance of this complaint was communicated on 1 July 2022, in the covering letter to the CO's strike out decisions.

144. Mr Evans' application of 8 June 2022 was expressly made as a response to being told of the CO's preliminary view that his earlier complaint had no reasonable prospect of success; as he explained:

> "... I have attached a further complaint with wording that may be easier for you to address, but essentially is covering the same ground. ..."

145. In making this application, Mr Evans stated that his suspension of 23 June 2021:

© EAT 2025

> "... breached the disciplinary regulations set out in appendix 1 when I was suspended from office under the disciplinary standing orders. This is because the standing orders attempt to vary the disciplinary regulations in an illegitimate manner."

146. In not accepting this further application, it was explained that the CO considered it:

> "... effectively duplicates the issues raised in your previous complaints."

Additionally observing:

> "You have not set out, in any of your complaints, which Rule you believe the Union breached when adopting the Standing Orders introducing the power to impose a precautionary suspension. That appears to be a key part of your argument but you have not identified a breach to support your position. As you will see the Certification Officer has addressed this point in her decision."

147. For Prospect, it is contended that it was a clear abuse of process for Mr Evans to seek to pursue a further application regarding his suspension when this was simply another way of putting the point that was already before the CO. Referring to the guidance provided by Lord Sumption in ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*** [2014] AC 160 SC, it is said that this further application engaged the first principle identified in that case, given that the CO's decision of 1 July 2022 was a determination that a cause of action had been held not to exist, which therefore had to be challenged by way of appeal, not by further complaint. Alternatively, it is said to engage the third principle, given that a cause of action is extinguished once judgment has been given on it; or the fourth principle, namely that the CO's strike out decision of 1 July 2022 decided an issue that was necessarily common to the later application. In any event, Prospect argues that the fifth principle would be engaged: the further application would be amount to an abuse of process under ***Henderson v Henderson*** (1843) 3 Hare 100. Acknowledging that in ***Chandra v UCU*** [2025] EAT 70, Bourne J had held that the CO had no power to effectively strike out a complaint without hearing from the parties or, at least, giving the applicant an opportunity to show cause, Prospect nevertheless argues that the CO's broad discretion to regulate proceedings (as recognised in ***Morley v***

© EAT 2025

Unison [2024] EAT 143) must provide a basis for the non-acceptance of this obviously abusive further application.

148. For his part, Mr Evans contends that the CO's purported non-acceptance of his application plainly fell outside her powers (per ***Chandra***). As for the underlying merit of his further complaint, he explains that he was trying to clarify his point that the standing orders relied on for his suspension had been ultra vires: as such, he did not have to identify a breach of a specific rule, he was complaining of the wrongful creation of a whole set of disciplinary rules.

The relevant legal framework

149. I have already set out the basic legal framework applicable to an application to the CO of a breach of trade union rules (see paragraphs 64-69 above). I have also referred (see paragraph 57 above) to the broad discretion afforded the CO under section 256 TULRCA, which provides that:

> "(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, ..."

150. The potential breadth of section 256 was noted in ***Morley v Unison***, at paragraph 38, although the appeal in that case was conceded and the EAT did not further explore the basis for the CO's decision in issue. In ***Chandra***, however, when considering (as here) a decision not to accept applications, Bourne J was clear that the CO's power to summarily dismiss a complaint without a hearing was limited, ruling that:

> "40. ... 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) [the requirement to give notice to show cause]. It may also have done more than merely "regulate the procedure" under section 256(1)."

© EAT 2025

151. The latter part of Bourne J's reasoning at paragraph 40 reflects his earlier observation that:

> "35. Section 256(1) empowers the CO to make provision to "regulate the procedure to be followed" when dealing with application. 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."

152. Noting that section 108B(1) TULRCA states that the CO may refuse to accept an application unless satisfied that the applicant has taken all reasonable steps to resolve the claim by use of internal procedures, Bourne J considered this suggested that, provided all 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*" (***Chandra*** paragraph 31).

153. Turning then to the CO's strike out powers under section 256ZA TURLCA, Bourne J acknowledged that section 256ZA(6) expressly states that the provisions of section 256ZA do not prevent the CO "*from making any further provision under section 256(1) about the striking out of proceedings on any application*", but rejected the suggestion that this might allow the CO to adopt additional procedures whereby applications might be summarily struck out, reasoning:

> "37. ... I do not believe Parliament meant that, in respect of an application to which section 256(1) applies, the CO can make a provision for striking out which is inconsistent with section 256A(1).
> 38. In my judgment, the true meaning of section 256ZA is simply that the procedural provisions relating to striking out are not exhaustive. ... So, subsection (6) is not a dead letter, but its scope is limited."

