

D/9/26-27

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

Stephen Flaherty

Applicant

and

UNISON

Respondent

Date of Decision

29 July 2026

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Decision

1. Upon application by Mr Stephen Flaherty under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) I make the following declaration:

I uphold Mr Flaherty’s application for a declaration that on the 18th May 2025, UNISON held elections for, amongst others, the post of 2 disabled members’ seats, an election that was completed in June. The Respondent allowed candidate C, to stand for the seat that had been reserved for women. This was a breach of the Union’s own Rules and of Section 108A of the Trade Union and Labour Relations Act 1992.

Background

2. Mr Flaherty (“the Applicant”) is a member of UNISON (“the Respondent”).
3. By application under section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992, submitted on 24 May 2025, the Applicant made a complaint that the Respondent breached its rules and/or threatened to do so by permitting a biological male to stand for the Disabled Members’ reserved female seat during the 2025 NEC elections.
4. The Applicant’s application was acknowledged by my office on 29 September 2025.
5. The Respondent was notified of the Applicant’s application by my office on 6 February 2026, and the Respondent’s representative acknowledged its receipt on 16 February 2026.

6. The Applicant confirmed his complaint as follows:

On 18 May 2025 the Union breached Rule 2.6.

The rule was breached in the following manner:

The Respondent allowed [candidate C], a male, to stand for the seat that had been reserved for women.

By the definition of “female”, [candidate C] is ineligible to stand in the election and so should not have been allowed to run for it.

7. A Case Management Meeting (CMM) took place remotely, by Video Conference, on 1 July 2026 and was attended by the Applicant and Miss Tutin of Counsel, instructed by Dominic Pellew of Conrathe Gardner Solicitors. The Respondent was represented by Leading Counsel Miss Newton KC, instructed by Ann Rooney of Thompsons Solicitors and Jeanette Sainsbury from UNISON Legal. Both parties agreed at the CMM that this was an application which could be dispensed with by way of submissions only.
8. No parties provided oral evidence at the hearing, as agreed.
9. Before the hearing, the parties supplied a bundle of documentary evidence consisting of 302 pages and copies of correspondence exchanged between the parties between 2-14 July 2026.
10. The Hearing took place on 15 July 2026 by Video Conference. The Applicant was represented by Miss Tutin of Counsel and the Respondent was represented by Miss Newton KC one of His Majesty’s Counsel.

The relevant statutory provisions

11. The statutory provisions which are relevant for the purposes of this application are as follows:

The Trade Union and Labour Relations
(Consolidation) Act 1992:

Right to apply to Certification Officer – s108A

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

(2) The matters are—

(a) the appointment or election of a person to, or the removal of a person from, any office;

(b) disciplinary proceedings by the union (including expulsion);

(c) the balloting of members on any issue other than industrial action;

(d) the constitution or proceedings of any executive committee or of any decision-making meeting;

(e) such other matters as may be specified in an order made by the Secretary of State.

(3) The applicant must be a member of the union or have been one at the time of the alleged breach or threatened breach.

(4) A person may not apply under subsection (1) in relation to a claim if he is entitled to apply under section 80 in relation to the claim.

(5) No application may be made regarding—

(a) the dismissal of an employee of the union;

(b) disciplinary proceedings against an employee of the union.

(6) An application must be made—

(a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or

(b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).

(7) Those days are—

(a) the day on which the procedure is concluded, and

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

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

(9) In subsection (2)(c) “industrial action” means a strike or other industrial action by persons employed under contracts of employment.

(10) For the purposes of subsection (2)(d) a committee is an executive committee if—

(a) it is a committee of the union concerned and has power to make executive decisions on behalf of the union or on behalf of a constituent body,

(b) it is a committee of a major constituent body and has power to make executive decisions on behalf of that body, or

(c) it is a sub-committee of a committee falling within paragraph (a) or (b).

(11) For the purposes of subsection (2)(d) a decision-making meeting is—

(a) a meeting of members of the union concerned (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union, is final as regards the union or which, under the rules of the union or a constituent body, is final as regards that body, or

(b) a meeting of members of a major constituent body (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union or the body, is final as regards that body.

