Neutral Citation Number: [2025] EAT 149

Case No: EA-2023-000748-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 October 2025

Before:

MARCUS PILGERSTORFER KC

DEPUTY JUDGE OF THE HIGH COURT

Between:

TOM SIMPSON

Appellant

- and -

UNITE THE UNION

Respondent

- -
- -

Tom Simpson, the **Appellant** appeared in person
Oliver Segal KC (instructed by **Unite the Union Legal Department**) for the **Respondent**

Hearing date: 10 July 2025

- -

JUDGMENT

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SUMMARY

Certification Officer; Trade Union Membership; Apparent pre-determination bias

Mr Simpson, a member of Unite the Union, appealed pursuant to section 108C of the Trade Union and Labour Relations (Consolidation) Act 1992 against the decision of the Certification Officer. The Certification Officer decided that the disciplinary procedure followed by Unite against Mr Simpson involved no breach of the union's rules. That issue turned on whether the union had breached the rules of natural justice which were incorporated within the disciplinary procedure. Specifically, Mr Simpson relied on apparent predetermination bias arising from the prior involvement in the disciplinary process of Mr Gillespie, the chair of his disciplinary panel. The Certification Officer's decision was taken on remission following a successful appeal to the EAT which identified the test for her to apply. Mr Simpson appealed against the further decision of the Certification Officer on three grounds.

Held, dismissing the appeal:

(i) The Certification Officer had identified and applied the correct test: whether Mr Gillespie's involvement at various stages of the process before chairing the disciplinary panel was such that a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that Mr Gillespie had predetermined the matter.

(ii) The Certification Officer had not erred by failing to ascribe to the hypothetical observer knowledge that some other unions separate out functions during the disciplinary process. That matter had not been argued below and the Certification Officer did not err by focusing on the facts of the instant case.

(iii) The Certification Officer did not err by failing to take into account or refer to a number of evidential matters raised by Mr Simpson.

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MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. The Certification Officer has jurisdiction to grant a declaration that a trade union has breached its rules when conducting disciplinary proceedings in respect of a member: see section 108A Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). An appeal from the Certification Officer's decision lies to this Tribunal: see section 108C TULRCA.

2. In this case, Unite the Union ("Unite") operates disciplinary rules which include an obligation to comply with the rules of natural justice. A component of that is the avoidance of apparent predetermination bias. Following a successful appeal to this Tribunal (see **Tom Simpson v Unite the Union [2022] EAT 154**), an issue was remitted to the Certification Officer to determine. That issue was whether there had been apparent predetermination bias in Mr Simpson's case due to the prior involvement in the disciplinary process of the chair of the disciplinary panel.

3. This is Mr Simpson's further appeal against the remitted determination of the Certification Officer. The grounds of appeal concern whether the Certification Officer applied the correct test for apparent predetermination bias, whether the Certification Officer ascribed the requisite knowledge to the hypothetical observer, and whether she took account of all necessary evidential considerations when applying the test.

Factual Background

4. Mr Simpson was a member of the Community Branch of Unite. He was Branch Secretary for the Greater Glasgow Unite Community Branch and the Branch delegate to the South Lanarkshire Trade Council.

Mr Simpson's Complaints

5. On 2 March 2018, Mr Simpson made a complaint by email to Unite alleging *"bullying, discriminatory and sexually harassing behaviour"* by another member of Unite. He alleged that on a number of occasions the other member had squeezed his shoulders, that a piece of paper had been thrown in his

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face in a pub, that the other member had squeezed his left leg above the knee, and had exerted a "*physical body push"* against him. Mr Simpson asserted that some of the alleged physical conduct had been admitted in correspondence. On 19 March 2018, Mr Simpson made a further complaint about the conduct of the same member of Unite, and also against a second member who he asserted had been responsible *"for commissioning and forwarding false, defamatory, harmful and discriminatory statements about me to others"*.

Ms Dougall's Investigation

6. Elaine Dougall, Regional Coordinator in the Scotland Region of Unite, was asked to investigate the complaints. She produced a report which found *"no evidence to substantiate [either of the] complaints"*. She concluded that it was Mr Simpson who had acted in an inappropriate and unjustifiable manner, that there was *"no substance to either complaint",* and that Mr Simpson's actions *"may be construed as vexatious"*. She recommended that a Finance and General Purposes Committee ("F&GP Committee") be convened to determine if Mr Simpson himself had breached Unite's membership discipline rule.

F&GP Decision on the Complaints and to Investigate Mr Simpson

7. The F&GP Committee met on 4 September 2018. Mr John Gillespie, Regional Chair of Unite in Scotland, acted as the chair. The minutes of the meeting record as follows:

> *"Rule 27 Complaint – Mr. Simpson*
>
> *Elaine Dougall was asked to go through her investigation with the committee who then asked the RCO a number of questions which were answered to their satisfaction. The committee then went into a private session to go over the paperwork provided to them with regard to the case and to determine how they wished to proceed.*
>
> *Having considered the evidence provided to them the committee did not uphold the Rule 27 complaint submitted by Mr. Simpson. In reaching their conclusions the committee also took into consideration whether the complaint by Mr. Simpson had any malicious or vexatious intent. In doing so the committee believed there was that possibility and instructed an investigation to take place and for Mr. Simpson to be suspended during the period of the investigation and any subsequent hearings that may take place. This was not to be seen as an implication of guilt merely a measure to conclude the investigation."*

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8. Mr Gillespie took part in that consideration and decision as is clear from his witness statement prepared for the first hearing before the Certification Officer. In that statement he explained as follows (at paragraphs 6-8):

> *"6. …I was present on the F&GP that day along with six other Committee members. As Chair of the F&GP I tend to let the members debate the matter and try and take the temperature of the meeting and the room. I did so that day and found out members unanimous, having looked through Ms Dougall's report, in the view that there was something amiss in the complaint having been put forward by Mr Simpson. Ms Dougall was questioned about her conclusions. We took a unanimous decision that the conduct of [the members] did not warrant a disciplinary case being opened. However we reached a further conclusion that there was, on the face of it, evidence to suggest that Mr Simpson had been malicious or vexatious in his complaint.*
>
> *7. However concerns were expressed by the Committee that we could not proceed to a disciplinary matter without giving Mr Simpson the opportunity to explain why he believed the actions of other, many of which seemed relatively harmless in themselves or at the least explainable, amounted to the behaviour he had described.*
>
> *8. We concluded that we needed more information and for this reason we initiated a second investigation. Mr Simpson would and rightly should be given the opportunity to explain himself."*

9. On 7 September 2018, Mr Simpson was suspended pending an investigation. He was later told that Stephen Deans, Regional Coordinating Officer within the Scotland Region, would be conducting the investigation.

10. On 9 October 2018, the F&GP Committee met again. Mr Gillespie was present. The minutes record that whilst Mr Deans had made contact with Mr Simpson, a date for a meeting was awaited. Matters were left that there would be a report back to the committee after the meeting had taken place.