Declining to express a view as whether such other "*provision*" for section 256ZA(6) purposes might extend to empowering the CO to strike out applications in circumstances other than those described in section 256ZA(1), Bourne J further observed, however, that:

> "39. ... 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."

© EAT 2025

154. It has not been suggested to me that any of the exceptions set out at paragraph 75 ***Lock and anor v British Gas Trading Ltd*** *(No. 2)* [2016] ICR 503 would apply, such that I ought to depart from Bourne J's conclusions in ***Chandra***. The submission made on behalf of Prospect is, rather, that the present case must be suitable for "*further provision*" under section 256ZA(6), such as to permit the non-acceptance of a repetitive application that is properly to be characterised as an abuse of the CO's process. In advancing that submission, Prospect relies on the authoritative statement as to the principles of res judicata provided by Lord Sumption (with whom the rest of the Supreme Court agreed) at paragraph 17 ***Virgin Atlantic***. There may be some question as to whether Mr Evans' application of 8 June 2022 was caught by cause of action or issue estoppel (the application preceded the CO's determination of the cause or issue in question), but that would not mean that it would not be an abuse of process to seek to pursue further proceedings raising matters that could, and should, have been included in an earlier complaint (see Lord Sumption's fifth principle in ***Virgin Atlantic***, and the judgment of Wigram V-C in ***Henderson v Henderson*** at p 115). The short point is that neither the decision-taker nor the other party to proceedings should be "*twice vexed in the same matter*" (***Johnson v Gore Wood & Co*** *(a firm)* [2002] 2 AC 1, per Lord Bingham at p 31), and an application that does this is properly to be struck out as an abuse.

Analysis and conclusions

155. For the reasons identified in ***Chandra***, I am unable to see that the CO acted within her powers in purporting not to accept Mr Evans' application of 8 June 2022. Prospect argues that there must be a means by which the CO can refuse to accept an application, but the only provision that references the acceptance of complaint is that which relates to the exhaustion of internal procedures as a precondition to an application to the CO (section 108B(1) TULRCA). As Bourne J observed in ***Chandra***, on its face, section 108B TULRCA supports the view that, where satisfied that the applicant has complied with all relevant internal procedures, the CO

© EAT 2025

is required to provide the parties with the opportunity to be heard unless the matter properly falls within the power afforded by section 256ZA.

156. As for the power to strike out under section 256ZA, although it is allowed that the discretion afforded by section 256(1) would mean the CO could make further provision about the striking out of proceedings (see section 256ZA(6)), I respectfully agree with Bourne J that this would not permit a form of strike out inconsistent with section 256ZA(4), by providing no opportunity for the party against whom it was proposed the order should be made to show cause why that should not be done. Certainly, where an application is repetitive of an earlier complaint that would properly be characterised as vexatious for the purposes of section 256ZA(1), such as to engage the existing provisions of that section, including the requirement to provide the applicant with the opportunity to show cause.

157. Accepting Mr Evans' point that the CO thus erred in not accepting his application of 8 June 2022, I would nevertheless agree that, to the extent it was a further iteration of his previous complaint, it was properly to be considered an abuse of the CO's process. It may be – as Mr Evans' has suggested on this appeal – that he in fact simply intended the application of 8 June 2022 to be a means of better explaining his case: an additional submission in support of his argument that his earlier application ought not be struck out. To the extent that it was simply part of his representation in response to the notice to show cause, there can be no complaint (although that would suggest that the appeal in this regard was entirely academic); however, submitting a new application, "*covering the same ground*", would seem to be a clear abuse of the process, vexing both the CO and Prospect with the same complaint.

158. Given the seemingly vexatious nature of the 8 June 2022 application, the proper course for the CO would have been to have provided Mr Evans with the opportunity to show cause as to why that should not be struck out. The CO's failure to do so amounted to an error of law and I duly allow Mr Evans' appeal in this regard. As, however, Mr Evans' application of 8 June

© EAT 2025

2022 was expressly stated to be "*covering the same ground*" as his earlier complaints relating to his suspension, my preliminary view is that remission to the CO would serve no purpose as it is inevitable that the application of 8 June 2022 should be struck out. In the circumstances, I consider that the appropriate course is for me to exercise the powers of the CO (pursuant to section 35 of the Employment Tribunals Act 1996) and to provide Mr Evans with the opportunity to show cause why I should not strike out his application of 8 June 2022.