(12) For the purposes of subsections (10) and (11), in relation to the trade union concerned—

(a) a constituent body is any body which forms part of the union, including a branch, group, section or region;

(b) a major constituent body is such a body which has more than 1,000 members.

(13) Any order under subsection (2)(e) shall be made by statutory instrument; and no such order shall be made unless a draft of it has been laid before and approved by resolution of each House of Parliament.

(14) If a person applies to the Certification Officer under this section in relation to an alleged breach or threatened breach he may not apply to the court in relation to the breach or threatened breach; but nothing in this subsection shall prevent such a person from exercising any right to appeal against or challenge the Certification Officer's decision on the application to him.

(15) If—

(a) a person applies to the court in relation to an alleged breach or threatened breach, and

(b) the breach or threatened breach is one in relation to which he could have made an application to the Certification Officer under this section,

he may not apply to the Certification Officer under this section in relation to the breach or threatened breach.

108B Declarations and orders

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

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

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

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

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

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

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

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

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

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

(4) The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.

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

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

(7) Where an enforcement order has been made, any person who is a member of the union and was a member at the time it was made is entitled to enforce obedience to the order as if he had made the application on which the order was made.

(8) An enforcement order made by the Certification Officer under this section may be enforced (by the Certification Officer, the applicant or a person

mentioned in subsection (7)) in the same way as an order of the court.

(9) An order under section 108A(2)(e) may provide that, in relation to an application under section 108A with regard to a prescribed matter, the preceding provisions of this section shall apply with such omissions or modifications as may be specified in the order; and a prescribed matter is such matter specified under section 108A(2)(e) as is prescribed under this subsection.

The relevant rules of the Respondent Union

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

2 National Executive Council

2.1 Functions and authority

The general management and control of the Union between National Delegate Conferences shall be vested in the National Executive Council, which shall comprise representatives elected from the Regions and Service Groups plus four national Black members' seats, two young members' seats and two disabled members' seats. It shall have full power and authority to act on behalf of the Union in every respect and for every purpose falling within the objects of the Union. It shall not do anything that is inconsistent with these Rules or the policy of the Union as laid down by the National Delegate Conference.

2.6 Disabled members' seats

There will be an additional two representatives, reserved for disabled members, one female, and one general, elected from a national constituency of all regions. No member shall be a candidate for election to the disabled members' seats unless they have been nominated by at least two branches or a regional disabled members self-organised group. The period of office will be two years.

Findings of Fact

13. The nominations for the Respondent union's 2025 NEC elections closed on 14 February 2025. Pursuant to Rule D2.6 of the Respondent union's Rulebook, two of the '*additional*' contested seats on the Respondent union's NEC included the '*Disabled Members*' seats, reserved for one '*female*' and one '*general*'. Four individuals were nominated as candidates for the Disabled Members' 'Female' and 'General' seats.
14. On 16 April 2025, the UK's Supreme Court gave judgment in *For Women Scotland v The Scottish Ministers* [2025] UKSC 16.
15. Voting for the aforesaid 2025 NEC elections took place between 21 April and 21 May 2025.
16. On 19 May 2025, the Applicant became concerned about the implications of allowing a biological male (Candidate C) to stand for a seat ring-fenced for women.
17. On 21 May 2025, an updated draft of the Equality Human Rights Commission's Code of Practice was laid before Parliament for consideration, reaffirming that, for the purposes of the Equality Act 2010, a person's sex remains their biological sex.

18. On 24 May 2025, the Applicant submitted his complaint to the Certification Office.
19. The results of the Respondent union's 2025 NEC elections were announced on 11 June 2025 and the declared votes were as follows:
- Candidate A - 19,678 votes*
Candidate B - 15,433 votes
Candidate C - 8,912 votes
Candidate D - 5,866 votes
20. The successful candidate A for the Disabled Members' Female seat, a biological woman, commenced office on 20 June 2025 and remains in office until the close of the Respondent's National Delegate Conference on 18 June 2027.