Mr Deans' Investigation Report and F&GP Decision to Proceed to a Disciplinary Hearing

11. Mr Simpson and Mr Deans did not meet. Mr Simpson sent a communication to Mr Deans with what Mr Deans described as an *"extensive list of conditions and demands before he would meet with me"*. Accordingly, Mr Deans proceeded to prepare an undated report without Mr Simpson's input. The report recorded Mr Deans' belief that Mr Simpson's actions were vexatious and malicious and that he had breached Unite's membership discipline rule. Mr Deans recommended that the F&GP Committee should convene a *"Rule 27 panel"* to consider the findings and determine whether there had in fact been a breach of the membership discipline rule.

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12. On 12 March 2019, the F&GP Committee met with Mr Gillespie in the chair. The minutes record that Mr Deans' report was considered and that:

> *"The F&GP Committee agreed with Stevie Deans['] recommendation and has put together a panel of 3 members, Agnes Tolmie, James Mann and John Gillespie."*

13. Again, Mr Gillespie described his involvement in his witness statement prepared for the first hearing before the Certification Officer. At paragraphs 11-12 he stated:

> *"11. The panel deliberated on [Mr Deans'] report. We agreed with the view of the investigating Officer that the matter should proceed to a disciplinary matter. It was agreed that a panel consisting of myself, Ms Tolmie and Mr Mann would hear the case and consider all of the evidence in the matter.*
>
> *12. It is entirely normal for such panels to be made up of lay persons from within the Region and our Executive Committee. It is in fact required by our Rules. I do not see any difficulty or impropriety. The elected members of the Region are required to sit on these bodies and our involvement to date was to decide if ... there was sufficient evidence to proceed to the next stage and commence a disciplinary process."*

Disciplinary Hearing and Outcome

14. A disciplinary hearing was arranged for 8 May 2019. Ahead of that, on 3 April 2019, a letter was sent to Mr Simpson setting out the allegation he faced and inviting him to the hearing. The letter referred to Rules 27.1.1, 27.1.3 and 27.1.5 of Unite's Rule Book and set out the charge as follows:

> *"The conduct which the disciplinary panel will consider is the lodging and pursuing of complaints (lodged initially on 2nd and 16th March 2018) in respect of [2 members] which were subsequently found, following investigation, to be without merit. The panel will consider whether they were potentially malicious, vexatious and/or defamatory."*

15. On 30 April 2019, Mr Simpson wrote to Mr Gillespie. Amongst other things, Mr Simpson set out his view that Mr Gillespie should recuse himself from the disciplinary panel because of his involvement in and connection to organisations with which those about whom Mr Simpson had complained were also connected. The letter ended as follows:

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

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16. Mr Gillespie did not reply to that letter, nor did he inform the other members of the disciplinary panel of its contents.

17. The disciplinary hearing took place on 8 May 2019, but Mr Simpson did not attend. The panel made a decision which was communicated by letter dated 22 May 2019. By that letter, Mr Simpson was told that the charges against him were upheld and he was expelled from Unite with immediate effect.

Appeal and Outcome

18. Mr Simpson appealed by email of 5 June 2019. Part of that appeal (within complaint 4) stated as follows:

> *"Mr Gillespie chaired the F&GP committee of 4th September 2018 that decided to instruct an investigation… Mr Gillespie chaired the F&GP Committee of 9th October 2018 that decided to instruct Stephen Deans to further investigate… Mr Gillespie chaired the F&GP committee of 12 March 2019 that decided to "put together" a Rule 27 panel consisting of "3 members, Agnes Tolmie, James Mann and John Gillespie". Clearly it was not legitimate for Mr Gillespie to be a member of the committee which raised the initial concerns, initiated the investigation into those concerns, confirmed that the investigation found the concerns to have foundation and go on to participate in hearing the case concerning those concerns."*

19. The appeal was considered by a sub-committee of the Executive Council on 5 August 2019, but Mr Simpson did not attend. By letter of 4 September 2019, Mr Simpson was informed that his appeal had been dismissed.

First Decision of the Certification Officer

20. Aggrieved by that outcome, Mr Simpson made an application to the Certification Officer pursuant to section 108A(1) TULRCA, contending that there had been a breach of Unite's disciplinary rules and this had resulted in his expulsion. The nature of the complaint was clarified by the Certification Officer. Mr Simpson confirmed that this clarification was accurate at the outset of the hearing which was conducted over three days on 26, 27 and 28 January 2021. The clarified complaint was set out in a communication dated 4 November 2020 as follows:

> *"Rule(s) breached by Unite the Union:*
> *a) Principles of natural justice as incorporated in Unite rules.*
> *b) Unite Rule 27 including Unite Rule 27.2.*
>
> *Date(s) of rule breaches:*
> *From 4-9-2018 to 8-5-2019*

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Description of rule breach:
It is a principle of natural justice that no person may judge their own case. Unite breached this principle and undermined procedural fairness by arranging for John Gillespie, the Chair of the F&GP Committee and chair of the Scottish Unite Executive Committee, to act as chair of the disciplinary panel set up to consider disciplinary charges brought by the F&GP Committee and the Scottish Unite Executive Committee against me, Mr Gillespie chaired the F&GP committee of 4th September 2018 that decided to instruct an investigation into possible malicious and vexatious Intent and decided on my suspension from elected positions.

Mr Gillespie chaired the F&GP committee of 9th October 2018 that decided to instruct Stephen Deans to "further investigate". Mr Gillespie chaired the F&GP committee of 12th March 2019 that decided to "put together" a Rule 27 panel.

It is a breach of unite Rules and Natural justice for Mr Gillespie to have been a member of the committee which raised the initial concerns, initiated the investigation into those concerns, confirmed that the investigation found the concerns to have foundation and to then have gone on to participate in hearing the case concerning those concerns."

21. Rule 27 of Unite's Rule Book was therefore invoked by Mr Simpson. That Rule makes provision for Membership Discipline. Rule 27.1 permits a member of Unite to be charged with types of misconduct set out in subsequent sub-paragraphs. In Mr Simpson's case, the charge concerned Rules 27.1. 1, 27.1.3 and 27.1.5 which provide as follows:

"27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.
…
27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.
…
27.1.5 Bringing about injury to or discredit uypon the Union or any member of the Union including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers…"

22. Rule 27.2 was specifically referred to by Mr Simpson in his complaint. This Rule provides:

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

23. Rule 27.3 provides that charges may be heard by *"a Branch, Branch Committee (where so determined by the Branch), Regional committee or the Executive Council"*. The remainder of Rule 27, set out in full

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by the Certification Officer in her decision under appeal (see §14), deals with other aspects of member discipline, suspension, sanctions that may be visited for breach, and appeals. Guidance on the implementation of Rule 27 was issued by Unite's Executive Committee and was set out in Annex B of the Certification Officer's decision.

24. In a decision dated 18 February 2021, the Certification Officer rejected Mr Simpson's application.

First Appeal to the EAT

25. Aggrieved, Mr Simpson appealed to this Tribunal by a Notice of Appeal received by the EAT on 19 March 2021. Judgment was handed down by HHJ James Tayler on 12 October 2022: see [2022] EAT 154. The EAT allowed the appeal and remitted the matter to the Certification Officer.