Disposal

159. For all the reasons provided above, I therefore:

(1) Dismiss the appeal on grounds 1, 2, 5 and 6.

(2) Allow the appeal on ground 10 and remit Mr Evans' complaints of a breach of Prospect's code of conduct for the General Secretary election to the CO for consideration afresh.

(3) Allow the appeal on grounds 11 and 12 but, exercising the powers of the CO (pursuant to section 35 Employment Tribunals Act 1996), direct that the application to which these grounds relate (that of 8 June 2022) shall be ordered to be struck out unless, by written representations to be received by the EAT within 21 days of the handing down of this judgment, Mr Evans can show cause why such an order should not be made.

(4) Dismiss the appeal on ground 13.

© EAT 2025

EA-2022-001324-LA

EMPLOYMENT APPEAL TRIBUNAL

Appeal No EA-2022-001324-LA

B E F O R E

The Honourable Mrs Justice Eady DBE
IN CHAMBERS

IN THE MATTER of an Appeal under Section 21(1) of the Employment Tribunals Act 1996 from the decision of the Certification Officer and sent to the parties on 01 July 2022

B E T W E E N :

Evans (2) Appellant

- and -

1. Prospect 2. Certification Officer 3. ACAS
4. Secretary of State for Business and Trade

Respondents

UPON the appellant's appeal having been permitted to proceed to a full hearing on the grounds identified in the reasoned order of UTJ Holly Stout, seal dated 29 May 2024

AND UPON the appeal having been listed for hearing, due to commence on Tuesday 22 July 2025

AND UPON the appellant's application for recusal, dated 13 July 2025

AND UPON the appellant's application for a preliminary determination "*on the legality (vires) of witness statements*", dated 12 July 2025

AND UPON considering the parties' respective written submissions

AND for the reasons provided

© EAT 2025

IT IS ORDERED THAT:

1. The application for recusal is refused.
2. The application for a preliminary determination regarding witness statements is refused.
3. The parties are to seek to agree a timetable for the hearing which will allow submissions to be completed over the first two days of the hearing, allowing the third day to be allocated for judgment. The proposed timetable is to be sent to the Employment Appeal Tribunal, for the attention of the clerk to Mrs Justice Eady by 4:00pm Monday 21 July 2025.

IT IS DIRECTED that any application for permission to appeal should be made to the Employment Appeal Tribunal within 7 days, or the Court of Appeal within 21 days, of the seal date of this Order.

D A T E D 18 July 2025

TO: Mr Andrew Evans the Appellant
Department Pattinson & Brewer Solicitors for the First Respondent
Government Legal Department for the Second, Third and Fourth Respondents

Certification Officer

(Case No. D/4-11/22-23)

© EAT 2025

Reasons

Appellant	Evans (2)
Respondent	1. Prospect, 2. Certification Officer, 3. ACAS, 4. Secretary of State for Business and Trade
EAT Reference	EA-2022-001324-LA
Judge	The Honourable Mrs Justice Eady
Date	18 July 2025

Reasons:

Recusal

The application

(1) By his application dated 13 July 2025, the appellant seeks that I should recuse myself from presiding over the hearing of this appeal (the hearing having been allocated to me for determination of the appeal). The application is put as being on the grounds of apparent bias, as follows: (i) my prior service on the Acas Council "*engages direct institutional responsibilities now under challenge*", which is said to create "*an objective structural conflict that would undermine public confidence in the fairness of the proceedings*" and is "*not mitigated by time elapsed or assurances of subjective impartiality*"; (ii) my having "*sat with Mr Clancy (the General Secretary of the First Respondent and subject of all appeal grounds except Ground 13) in a 2017 EAT matter*".

(2) In support of this application, the appellant explains as follows:

> "3. This is not a speculative or peripheral concern. The Appellant's case is centrally concerned with:
> . The lawfulness of ACAS's internal governance and staff arrangements since at least 2010;
> . Alleged unlawful ministerial direction over ACAS officers and servants in breach of section 247(3) of TULRCA 1992;
> . The failure of the ACAS Council to disapply the Civil Service Code to ACAS Officers and Servants;
> . The proposition that the employment contracts of ACAS staff (including the CEO) are void.