Reasons

21. The parties agreed the following issues to be determined before me, as follows:
- a. Did the Respondent breach and/or threaten to breach, Rule D2.6 of its Rulebook?**
- 21.1.1 The Applicant submits that I should make a declaration that the Respondent union breached and/or threatened to breach its rules relating to the election of a person to office, pursuant to s.108A(2)(a) TULRCA. In the first instance, the Applicant submits that there was a breach and/or threatened breach of the Respondent union's rules by allowing a candidate C, a biological male, to stand as a candidate for the Disabled Members' Female seat in the Respondent's 2025

NEC elections that should have been reserved for a biological female. Further, learned Counsel for the Applicant invites me to consider that the Respondent's position that there was no breach of its rules by focusing on the outcome of the election, in that a biological female was elected to the seat, as 'wholly artificial' since such a position, the Applicant contends, seeks to overlook both the full extent and import of its rules as well as the impact of the unlawful inclusion of candidate C as a candidate in the democratic process. Namely, the Applicant contends that Rule D2.6 is an express rule of the Rulebook and that there are implied rules which regulate the election process. For instance, it is implied by necessity and/or its obviousness to the reasonable trade union member that the requirement for certain seats to be ring-fenced for women (introduced under the positive action measures to address under-representation) must be applied by the Respondent at all stages of the nomination and election process. In other words, the Applicant contends that the Respondent must be satisfied that candidates who are nominated for seats and put forward as candidates for election meet its required eligibility criteria. Moreover, the Applicant submits that the Respondent, in the instant application, failed to ensure that its required eligibility criteria was met by permitting a biological male (ie candidate C) to be nominated and put forward for election to the Disabled Members' Female seat, which should have been ring-fenced for a biological woman. The Applicant contends that such a failure amounted to an actual breach of its implied rules regulating the nomination/election process. In the alternative, the Applicant contends that the Respondent threatened to breach its rules by allowing candidate C to stand as a candidate for a seat ring-fenced for a biological woman and therefore, a threatened breach by not taking any steps to prevent a biological male from being nominated and/or put forward for election to a seat ring-fenced for a woman. In

particular, the Applicant asserts that the inclusion of candidate C could have had a material impact on the outcome. Notably, candidate C received 8,912 votes, equivalent to 18% of the vote share. In fact, the votes received were over double the difference in votes for the first placed candidate (who received 19,678 votes) and second placed candidate (who received 15,433 votes). Had the votes cast for candidate C gone to different candidates, the outcome of the election could have been different. The Applicant avers that the fairness of the election was thereby affected, calling into question the legitimacy of the democratic process. Accordingly, the Applicant seeks a declaration that the election results for this seat are null and void.

- 21.1.2 The Respondent contends that Rule D2.6 of the Rulebook provides that there should be two additional disabled representatives on the NEC, one female and one general, elected from a national constituency of all regions. Therefore, the Respondent submits that there is only 'a sensible and reasonable' construction of Rule D2.6, that is that it stipulates the requirements for those individuals ultimately elected to sit on the NEC as the National disabled members' representatives. The Respondent admits that the female disabled members' seat was established under the positive action provisions of the Equality Act 2010 to address the underrepresentation of women on the NEC. Furthermore, the Respondent accepts that the UK Supreme Court's ruling in *For Women Scotland v The Scottish Ministers* has clarified that seats reserved for men and women under these provisions of the Equality Act 2010 must be occupied by those of the relevant biological sex. The Respondent asserts that that is what happened in this case. The outcome of the election was that two additional representatives were elected, both of whom were biological women. Accordingly, the

Respondent submits that there has been no breach of Rule D2.6 relating to the NEC elections for the disabled female members' representative seat and that the complaint should be dismissed.