26. At §§45-48, the learned Judge made the following observations concerning the relevant requirements of natural justice:

> *"45. The Certification Officer only specifically considered the issue of the appearance of bias in the section of her reasons dealing with the secondary complaints:*
>
> > *81. Mr Potter referred me to the test of actual or perceived bias which is set out in Porter v Magill [2022] 2 AC 357. That test requires me to consider whether a fair minded observer, having considered the facts, would conclude that there is a real possibility that the judge was biased. That fair minded observer is neither complacent no[r] unduly sensitive or suspicious. If that fair minded observer would conclude that there was a real possibility that Mr Gillespie was biased then he should have recused himself.*
>
> *46. The Certification officer was not correct to state that this was the test for both actual or perceived bias – it is the test for apparent bias. The Certification Officer did not refer to the requirement that the observer be "informed" in addition to being "fair-minded", although she did refer to the observer "having considered the facts".*
>
> *47. The test, in the context of apparent predetermination is "whether a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had predetermined the matter to be decided": **R (Lewis) v Redcar and Cleveland BC** [2008] EWCA Civ 746, [2009] 1 WLR 83.*

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> *48. The attributes of a fair-minded and informed observer were considered by Lord Hope in **Helow v Home Secretary** [2008] UKHL 62, [2008] 1 WLR 2416 [1-3]:*
>
> > *[1] My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.*
> >
> > *[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, as Kirby J observed in **Johnson v Johnson** (2000) 174 ALR 655, (2000) 201 CLR 488 (para 53). 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."*

27. HHJ Tayler observed that internal procedures cannot realistically be expected to be as fastidiously conducted as legal proceedings. In many organisations, decisions are necessarily taken by individuals who act on behalf of the organisation (see §53). This is likely to be the case for a trade union, which was unlikely to be able to establish a level of independence akin to (for example) a regulator conducting a disciplinary exercise (see §59). Nonetheless *"[w]hile all the decisions taken in disciplinary proceedings may be taken by people who are acting on behalf of a trade union, the roles could be split between different committees or undertaken by different individuals who sit on the same committee to ensure a degree of separation and independence in decision making"* (§61). Accordingly, *"in the context of a trade union, significant prior involvement can result in an appearance of bias by way of predetermination"* (§65).

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28. Turning to the assessment of the Certification Officer, HHJ Tayler decided as follows (§§74-75), with my emphasis:

> *"74. The specific facts of this case are somewhat unusual. As set out above, in the context of a trade Union, it is not surprising that all those involved in the disciplinary process were acting on behalf of the union. Mr Simpson's particular complaint is about the repeated involvement of Mr Gillespie. This is not a case in which Mr Gillespie merely sat on the committee that decided that there was a case to answer and then chaired the disciplinary panel. The process started with Mr Simpson raising a complaint of harassment and ended with him being expelled from the Union. Mr Gillespie chaired the F&GP Committee that, after a private session, decided that Mr Simpson's complaints should be dismissed and that there was "something amiss in the complaint having been put forward by Mr Simpson" as a result of which an investigation should be initiated. He did not conduct the investigation but then chaired the F&GP Committee that accepted Mr Deans' recommendation and decided that Mr Simpson should be charged. When asked to recuse himself he did not reply to the letter or tell his fellow committee members about the letter. Mr Gillespie then chaired the disciplinary panel that decided that Mr Simpson should be expelled from the Union. While this process may not have been expressly prohibited by the Rules, the Certification Officer correctly concluded that the rules must be applied in a manner that accords with natural justice.* ***The real question was whether Mr Gillespie's involvement at various stages of the process before chairing the disciplinary panel, was such that "a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that Mr Gillespie had predetermined the matter", or put another way, would the fair-minded and informed observer consider there was a real risk that Mr Gillespie did not approach the disciplinary hearing with an open mind.***
>
> *75. I do not consider that the Certification Officer properly directed herself as to the law and identified this as being the question that she needed to answer in determining the primary complaint. Accordingly, I consider that she erred in law. I accept the Union's argument that it was the primary complaint that was properly before the Certification Officer, rather than the secondary complaints, although the way Mr Gillespie dealt with Mr Simpson's letter asking that he recuse himself from the disciplinary panel is properly to be seen as a component of the material that would have been known to the fair-minded and informed observer, and so is relevant to the primary complaint. To the extent that the Certification Officer considered the test for apparent bias it was in respect of the secondary complaints."*

29. In a subsequent judgment on disposal, dated 11 November 2022, HHJ Tayler explained that he had concluded that the Certification Officer had erred in law by *"failing to consider and apply the relevant law to the question of whether the disciplinary process adopted in this case gave rise to an appearance of bias by way of pre-determination"*. This issue was remitted for redetermination.

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Decision of the Certification Officer under Appeal

30. In accordance with HHJ Tayler's order, the matter was remitted to the Certification Officer. A hearing was originally listed for 19 April 2023. The parties were invited to make submissions and submit any new documentary evidence and to indicate whether they intended to call oral evidence. Unite indicated it would rely on the evidence previously submitted and that no oral evidence would be relied on. Mr Simpson submitted authorities and both parties lodged written submissions. The Certification Officer asked whether it was necessary to retain the hearing in these circumstances. Mr Simpson sought an oral hearing, but ultimately the Certification Officer decided she could deal with the matter fairly on paper and did so. As I shall explain, there is now no live appeal against this aspect of the decision.

31. At §12 of her reasons, the Certification Officer set out the involvement that Mr Gillespie had had in the disciplinary procedure (adopting the description set out at §71 of HHJ Tayler's judgment):

"*71. The disciplinary process, having specific regard to Mr Gillespie's involvement, was as follows:*

(1) Mr Simpson made the initial complaints
(2) Ms Dougall conducted the investigation
(3) Ms Dougall wrote the investigation report. She considered there was no evidence to substantiate both complaints but recommended that a F&GP panel be convened to determine if Mr Simpson had himself breached the Rules.
(4) Mr Gillespie chaired the F&GP Committee on 4 September 2018: (a) to whom Ms Dougall presented her complaint; (b) that questioned her about the report; (c) was satisfied by her answers; (d) went into private session to consider the paperwork; (e) rejected Mr Simpson's complaints; (f) decided it was possible that Mr Simpson had malicious or vexatious intent being of the view that "there was something amiss in the complaint having been put forward by Mr Simpson"; (g) instructed that an investigation take place (considering Mr Simpson should have a chance to answer the allegation); and (h) instructed that Mr Simpson should be suspended (noting that was not to be seen as an implication of guilt).
(5) Mr Deans investigated the issue raised by the F&GP Committee.
(6) Mr Gillespie chaired the F&GP Committee on 9 October 2019 when Mr Deans was instructed to continue the investigation and to seek a meeting with Mr Simpson.
(7) Mr Deans wrote the investigation report and recommended that a Rule 27 panel be put together.
(8) Mr Gillespie chaired the F&GP Committee on 12 March 2019 and (a) agreed with the view of the investigating Officer that the matter should proceed to a disciplinary hearing (which meant that Mr Simpson would be charged with a breach of the Rules by the Union) (b) decided that the disciplinary hearing would be before a panel of 3 members of the F&GP Committee, of which he would be the chair.
(9) Mr Simpson wrote to Mr Gillespie on 30 April 2019 and asked that he should not be on the disciplinary panel. Mr Gillespie did not reply to the letter or share it with the other members of the committee.