© EAT 2025

> 4. These matters directly implicate the acts and omissions of the ACAS Council- including those taken during the tenure of the assigned judge.
> 5. The judge's prior service on the ACAS Council engages direct institutional responsibilities now under challenge."

(3) Subsequently, the appellant has suggested that in fact his recusal application is put on the basis of direct bias, explaining that this would be "*on grounds of personal interest (considering Her Honour is a witness to some of the matters being considered and personally involved in the alleged unlawful conduct of the ACAS Council.)*" In support of this point, the appellant has forwarded a copy of the Acas Annual Report and Accounts 2013/14.

The factual context

(4) As the appellant's application notes, it is a matter of record that, between 2008-2014, I was formally an independent member of the Acas Council. The Acas Annual Report for 2013/2014 explains the role of the Acas Council in the following terms:

> "Our governance is assured through a Council which sets our strategic direction, policies and priorities. It also ensures the statutory duties and other work are carried out effectively."

The current website for Acas explains:

> "We are governed by an independent council. This means that we can provide an impartial service."
>
> "Council members are subject matter experts (employer, trade union and independent members), appointed by the Secretary of State for Business and Trade."

(5) It is apparent from the Acas website that Mr Mike Clancy is currently an Acas Council member (I understand from the documents I have seen in this appeal that Mr Clancy has held this office since 2016). Mr Clancy is recorded as being the General Secretary and Chief Executive of Prospect (the first respondent to the current appeal), and I therefore understand that he is a trade union member of the Acas Council. Mr Clancy was not a member of the Acas Council at any stage between 2008-2014.

(6) Mr Clancy is also a lay member of the Employment Appeal Tribunal ("EAT").

© EAT 2025

(7) As is again a matter of record, I sat at the EAT as a Senior Circuit Judge between December 2013-October 2019. Thereafter, I have continued to sit at the EAT from time to time as a visiting High Court Judge and was President of the EAT between February 2022-January 2025. For completeness, I also record that, prior to taking up my first salaried judicial appointment in December 2013, I was a member of Old Square Chambers, of which some of the counsel involved in the current appeal were, and are, also members.

(8) Further potentially relevant circumstances arise from the fact that I previously presided over a hearing on 20 February 2025, in a defamation case brought against the appellant by the first respondent (see *Prospect v Evans* [2025] EWHC 499 (KB)). Prior to that hearing, the appellant similarly raised various points regarding my professional connections with Mr Clancy, identifying these as potential reasons why I might consider I should recuse myself from hearing that case. As well as my prior involvement with Acas, the appellant noted that I had previously sat with Mr Clancy in the EAT, identifying a hearing that had taken place on 31 January 2014 (*Riverside Industrial Equipment Ltd v Audsley* UKEAT/0105/13). At that stage, I provided directions in response to the concerns then identified by the appellant, explaining that I was unable to see that any proper basis for recusal had been identified and that the case would thus remain in the list before me. Going on to hear the case, I handed down judgment on 10 March 2025; I am not aware that any application for permission to appeal on the grounds of apparent bias (or any other basis) has been pursued by either party.

(9) When previously addressing the appellant's concerns in *Prospect v Evans*, I had not understood that I would be assigned to sit in the EAT in July 2025 and thus stated that I would not be sitting on this appeal. Since that time, changes in my itinerary meant that I was subsequently available to sit on the appeal and was allocated to do so. It is not, however, suggested that any conflict arises from my prior involvement in the King's Bench proceedings.

(10) More generally, the reasons provided for my directions in *Prospect v Evans* explained:

> "(5) ... It is correct that I was previously an independent Council member of ACAS from 2008 until early 2014, but I am unable to see that a relationship with a non-party to the present proceedings, which ended over a decade ago, could

© EAT 2025

> cause the fair minded, informed observer to consider there was a real possibility of bias.
> (6) As for the position of Mr Clancy, I do not consider this to be analogous to the circumstances addressed in Lawal (which involved leading counsel appearing on an appeal before the EAT when they had previously sat as a part-time judge of the EAT with one or both lay members hearing the appeal); Mr Clancy would not be providing a judge of the EAT with guidance on the law. As for the possibility that my sitting with Mr Clancy in the past might have given rise to a "fairly close relationship of trust and confidence", I observe that the only case that has been identified as one in which I have sat with Mr Clancy dates back to January 2014. I have no independent recollection of that case and no recollection of sitting with Mr Clancy since then. Even accepting that I might have sat with Mr Clancy at some point since January 2014, I cannot see that it could be said that a "fairly close relationship of trust and confidence" would have been established. More generally, I have asked the EAT listing team to let me know when Mr Clancy last sat at the EAT and am informed that this was on 20 November 2020 (with His Honour Judge James Tayler). Informed as to these facts, I cannot see that the fair minded observer would consider there was a real possibility of bias."