Alternatively, the Respondent submits that whilst candidate C, a biological man, had been allowed to stand as a candidate, the outcome of the election is known and a biological woman was elected to and still occupies the disabled female members' seat. Consequently, leading Counsel for the Respondent invites me to accept that the Applicant's complaint, at its highest, concerned a threatened breach which never ultimately materialised. The Respondent relies on the guidance provided by the Editors of *Harvey on Industrial Relations and Employment Law* which states that my jurisdiction to consider a 'threatened breach' allows me 'to give a ruling *quia timet* – in order to prevent the breach occurring....[and, that I]... should not entertain an application relating to a threat which was made at some time in the past but which never, in fact, came to anything'. Therefore, the Respondent submits that I should not determine academic or hypothetical questions (cf. *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111; *Ainsbury v Millington* [1987] 1 WLR 379). Moreover, the Respondent contends that in circumstances where the outcome of the election is known, and it has been demonstrated that there was ultimately no breach of rule, I should not entertain hypothetical academic arguments about an 'historical threatened breach' that did not materialise.

- 21.1.3 Having listened very carefully to both counsel and having the benefit of their high-quality written submissions, it is accepted by both parties that a trade union's rulebook is in law a contract between all its members (*Embery v Fire Brigades Union* [2023] EAT 123, per Eady J.; and, *Heatons Transport (St Helens) Ltd v Transport and*

General Workers' Union [1972] ICR 308; Kelly v The Musicians' Union [2020] EWCA Civ 736). Accordingly, a trade union's rulebook must be interpreted in pursuance of the principles which apply generally to the interpretation of contracts. Nevertheless, it is not to be assumed that all the terms of the contract will be found in the Rulebook alone and as such some terms may be informed by the trade union's custom and practice. Consequently, it is well-established that the rules of a trade union should be given an interpretation which accords with what the reasonable trade union member would understand the words to mean and what common sense would have expected (Jacques v AUEW [1986] ICR 683; Coyne v Unite the Union (D/2/18-19) [2018]; and, McVitae v UNISON [1996] IRLR 33). To that end, the Respondent union's reservation of NEC seats was clearly understood by its members as for '*Disabled Members*' seats (one '*female*' and one '*general*').

- 21.1.4 Rule D2.1 of the Respondent's Rulebook includes two disabled members' seats elected from a national constituency. Further, Rule D2.6 provides that "*There will be an additional two representatives reserved for disabled members, one female and one general, elected from a national constituency of all regions. No member shall be a candidate for election to the disabled members' seats unless they have been nominated by at least two branches or a regional disabled members self-organised group. The period of office will be two years*". Therefore, the proper construction of Rule D2.6 of the Respondent union's Rulebook following the promulgation of the UK Supreme Court on 16 April 2025 of For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16, such having declaratory effect (ie retrospective), is that only biological female candidates could stand for the Disabled Members' Female/General seat, being seats ring-fenced for that purpose. The Respondent union accepts the

effect of the UK Supreme Court ruling under the positive action provisions of the Equality Act 2010. In fact, applying McVittae v UNISON, such a term was implied because if members had been asked about it *"they would have said that it was so obvious that it must have been intended to form part of the agreement"*. The Respondent union's 'disabled members' female/general' seat on its NEC was introduced under the positive action provisions of Equality Act 2010. Therefore, any references to 'female' (or 'woman') in the Respondent union's rulebook must therefore be interpreted consistently and in compliance with s.11(a) of the Equality Act 2010. Following the Supreme Court's ruling in For Women Scotland v The Scottish Ministers the expression 'biological sex' was used to describe the sex of a person at birth. The UK's Supreme Court clarified that as a matter of ordinary language, the provisions relating to sex discrimination could only be interpreted as referring to biological sex. The Supreme Court concluded that 'woman' in s.11 of the Equality Act meant, and was always intended to mean, a biological woman. The provision could not be extended to include certificated sex without rendering the definition incoherent and unworkable. As a result, the UK Supreme Court declared that any positive action measures taken by organisations under the Equality Act must be interpreted in compliance with its judgment. Plainly, applied to the instant application before me, any seats ring-fenced for women on the Respondent union's NEC must be reserved for biological women, as that was always the intent of Parliament when passing the Equality Act and should therefore have always been the way in which sex was interpreted from when the measures were first introduced. To that end, it is to be implied that candidates should meet the eligibility requirements at the nomination and election stages. Consequently, the Respondent union did breach Rule D2.6 of its Rulebook by permitting a biological male (Candidate C) to