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(10) Mr Gillespie chaired the disciplinary panel and with the other two members decided that Mr Simpson should be expelled from the Union.
(11) Mr Gillespie gave evidence at the appeal hearing before a sub-committee of the Executive Council.
(12) The sub-committee of the Executive Council dismissed the appeal."

32. At §17, the Certification Officer then set out what she had to decide on remission, as follows:

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

33. After dealing with aspects of Mr Gillespie's prior involvement, the Certification Officer explained her decision at §§24-29, which I extract in full:

"24. In my view, Mr Gillespie and the F&GP acted appropriately in each of the stages which led, eventually, to the referral to a disciplinary hearing. I am satisfied that a fair minded and informed observer would agree, and that they would also agree that Mr Gillespie's actions do not provide the basis to conclude that any subsequent action taken had been pre-determined. The observer would be aware that the F&GP were responsible for the oversight of the investigations and the decision as to whether to refer the matter forward to the Hearing. They would also be aware that both investigators had recommended that the issues be referred to a disciplinary hearing and that Mr Simpson had been given several opportunities to meet with the second investigator but had declined to do so. They would also be aware that Mr Simpson would have a further opportunity, at the disciplinary hearing, to make his case and respond to the allegations. For the avoidance of doubt, I am also satisfied that, taking into account all of Mr Gillespie's, and the other members of the F&GP, involvement in the early stage does not amount to there being a real risk of apparent or perceived bias.

25. The remaining question, therefore, is whether, having participated in each stage of the proceedings up to the referral, Mr Gillespie should have participated in the disciplinary panel itself. It is worth noting here that this complaint relates only to Mr Gillespie; the other two panel members were also members of F&GP who would have participated in the earlier decision-making process. It is also worth noting that the argument put forward by Mr Simpson at the original hearing before me related both to Mr Gillespie's political affiliations and to his role which he described as either a complainant or a prosecutor.

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

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

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

> *'43. The second letter was to Mr Gillespie, chair of the disciplinary panel. In this letter Mr Simpson sought confirmation that the documents and video material he had supplied would be provided by the hearing and offered again to reply, in writing, to any question the panel had. He also noted that Mr Gillespie appeared to have connections, through the Union, and other organisations, to the two members about whom Mr Simpson had originally complained. Mr Simpson set out his concern about this as follows: [extract omitted; it is set out above at paragraph 15 of this judgment].*
>
> *44. When giving evidence Mr Gillespie told me that he did not reply to Mr Simpson's letter nor share it with anyone. He did not consider himself to have a conflict of interest and saw no reason why he should stand down from the panel. He told me that he acted impartially throughout.'*

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

> *'83. When giving evidence Mr Gillespie drew my attention to the letter written to him by Mr Simpson on 30 April 2019 which asked Mr Gillespie to consider whether he should recuse himself from the Hearing. The text of that request is set out at paragraph 43 above. The reason for the request was set out by Mr Simpson as being common membership of some Unite Committees, and Unite Progressive Left Scotland, with a Unite colleague who Mr Simpson describes as a supporter of one of the members about whom he had originally complained. Mr Simpson also noted that the other Member was on the management committee of an organisation who had hosted an event at which Mr Gillespie spoke; however, Mr Gillespie told me in evidence that he did not recall attending such an event.*
>
> *84. In my experience it is not uncommon for Union Members and staff to also be a part of movements or organisations which are affiliated to, or linked with, the Union. I do not think,*

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> *however, that this can be sufficient for the fair minded observer described at paragraph 81 above to believe that real or perceived bias could exist. Nor am I persuaded that the fact that Mr Gillespie sat on a Union Committee with a supporter of the person about whom Mr Simpson had originally complained, is sufficient to demonstrate real bias. On that basis I refuse to make the declaration requested by Mr Simpson.*
>
> *85. I would add, however that it would have been best practice for Mr Gillespie to have shared the letter written by Mr Simpson with the other members of the panel or with Mr Rafferty as Scottish Secretary. This would have ensured that they were comfortable with his decision as to whether he could be perceived as being biased and demonstrated a greater degree of transparency. I am conscious, however, that Mr Gillespie himself drew my attention to this letter and explained the actions he too and I make no criticism of him.'*
>
> *29. Mr Simpson has not provided me with any evidence or argument which would cause me to revisit this decision. Nor has he provided any evidence or argument to suggest that, at this stage, anything happened which would lead the fair-minded observer to conclude that the matter had been pre-determined. I remain of the view that it would have been best practice for Mr Gillespie to have shared the correspondence."*

34. The Certification Officer concluded by accepting that Unite's disciplinary procedures needed to comply with natural justice (§30). She found the procedures Unite followed were consistent with the union's Rules and *"gave Mr Simpson every opportunity to explain his position and respond"* (§31). Whilst there was no separation of functions as would be the case in a tribunal or court, Unite was not such a body (§31). Her conclusion is then stated at §§32-3 (emphasis in the original):

> *"32. For the reasons set out above I am satisfied that Mr Gillespie's involvement in the earlier stage of the proceedings did not give rise to a real risk of bias at the disciplinary panel stage. Nor do I think his failure to respond to Mr Simpson's letter asking him to recuse himself from the panel gives rise to such risk.*
>
> ***I do not uphold Mr Simpson's complaint that there was an appearance of bias by way of pre-determination arising from Mr Gillespie's involvement in the early stages of the disciplinary hearing and the disciplinary panel itself.***
>
> *33. Finally I am aware that some unions have introduced a separation between the Committee which oversees a disciplinary process and the disciplinary panel. Whilst I do not consider this necessary in all circumstances unions may wish to consider whether it is best practice in cases such as this where a complainant is already aggrieved by the process which has been followed by the Union or whether he or she believes that there are potential conflicts of interest."*

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This Appeal to the EAT

35. Mr Simpson was unhappy with the Certification Officer's decision on remission. He therefore appealed for a second time to the EAT. The Notice of Appeal was initially considered on 6 October 2023 on the sift by Judge Stout who directed that there be a Preliminary Hearing. In her reasons, she doubted that there was an arguable error concerning the decision to proceed without a hearing, but observed that arguably the Certification Officer lost sight of the fact the threshold for apparent bias is low and referred to an arguable misstatement of the test at §29 of the reasons. She also considered there may arguably be an error concerning the letter Mr Simpson wrote to Mr Gillespie which was arguably within the scope of the remittal.

36. The Preliminary Hearing was conducted by Mathew Gullick KC, DHCJ. At this hearing, held on 15 May 2024, Mr Simpson had the benefit of representation by David Stephenson of Counsel, acting through the ELAAS scheme. Three reformulated grounds of appeal were identified as being arguable and permission was given for them to proceed to a full hearing. Only these three grounds of appeal were live before me:

(1) That the Certification Officer misapplied the law concerning apparent predetermination bias.

(2) That the Certification Officer erred in law by not considering whether the separation of union decision-making in other unions' disciplinary processes was a relevant factor which the fair-minded and informed observer would have had in mind when considering if the test of apparent bias was satisfied and/or that she failed to give adequate reasons.

(3) That the Certification Officer failed to take into account relevant evidential considerations and/or give adequate reasons.