I note that the application now made by the appellant refers to my having sat with Mr Clancy in 2017. I have no record, or recollection, of that, but would not consider that would make a material difference to the view I had previously reached in this regard.

The responses of the respondents

(11) The respondents resist the recusal application.

(12) For the first respondent it is submitted that the facts relevant to the application must be examined in the light of the particular issues which are before the EAT on this appeal. Doing so, it is contended that it is apparent that the matters to which the appellant has referred fall wholly outside the proper ambit of the appeal; specifically, "*the issues for which permission to appeal was granted do not include the legitimacy of the staff and governance decisions of ACAS*." As for the suggestion of apparent bias, it is said that "*membership of the ACAS Council during a period which ended*

© EAT 2025

more than a decade ago *would not cause the fair-minded and informed observer to conclude*" that there was a real possibility of bias.

(13) Those acting for the third respondent observe that the issue in the present appeal is "*whether the Certification Officer was biased by reason of determining a matter relating to a Union, the General Secretary of which, at the material time was a member of Acas Council. It is not understood how Eady J fulfilling that same role at an earlier point in time, applying the fair minded and informed observer test and having regard to the relevant context, could give rise to a real ground for doubt in Her Ladyship's ability to approach the instant appeal with an impartial and entirely open mind.*"

(14) The second and fourth respondents similarly resist the application, emphasising that it is the duty of a Judge to hear the case before them and that they should not accede to an unfounded application for recusal (see *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451).

Analysis and decision (recusal)

(15) Although the appellant's original application for recusal was put on the basis of apparent bias, he has latterly put this as raising questions of actual or automatic bias (suggesting that I would be sitting in judgment on my own conduct and/or might be a witness to the alleged unlawful conduct of the Acas Council). The different categories of bias were considered by the Court of Appeal in *Locabail*. Actual bias would arise where a judge allows their decision to be influenced by partiality or prejudice; a judge would, however, also be automatically disqualified from determining a case where they have an interest in the outcome of the matter to be determined. I do not understand the appellant to be suggesting that I might have any pecuniary interest in the outcome of the current litigation, but I think he is saying that I might nevertheless be concerned with the result as that will require determination of issues which relate to conduct with which I had some involvement (either directly or indirectly) in my former capacity as an independent member of the Acas Council. Alternatively, the appellant says that this gives rise to the appearance of bias (applying the test laid down in *Porter v Magill* [2002] 2 AC 357 HL).

(16) In the present case, it seems to me that whether approached as a question of automatic *or* apparent bias, the starting point is to be clear as to the facts viewed in context of the particular decision before the judge: "*Every application must ... be decided on the facts and circumstances of the individual case and in the particular context in which the application has*

© EAT 2025

been made." per Lord Fairley P *Swansea City & County Council v Abraham and ors* [2025] EAT 93 at paragraph 38.

(17) The application for recusal relates to ground 13 of the appeal, by which the appellant contends that the decision of the Certification Officer ("CO") is "*vitiated by apparent bias as a result of the links between the CO and Acas and trade unions generally and also, in this case, between Mr Clancy who is General Secretary of [Prospect] ..., a member of the Acas Council and the promotion of whose candidacy for election by the NEC is the underlying subject matter of Ground 10. ...*" (see the reasons provided by UTJ Stout when permitting this matter to proceed to a full hearing).

(18) In advancing ground 13, the links drawn by the appellant between Acas (and Mr Clancy) and the CO are set out as follows: (a) co-location (both have been located in the same building since 2020), with the CO having a designated space in an open plan office and staff using shared facilities; (b) Mr Clancy's name has appeared in the Acas annual report as has that of the CO – "*in the latest edition Mr Clancy is mentioned four times and [the CO] three times*"; (c) Acas has a statutory responsibility for the accommodation, equipment and staffing of the CO; (d) there is a statutory requirement that the Acas Council should include three members who represent workers; (e) it was highly likely that Mr Clancy was consulted on the appointment of the present CO (in 2018) and on the move of the CO to its present location in 2020, and it was highly likely that the CO would have been aware of this.