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37. The jurisdiction of the EAT to hear this appeal is governed by section 108C TULRCA which provides as follows:

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

38. This statutory language is applicable to decisions of the Certification Officer made on or after 1 April 2022. Prior to that date, as HHJ Tayler observed at §§38-9 of his judgment, the jurisdiction of the EAT was limited to "any question of law" arising in proceedings before or from a decision of the Certification Officer. As the grounds which Judge Gullick KC permitted to proceed were all framed as errors of law, this change was of limited impact in these proceedings[1].

Ground 1: Misapplication of the Law concerning Apparent Bias

39. The first ground of appeal, as set out in the amended grounds of appeal, is that the Certification Officer misdirected herself in law by misstating the test concerning apparent predetermination bias at §§24-29 of her Reasons. It is said that the Certification Officer erroneously asked whether there was evidence which would lead the fair minded observer to conclude that the matter had been predetermined. It is argued that this applies too high a threshold, because the test that falls to be applied is *"whether a fair minded and informed observer, knowing the facts, thinks that there was a real possibility that the decision maker had predetermined the matter to be decided"*.

40. At the hearing of this appeal, Mr Simpson expanded on that position. He submitted that the Certification Officer had misstated the correct test of apparent predetermination bias on at least 12 occasions in her decision. He identified them as follows (with my emphasis added):

[1] On behalf of Unite, Mr Segal KC agreed this was so at the hearing. Although I had understood Mr Simpson also to agree, in comments on a draft of this judgment, Mr Simpson said he did not. He submitted the change in section 108C TULRCA, whereby the EAT is permitted to consider "any question" arising in proceedings, was of impact. He referred to the proper construction of his complaint before the Certification Officer, and all the points he had made in his skeleton argument and orally at the hearing. He argued these evidenced many points of unfairness to him. Notwithstanding those submissions, I remain of the view that the change in statutory wording is of limited impact in this appeal. That is because the three grounds which were identified and permitted to proceed by Judge Gullick KC at the preliminary hearing were all framed as errors of law. It was only those grounds which were live before me. The change in section 108C TULRCA does not permit the EAT at a full hearing to ignore the scope of the appeal as set at the preliminary hearing stage.

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(1) At §16, when referring to HHJ Tayler's judgment, the Certification Officer described the Judge as having found that the Certification Officer "did not explicitly consider whether Mr Gillespie's involvement in the earlier stages of the disciplinary process demonstrated **a real risk of**, or gave rise to, an appearance of bias by way of predetermination".

(2) Later in §16, when referring to HHJ Tayler's decision to remit, the Certification Officer described the Judge as not feeling that the evidence or argument "was sufficient to determine whether there was **a risk of real bias** arising from Mr Gillespie's involvement in the earlier stages of the disciplinary proceedings".

(3) At §17, when describing the issue remitted, the Certification Officer described the issue, put another way, as "would a fair minded and informed observer consider there was **a real risk** that Mr Gillespie did not approach the disciplinary hearing with an open mind".

(4) At §20, when dealing with the F&GP Committee having undertaken part of its consideration in private, the Certification Officer said that she could not see that this "in itself, would lead to a fair-minded observer seeing **a real risk of** bias".

(5) Later at §20, when commenting on the decision to suspend Mr Simpson, the Certification Officer stated that this "does not, however, undermine my conclusion that, at this stage, there was **no real risk that** Mr Gillespie and the F&GP Committee were acting with a closed mind and had already reached a decision."

(6) At §24, the Certification Officer stated, for the avoidance of doubt, that Mr Gillespie's prior involvement at the early stage did "not amount to there being **a real risk of** apparent or perceived bias".

(7) At §27, the Certification Officer described having found that "an informed observer would also consider that there is **no real risk that** Mr Gillespie, or the Committee, approached their decision making with anything other than an open mind".

(8) At §28, in the context of Mr Simpson's letter of 30 April 2019, the Certification Officer stated that "Mr Gillespie's political affiliations, and whether they give rise to real or actual bias, are not, relevant to this decision".

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(9) At §28, the Certification Officer cited her first decision at §84 which referred to the "fair minded observer" but did not attribute that observer with the characteristic of being informed.

(10) Also in §28, in the same extract from §84 of her first decision, the Certification Officer restated the test as being whether the matter was "sufficient for the fair minded observer… to believe that real or perceived bias could exist"

(11) At §29, the Certification Officer referred to the observer being "fair-minded" but not informed, and posed the question as to whether anything "**would lead** the fair-minded observer to conclude that the matter **had been** pre-determined".

(12) Finally, at §32, the Certification Officer stated her conclusion in terms of whether Mr Gillespie's involvement gave "rise to **a real risk of** bias at the disciplinary panel stage".

41. On behalf of Unite, Mr Segal KC submitted that the Certification Officer had set out and applied the correct legal test. He said the correct test was evident from §§16-17 of the reasons. He submitted the Certification Officer went through each instance of Mr Gillespie's prior involvement and explained why the committee had acted with an open mind. Mr Segal submitted that the Certification Officer's finding on the true remitted issue is set out at §24 and §32. She then considered Mr Simpson's letter to Mr Gillespie, asking him to recuse himself because of his political affiliations, at §§27-29. This was done in full appreciation of its relevance to the remitted issue, and a correct conclusion was reached at §32. In relation to the way she expressed herself at §§24 and 29, Mr Segal submitted that the Certification Officer did not lose sight of the correct test and had in any event made the position clear when stating her conclusions at §32.

"Real Risk"

42. Eight of Mr Simpson's criticisms of the way the Certification Officer expressed the test she was applying were directed at her having used the language of "real risk" rather than "real possibility" of apparent predetermination bias: see para 40(1), (2), (3), (4), (5), (6), (7) and (12) above.

43. At §§47-8 of his judgment in this case, HHJ Tayler referred to extracts from **R (Lewis) v Redcar and Cleveland BC [2008] EWCA Civ 746, [2009] 1 WLR 83** and **Helow v Home Secretary [2008] UKHL 62, [2008] 1 WLR 2416.** In both extracts, the language of "real possibility" is deployed. Judge Tayler

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then adopted that language when identifying the "real question" for the Certification Officer at §74 which I have cited above. He went on, however, to reformulate the question in "another way" in the same paragraph in terms of whether the fair minded and informed observer would consider "*there was a real risk that Mr Gillespie did not approach the disciplinary hearing with an open mind"*.

44. Although, clearly, Judge Tayler saw the two formulations as coming to the same thing, Mr Simpson submitted that Judge Tayler was wrong to have set out an alternative formulation in terms of risk, and maintained there was a substantive difference between the language used. He took me to Lord Hope's speech in **Porter v McGill [2001] UKHL 67, [2002] 2 AC 357.** At §102, his Lordship set out a modification of the test in **R v Gough [1993] AC 646** which had been proposed in **Re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564** as follows:

> *"When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased".*

45. At §103, Lord Hope continued:

> *"I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. 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."*

46. Mr Simpson relied on Lord Hope having deleted from the test the reference to "a real danger". He submitted that reformulating the test in terms of "risk" was akin to reintroducing that which Lord Hope removed.

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47. In my judgment Mr Simpson's criticism of Judge Tayler and, by extension, of the Certification Officer is misplaced. I do not consider there is a substantive difference between formulations expressed in terms of "real possibility" or "real risk". Each reflects that the fair-minded and informed observer need not conclude with certainty, high-probability or even on (or near) the balance of probabilities that there was prejudgment. Rather, the language indicates that a chance (provided it is real as opposed to illusory) is sufficient. As Judge Stout observed on the sift in this case, the test presents a low bar in terms of the level of chance required[2]. I am satisfied that the formulations come to the same thing.

48. I do not consider that Mr Simpson's argument based on **Porter** and the removal of the words "a real danger" from the test is a reason to reach a different conclusion. The words "a real danger" were originally intended to bear the same meaning as "a real possibility". As Lord Hope explained at §99 of his speech in **Porter**, Lord Goff in **R v Gough** had preferred *"to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias"*. Thus the language of "real danger" was selected to stress the low bar in terms of the chance required. The removal of "real danger" from the test in **Porter** arose because the words were considered no longer to serve a useful purpose, not because they meant something different from "real possibility". The "real danger" test had been criticised in other jurisdictions on the basis it tended to emphasise the court's view of the facts and placed inadequate emphasis on the public perception of the matter: see per Lord Hope at §100. That criticism does not seem to me to apply to using "a real risk" as an alternative to "a real possibility" in relation to the hypothetical observer. I also note that when approving the adjustment of the test in **Porter**, Lord Hope emphasised that doing so would ensure harmony with the objective test which the Strasbourg court applies (see §103, above). He described the Strasbourg Court's approach using the language of "risk": it looked at the question of *"whether there was **a risk** of bias objectively in the light of the circumstances which the court has identified"* (§100, with my emphasis). For all these reasons, I do not accept that Lord Hope's deletion of the words "real danger" from the adjusted **R v Gough** test supports Mr Simpson's submission that expressing the test in terms of "a real risk" departs substantively from one formulated in terms of "a real possibility". I am fortified in this

[2] Incidentally, Judge Stout also used the terms "real risk" and "real possibility" interchangeably in her reasons.

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view by a consideration of Lord Rodger's speech in **Helow v Home Secretary**, a case decided after **Porter**. Lord Rodger used interchangeably the concept of "real risk" and "real possibility" when discussing the views of the hypothetical observer: see §23 of his speech.

49. In my judgment there was therefore no error on the part of the Certification Officer expressing herself in terms of "real risk" instead of (or, more accurately, as well as[3]) "real possibility".

Characteristics of the Hypothetical Observer

50. Mr Simpson's next batch of criticisms (see paragraph 40(7), (9), and (11) above) were that the Certification Officer did not always attribute the observer with both the characteristics of being fair-minded and informed. This was a criticism which HHJ Tayler accepted of the Certification Officer's first decision: see his §46. Judge Tayler's judgment was plainly before the Certification Officer to guide her when she retook the decision on remission.

51. The criticism at instance (9) arises from the Certification Officer having extracted paragraph 84 of her original decision. However the criticism at instances (7) and (11) relate to §27 and §29 of the new decision. In the former, the Certification Officer refers to what the "informed observer" would consider. In the latter, the Certification Officer concludes that nothing in Mr Gillespie's handling of Mr Simpson's letter of 30 April 2019 would lead to a relevant conclusion in the "fair-minded observer". Whilst it is undoubtedly true that the Certification Officer in these paragraphs refers only to the observer having one of the two necessary qualities, the decision must be read fairly and as a whole. It is not appropriate to read the decision overly technically or with a nit-comb in hand. As Lord Hope said at §26 of **Hewage v Grampian Health Board** [2012] ICR 1054 in respect of decisions of the Employment Tribunal (which I consider equally applicable to decisions of the Certification Officer):

> *"It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."*

[3] The Certification Officer set out the test to apply at §17 in terms of whether the hypothetical observer would think there was a "real possibility" of pre-determination.

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52. In her decision on remission, the Certification Officer exhibited in numerous places that she was well aware that the hypothetical observer was to be attributed with both characteristics of fair-mindedness and being informed. Most notably this is apparent at §17 where the correct test is clearly stated. This is to be expected given that the Certification Officer had the benefit of HHJ Tayler's judgment which set out the approach she was required to adopt.

53. Once the Certification Officer's decision is read fairly and as a whole, in my judgment there is no legitimacy in this part of Mr Simpson's criticisms.

Requiring bias as opposed to a real possibility of bias

54. I then turn to the point which emerges more clearly from the amended notice of appeal (and see also paragraph 40(11) above). Mr Simpson argues that at §§24 and 29, there is no reference made by the Certification Officer to the question being of a real possibility or risk of bias at all. Rather, at §24, the Certification Officer expressed herself as being satisfied that the hypothetical observer *"would agree"* that Mr Gillespie's actions did not provide a basis *"to conclude that any subsequent action taken had been pre-determined",* and at §29 there was no evidence or argument to suggest that anything happened *"which would lead the fair-minded observer to conclude that the matter had been pre-determined"*.

55. I can well see why, viewed in isolation, those expressions were sufficient to raise the eyebrow of the Judges who considered this case at the interlocutory stage. It would plainly have been preferable for the Certification Officer to have consistently used the language of the applicable test taken from the authorities and HHJ Tayler's judgment remitting the matter to her.

56. Nonetheless, the question for me is whether, as a matter of substance, the Certification Officer misapplied the test. I have ultimately concluded, adopting a fair reading of her decision as a whole (in the manner I have described above) that she did not. My reasoning is as follows:

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a) First, it is in my judgment highly significant that the Certification Officer correctly directed herself to the test to be applied at §17 of her judgment. I have set this out above. There, the Certification Officer correctly identified the attributes of the hypothetical observer and correctly identified the question was whether such an observer, knowing the facts, would think that there was *"a real possibility that Mr Gillespie had predetermined the matter"*.

b) Secondly, that self-direction was not the only indication that the Certification Officer had understood that she was to consider matters in terms of whether there was a "real possibility" or "real risk" of pre-determination. As Mr Simpson's list of instances demonstrate, there are numerous references to the "real risk" standard running throughout the Certification Officer's decision.

c) Third, the Certification Officer had before her the judgment of HHJ Tayler, and specifically referred to applying it when reaching her decision: see for example at §§17, 18, 20, and 27.

d) Fourth, the criticism of §24 of the reasons arises in the context of the Certification Officer dealing with the impact of Mr Gillespie's prior involvement in the process. Whilst in the first part of the paragraph the Certification officer stated the hypothetical observer "would agree" that there was no basis to conclude, in light of Mr Gillespie's prior involvement, that any subsequent action had been pre-determined, later, after setting out what the observer would have been aware of, she refers to being satisfied that Mr Gillespie's prior involvement did not amount to there being a "real risk" of apparent or perceived bias. Thus the concept of the standard being a real possibility of pre-determination bias is nonetheless indicated in the paragraph. This is also clear from §27 where the Certification Officer refers to the hypothetical observer considering there was "no real risk" that Mr Gillespie approached his decision making other than with an open mind.