(19) It is the appellant's case (as set out within ground 13) that:

> "it appears there would be a personal and professional interest in the Certification Officer making an adverse finding against someone on the board of Acas as General Secretary of the respondent union. Namely that they would see that person in the office where Acas meetings are conducted and the Certification Officer may have concerns that the office's staff and facilities could be affected (TULR(C)A 1992 s254(5)) by a disgruntled member of the Acas council. Acas and the Certification Officer are so interlinked that it is not possible for the Certification Officer to make decisions about a member of the Acas Council and/or their union without apparent bias.
>
> ...
>
> Ms Bedwell and Mr Clancy have a clear business association, namely that Mr Clancy is on the board of the organisation that provides staff, accommodation, systems and facilities to Ms

© EAT 2025

> Bedwell, as well as paying Ms Bedwell (section 255(1) TULR(C)A 1992), and that the organisation Mr Clancy helps govern and the organisation run by Ms Bedwell share an office. It is likely Mr Clancy and Ms Bedwell see each other in the office and Mr Clancy was also likely consulted in Ms Bedwell's appointment and the decision to move the Certification Office in with Acas.
>
> ...
>
> These issues together with the Certification Officer's refusal to properly examine the complaints, as evidenced by the grounds, the urgency to strike out the complaints without requesting further evidence, the construction of a defence by the Certification Officer for the respondent on complaint 2, and the Certification Officer's conduct with regards prior complaints concerning financial irregularities at Prospect, would lead a fair minded and informed observer to conclude that there was a real possibility that the decision maker was biased."

(20) Having regard to the matters that form the basis of the bias appeal advanced by ground 13, I am unable to see how the issues identified in the present recusal application can be said to arise (still less to be matters with which this appeal is "centrally concerned"). As is observed in Prospect's skeleton argument for the full hearing of the appeal, at paragraph 6:

> "(1) The only relevant decision which is the subject of the appeal, and in respect of which permission has been granted to proceed is the decision of the Certification Officer dated 1 July 2022.
> (2) The challenge is one of apparent bias (as opposed to actual bias) in respect of that decision.
> (3) The basis for asserting apparent bias is particularised in Ground 13 ... Permission was granted in respect of those matters only."

Matters relating to the lawfulness of Acas's internal governance and staff arrangements since at least 2010, alleged unlawful ministerial direction over Acas officers and servants in breach of section 247(3) of TULRCA 1992, any alleged failure of the Acas Council to disapply the Civil Service Code to Acas officers and staff, or any proposition that the employment contracts of Acas staff (including the CEO) are void, are simply not

© EAT 2025

questions for determination on the ground of appeal that has been permitted to proceed to a full hearing.

(21) In reaching this view, I should make clear that, notwithstanding the fact that the appeal is limited to that which has been allowed to proceed, I have taken time to read the various skeleton arguments that the appellant has submitted in relation to the bias point he takes under ground 13. Even with that fuller argument in mind, I am satisfied that the matters with which the appellant now says his appeal is "*centrally concerned*" do not arise for determination.

(22) For completeness, I make clear that I have had no involvement – whether directly or indirectly – in any of the matters of which complaint is made under ground 13 of this appeal.

(23) Having satisfied myself that I can have no interest in any determination of the points raised by ground 13, I have nonetheless considered whether the fair-minded and informed observer might consider there was a real possibility of bias arising from the circumstances of this case. Although I have previously rejected the suggestion that this might arise in relation to Mr Clancy's position as a lay member of the EAT, I have re-visited this point having regard to the potential cumulative impact of Mr Clancey's role as a lay member and my former position as an independent member of the Acas Council, a body on which Mr Clancy now sits and which is itself one of the respondent's to this appeal. Taking into account the whole facts and circumstances in this way, I remain unable to see that the suggestion of bias is anything other than fanciful.