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e) Fifth, the criticism of §29 of the reasons arises in the context of the Certification Officer dealing with the way Mr Gillespie dealt with Mr Simpson's letter asking him to recuse himself[4]. Whilst it is true that the language adopted concludes that there was no evidence that *"would lead"* the hypothetical observer *"to conclude that the matter had been pre-determined"*, in my view it is not realistic to suggest that the Certification thereby lost sight of the true test she had articulated earlier.

f) Finally, and of particular significance to the criticisms of §24 and §29, at §32 of her reasons the Certification Officer expresses her conclusions on both the impact of Mr Gillespie's prior involvement, and in respect of his handling of Mr Simpson's letter in terms of whether they give rise to a real risk of bias. This underscores, in my view, that in fact the Certification Officer did apply the correct test of whether the hypothetical observer could conclude there was a "real possibility" of predetermination bias.

The Remaining Criticisms

57. Finally, I turn to Mr Simpson's remaining criticisms at paragraph 40(8) and (10) above. I do not consider that these justify the conclusion that the Certification Officer applied the wrong test. The point at (8) is that the Certification Officer stated that Mr Gillespie's political affiliations were not relevant to the decision she had to make. As I explain below in relation to Ground 3, no error arises in this respect. The point at (10) arises from the Certification Officer having extracted a paragraph of her first decision. I am not satisfied that extracting this gives rise to an error given my conclusions above. The reference to sufficiency there merely prompts the question of what the Certification Officer understood would be sufficient. The answer to that, in my view, is given by considering the other paragraphs of her decision fairly and as a whole.

[4] As HHJ Tayler said at §75 of his judgment, the "secondary complaints" concerning this letter more generally were not properly before the Certification Officer at the time of the first decision (and therefore could not be remitted). However, the way Mr Gillespie dealt with Mr Simpson's letter was properly to be seen as "a component of the material that would have been known to the fair-minded and informed observer, and so is relevant to the primary complaint". See further under Ground 3 below.

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58. It follows from the foregoing, that I reject the submission that the Certification Officer has misapplied the applicable test, and I dismiss Ground 1.

Ground 2: Separation of Union Decision Making in the Disciplinary Process

59. Ground 2 is that the Certification Officer erred in law by not considering whether the issue she identified in §33 of her reasons (about the separation of union decision-making in disciplinary processes) was a relevant factor to which the fair-minded and informed observer would have regard when considering if the test of apparent bias was satisfied in the instant case. In the alternative, it is argued she failed to give adequate reasons on this point.

60. At §33 of her reasons (extracted above), the Certification Officer expressed herself as being aware that some unions had introduced a separation between the committee which oversees a disciplinary process and the disciplinary panel itself. She indicated she did not regard that as necessary in all circumstances, but invited unions to consider whether it might be best practice to adopt it in certain cases.

61. Mr Simpson submitted that this knowledge ought to have been attributed by the Certification Officer to the hypothetical fair-minded and informed observer before she posed the question of whether that observer would think there was a real possibility that Mr Gillespie had predetermined the matter to be decided.

62. On behalf of Unite, Mr Segal KC argued that this ground was misconceived. He submitted the contents of §33 was non-prescriptive guidance forming part of a post-script to the Certification Officer's decision. He submitted that the point now advanced on appeal (that the hypothetical observer should be attributed with the knowledge of separation introduced by other unions) was not a point put before her by Mr Simpson below. Mr Segal submitted that Mr Simpson should not be permitted now to raise this new point.

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63. Mr Segal further argued that it would be absurd to suggest that the majority of unions act in breach of natural justice in not providing for that 'separation' of function. He argued that the question in every case must be whether, taking into account all of the facts, including the decision maker's conduct and/or role, a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision maker had pre-determined the matter to be decided. That, Mr Segal argued, was the issue remitted to the Certification Officer, and was the matter she determined.

64. At the hearing before me, Mr Simpson accepted that he had not argued before the Certification Officer that the fact that some unions separated out functions during a disciplinary process was a piece of knowledge that should be attributed to the fair-minded and informed observer. In those circumstances I agree with Mr Segal that the Certification Officer cannot legitimately be criticised in the way that Ground 2 seeks to do. Mr Simpson argued that the point was sufficiently raised because he had criticised the fact that his case was handled without sufficient separation, but in my view that is different from relying on knowledge on the part of the hypothetical observer that other (different) unions do separate out the functions. The latter fact was not advanced before the Certification Officer below, and I do not consider that she erred in the way that is now advanced before this Tribunal.

65. I further agree with Mr Segal that what the Certification Officer was doing in §33 was offering an observation by way of guidance that unions may wish to consider introducing separation in their procedures, especially in certain cases. That was a legitimate comment for her to make.

66. The Certification Officer's task on remission was to focus upon the particular case before her and the particular procedure adopted and to pose and answer the question identified by HHJ Tayler in his judgment. The Certification Officer was careful to scrutinise Mr Gillespie's prior involvement in the process (see §12, in which she set out HHJ Tayler's account of what had occurred). She correctly identified the test to apply (see eg §17) and applied it (see my analysis of ground 1). At §§18-24 she considered and set out the hypothetical observer's reaction to aspects of Mr Gillespie's involvement, and she reached her final conclusion on this point at §24 and §32. I detect no error of law in that process.

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67. I do not consider that the Certification Officer's decision was defective by not having expressly attributed knowledge of what other unions did to the hypothetical observer. As she recognised in §33, separation is not required in every circumstance. The issue in this case related to the reaction of the fair-minded and informed observer to the particular procedure adopted. Knowledge that some unions do have separation, and others do not, does not – in my view – materially alter the application of the test which was correctly applied by the Certification Officer.

68. I therefore dismiss ground 2.

Ground 3: Failure to take into account relevant considerations and/or give adequate reasons

69. I turn finally to Ground 3. This ground criticises the Certification Officer for failing to consider certain evidential matters (or failing to give adequate reasons) when considering what knowledge to attribute to the hypothetical observer. 9 matters are raised in the amended grounds of appeal at letters (a) to (i).

Scope of the Remission

70. Before turning to those matters, I must deal with a point concerning the scope of the remission to the Certification Officer. In his judgment HHJ Tayler had distinguished between Mr Simpson's "primary" and "secondary" complaints. The primary complaint was that the involvement of Mr Gillespie at a number of stages of the disciplinary process was in breach of natural justice and not procedurally fair (see §32, §66). Additional arguments formed part of secondary complaints and concerned alleged affiliations between Mr Gillespie and the people against whom Mr Simpson had made his original complaints (see §35). At §75, HHJ Tayler accepted Unite's argument that it was the primary complaint that was properly before the Certification Officer, rather than the secondary complaints. Matters which were not properly before the Certification Officer on the first occasion cannot have been the subject of legitimate appeal, and in turn cannot have been part of anything remitted to the Certification officer for redetermination. In my judgment it follows that the secondary complaints, based on Mr Gillespie's alleged affiliations and associations, was beyond the scope of the remission and the Certification Officer cannot be criticised for failing to address it directly.

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71. There is one caveat to the above as Judge Tayler stated at §75 of his judgment: the way Mr Gillespie dealt with Mr Simpson's letter asking that he recuse himself from the disciplinary panel was properly to be seen as a component of the material that would have been known to the fair-minded and informed observer, and therefore was relevant to the primary complaint. Mr Simpson sought to rely on that in order to argue that Mr Gillespie's conduct outlined in his letter was within scope. I do not agree. What Judge Tayler was indicating was that a case of breach of natural justice relying on the correctness of the contents of Mr Simpson's letter (viz about the affiliations raised there) was not in scope; however, what could be considered was the fact the letter had been sent and had stated what it had stated, and Mr Gillespie's reaction and conduct upon receiving the letter. That was knowledge which fell to be attributed to the fair-minded and informed observer and was therefore relevant when the correct question was posed in relation to the primary complaint.

72. The Certification Officer cited §75 from HHJ Tayler's judgment (see §4). She also noted that whilst Mr Simpson had asked her to consider evidence related to Mr Gillespie's political affiliations, she regarded that as beyond the scope of remission to her: §17. At §27, the Certification Officer recalled that HHJ Tayer had held that the hypothetical observer would have been aware of Mr Simpson's letter to Mr Gillespie asking him to recuse himself. It seems to me that this is a clear indication that the Certification Officer did attribute to the hypothetical observer the required knowledge in this respect. At §28, the Certification Officer recognised that the contents of the letter did not go to the issues remitted back to her, however she did set out her previous findings on how Mr Gillespie had handled the letter. Having done so she reached her conclusion in §29 and §32 that the hypothetical observer would not consider there to be a real possibility of pre-determination bias. In my view, the Certification Officer cannot legitimately be criticised in the way she dealt with the letter given the scope of the remission to her.

73. Having dealt with that preliminary matter, I turn to the evidential points which are the subject of Ground 3.

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Points (d) and (e)

74. Mr Simpson argues that the Certification Officer failed to ascribe to the hypothetical observer knowledge that (d) Mr Gillespie did not respond to Mr Simpson's letter dated 30 April 2019 and that Mr Gillespie failed to inform the other panel members or union officials of the matters raised by Mr Simpson; and (e) Mr Gillespie had prior involvement in dismissing/not pursuing Mr Simpson's March 2018 complaints and continued to participate in the investigation and expulsion of Mr Simpson.

75. I do not consider that this is a legitimate complaint of the Certification Officer's decision. I have already explained that the Certification Officer did attribute to the hypothetical observer knowledge of Mr Simpson's letter (see §27). This included knowledge that the letter was not responded to and that Mr Gillespie did not share the letter with anyone (at §12 of her reasons the Certification Officer cited §71of HHJ Tayler's judgment which deals with these points at §71(9); further at §27 of her reasons the Certification Officer cited §44 of her first decision to similar effect). Further the Certification Officer was fully cognisant of Mr Gillespie's prior involvement, including in relation to Mr Simpson's March 2018 complaints, and in the disciplinary proceedings against Mr Simpson. She set these matters out at §12. These matters were plainly placed within the knowledge of the hypothetical observer when the Certification Officer posed and answered the relevant question: see §§17, 24 and 32.

Point (f)

76. Next, Mr Simpson argued that the Certification Officer failed to ascribe to the observer knowledge that Mr Gillespie was not required to take part in each stage of the disciplinary decision making process and that this could have been carried out by other Scottish Executive Committee members and/or other union officials/committees.

77. That Mr Gillespie was not required to take part in each stage of the proceedings, and that other officials could have constituted the disciplinary panel, was not in dispute before me at the hearing of this appeal. Nor was it disputed before the Certification Officer. It was a point that was made express by HHJ Tayler in his judgment at §73. Whilst that passage was not specifically cited by the Certification Officer in her

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reasons, it is unrealistic to think that she was not clearly cognisant of it. It provided the backdrop to the critical question identified by HHJ Tayler at §74 of his judgment and identified by the Certification Officer at §17 of her reasons. There is no legitimate reason to suppose that it was not taken into account by her when applying the fair-minded and informed observer test. In any event, I see no error of law as a result of the Certification Officer posing and answering the correct question in light of what Mr Gillespie's actual prior involvement was.

Points (a), (b), (c) and (g)

78. Next, Mr Simpson referred to the following matters which, he submitted, the Certification Officer failed to ascribe to the hypothetical observer's knowledge: (a) that one of the members about whom Mr Simpson had complained had admitted parts of Mr Simpson's complaints of discrimination and bullying; (b) that Ms Dougall had confirmed that some of Mr Simpson's allegations had been admitted; (c) that Mr Gillespie had considered some of Mr Simpson's allegations to be "relatively harmless in themselves"[5]; and (g) Mr Gillespie was part of the disciplinary panel which concluded that there was a general wilfulness and obstructiveness and a refusal to cooperate which, Mr Simpson submits, was not supported by the evidence.

79. Mr Segal KC argued that these matters were clearly irrelevant to the issue remitted by the EAT and went, if anything, to the decision to expel Mr Simpson made by the disciplinary panel.

80. I agree with Mr Segal's submissions. The matters at (a) and (b) seem to me to go to the substantive merits (or demerits) of Mr Simpson's original complaints against other members rather than the question that was remitted to the Certification Officer. Further, Mr Gillespie's views about Mr Simpson's original complaints as given to the Certification Officer, and the views of the disciplinary panel (of which Mr Gillespie formed part) as to the extent of Mr Simpson's cooperation with the investigation of the disciplinary allegations, seem to me to go beyond the scope of the remitted matter, which concerned whether the test for apparent predetermination bias was met due to Mr Gillespie's prior involvement. Accordingly, I see no error of law in the way the Certification Officer posed and answered the remitted question.

[5] The phrase taken from Mr Gillespie's witness statement for the Certification Officer: see para 8 above.

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Points (h) and (i)

81. Finally, Mr Simpson relied on (h) Mr Gillespie's acceptance of a letter from the General Secretary of the Communist Party aimed at exonerating[6] one of the members Mr Simpson had complained about and (i) Mr Gillespie's close political associations with those Mr Simpson had complained about. He argued those matters ought to have been added by the Certification Officer to the knowledge of the hypothetical observer.

82. I do not agree that the Certification Officer erred in these respects. These matters went to Mr Simpson's secondary complaints which centred upon Mr Gillespie's affiliations. As I have explained, that was not a matter properly before the Certification Officer on the first occasion the case called for her decision, and was not remitted to her. It is in my judgment improper for Mr Simpson to seek to reopen these complaints and no error is disclosed by the Certification Officer in failing to address them. She well understood the scope of the remission and properly posed and answered the relevant question. No error of law is disclosed.

83. For all of these reasons I dismiss Ground 3.

Conclusion and Disposal

84. Stepping back, in my judgment the Certification Officer correctly focused on the remitted question. She identified and applied the correct legal test which had been identified for her by HHJ Tayler. No error is disclosed in her decision that the test for apparent predetermination bias was not made out on these facts. For the reasons I have given, I dismiss Mr Simpson's appeal.

[6] In submissions on a draft of this judgment, Mr Simpson considered the use of the word "exonerate" in relation to the letter from the General Secretary of the Communist Party was not accurate. He submitted it was more accurate to describe the letter as a corruption of process. I have nonetheless retained the use of this word because it reflects the language of §7(h) of the Amended Grounds of Appeal, drafted on Mr Simpson's behalf by ELAAS counsel, and approved by Judge Gullick KC.

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