(24) First, I am clear that my past membership of a particular set of chambers, with which some of the counsel involved in this appeal are associated, could not give rise to any concern (see *Locabail* at paragraph 25) (and that is not a point that the appellant has sought to take). Second, I am satisfied that no fair-minded observer could consider that any possibility of bias would arise from the fact that I sat with an EAT lay member some 11 (or even 8) years ago, on what would appear to have been a fairly isolated occasion. Third, I am clear that the coincidence of having been a member of the Acas Council would not change that perspective: not only was there was no overlap between my tenure and that of Mr Clancy, but I also held office as an independent member of the Council, I did not hold that office as a representative of a trade union. Fourth, I do not consider that holding office as an independent member of the Acas Council over a decade ago would cause the fair-minded observer to consider that any possibility of bias could arise in my now hearing this appeal.

© EAT 2025

(25) In reaching these conclusions, I have had regard not only to *Porter v Magill*, but to the guidance provided in *Locabail* (noting that a judge's past service or employment background will not normally give rise to any ground for recusal) and to the more recent assistance provided by the Supreme Court of Ireland in *Kelly v University College Dublin and ors* [2025] IESC 6 and the EAT in *Abraham*. Taking into account the principles identified in the case-law, and the guidance thus provided, I have then sought to step back and ask, objectively whether the whole facts and circumstances would cause the fair-minded, informed observer to consider there was a real possibility of bias, that is, that there was a more than fanciful possibility that, contrary to my oath, I might determine this appeal by reference to factors extraneous to its merits. Adopting such a holistic approach to all the facts and circumstances, I am satisfied that this is not the case.

(26) That being so, as the respondents have identified, my judicial duty is to hear the case which has been allocated to me.

Witness statements

The application and the position of the respondents

(27) By this application, the appellant seeks a preliminary determination as to whether witness statements submitted by the CO and the Chief Executive of Acas are "*ultra vires and inadmissible, by reason of statutory prohibitions that render their appointments and/or contracts void*".

(28) The application is resisted by the respondents. The submissions of the fourth respondent address the substantive question as to the vires of the appointments of the CO and Chief Executive of Acas. In relation to the appointment of the CO, it is noted that section 254(2) TULRCA 1992 does not proscribe the selection process that the Secretary of State must follow, other than to require that Acas be consulted before that appointment; that provision does not, therefore, render the CO's appointment by the process adopted by the Secretary of State ultra vires. As for the Chief Executive of Acas, it is observed that section 251(2) TULRCA 1992 provides that "*ACAS may appoint such other officers and staff as it may determine*", which would plainly permit the appointment of a Chief Executive. In any event, the respondents point out that a witness statement cannot be ultra vires: such a statement is not a decision of a public body but a statement of an individual as to what they know or believe to be the case, verified by a statement of truth.

© EAT 2025

Analysis and decision (witness statements)

(29) I can take this application more shortly. First, questions as to the vires of the appointments of the CO and/or the Chief Executive of Acas are irrelevant both to this appeal and to the question of the admissibility or otherwise of the witness statements in issue. This is not an appeal relating to the appointment of either officer and, as the respondents have observed, a witness statement is a statement made by an individual which states that which they know or believe to be true; the vires (or otherwise) of any appointment that they hold would not alter that position: the witness statement remains the statement of that witness, it is not something that can be "ultra vires". Second, questions as to the admissibility of evidence before the EAT are, in any event, for the judge to determine. There are no proper grounds on which the statements in question should be ruled to be inadmissible. Third, for the reasons stated in the submissions made by the fourth respondent, the points raised by the appellant relating to the "vires" of these appointments are without merit. For all these reasons, I refuse this application, which is properly to be characterised as totally without merit.

(30) In determining this application, I note the additional point made by the respondents, that this was a matter that the appellant might properly have raised at a much earlier stage. I also note the observations made by UTJ Stout when refusing the appellant's applications in her order, seal dated 16 July 2025, when she ruled that the appellant's applications were misconceived and without merit, and emphasised the need to refrain from making "*incidental and peripheral applications that are liable to detract and distract from the principal issues in the case*". I agree.

Further direction

(31) When this matter was initially permitted to proceed to a full hearing, the order of UTJ Holly Stout, seal dated 29 May 2024, made clear that the listing would include time for judgment to be delivered. In her further order, dated 10 September 2024, extending the listing to three, rather than two, days, UTJ made clear that the timetable for the hearing would be a matter for the judge. Given the need for that timetable to include time for judicial decision-making (whether the judgment is given ex tempore or reserved), the parties are expected to co-operate to agree a timetable for submissions over the first two days of the hearing, allowing the third day to be allocated for judgment. In lieu of agreement, a timetable may be imposed at the commencement of the hearing.

© EAT 2025