stand for the disabled members' female seat. Therefore, there being such a breach of Rule D2.6, it is agreed between the parties that such a breach of Rule D2.6 relates to the election of a person to office within the meaning of s.108A(2)(a) TULRCA 1992, falling within my jurisdiction.

- 21.1.5 Having considered all the evidence, I accept that there is no evidence to support the contention that candidate C's nomination prevented biological women from being nominated as well as standing in the election. Moreover, whilst the parties also agree that candidate C did attain a material share of the vote; they also agree that given the simple majority voting system used, it remains fundamentally unknown what impact the unlawful inclusion of candidate C had on this election. The onus is on the Applicant and no evidence supports any inference of those assertions. Furthermore, it is incontrovertible that a biological woman was elected as the female disabled members' representative. Also, I accept from the factual matrix before me that the Respondent union's nominations process took place before the UK Supreme Court's judgment in *For Women Scotland v The Scottish Ministers* on 16 April 2025. Consequently, prior to this landmark judgment the Respondent union (alongside many other UK unions) took the approach that trans women were to be legally treated as women and trans men were legally treated as men. Nevertheless, after 16 April 2025, it was definitively clarified that the latter legal position was incorrect in law and was to be treated as incorrect since the enactment of the Equality Act 2010.

21.1.6 As both Counsel agree, my jurisdiction is not limited under s. 108A(1) TULRCA 1992, to where there is an actual breach of a rule; but also, to that there has been a threatened breach of a rule, under s.108A(1) TULRCA 1992. For completeness and with due deference to both Counsel who eloquently argued their respective cases before me, had I not found a breach, I would not have entertained an application relating to a threatened breach because it was made at some time in the past and in fact never came to anything.

21.1.7 For all these reasons, I uphold the complaint.

b. Should the Certification Officer declare a breach; what enforcement is appropriate?

21.2.1 Given my decision, Miss Tutin of Counsel on behalf of the Applicant invites me to make a declaration and to determine whether it is appropriate for an enforcement order to be made. And, if so, what should be the terms of any such enforcement order. Accordingly, since I found a breach, I will make such a declaration that there has been a breach of Rule D2.6. However, as Miss Newton KC of Counsel rightly reminds me, I need do no more than that. Turning then to enforcement, I do not consider it appropriate to re-run the election (cf. Murray v Unite the Union (D/20/1516, 2 October 2015), as I find that the candidature of C had less than significant impact on the outcome of that election; furthermore, it is agreed amongst the parties that it remains fundamentally unknown what candidate C's exclusion would have been; and, the duly elected incumbent, candidate A, has been in post for over a year and is currently half-way through her tenure, undertaking work for the Respondent's national disabled members conference in October 2026, having

been onboarded (ie trained) and reasonable adjustments being put in place. Therefore, I conclude that any such by-election or 're-running' of that election would be disproportionate and unnecessary in all the circumstances. I also see no continuing threat of further breach; nor, even any ongoing breach. From the pithy (ie brief, forceful and meaningful) exchange of correspondence between the parties from 2-14 July 2026, on the eve of their hearing before me, it is evident that the Respondent recognises the UK Supreme Court's ruling in Women for Scotland v The Scottish Ministers and is amidst the revision of its procedures, in order to ensure its full compliance in its next scheduled NEC elections due to commence in January 2027. I therefore do not accept the Applicant's observations that the Respondent remains in 'opposition' and/or 'defiance' to the UK Supreme Court's ruling; to the contrary, there is no such threat or concern about lack of future compliance with the law.

- 21.2.2 Further and again for completeness, I do not consider it appropriate under my residual transitional provisions to impose a financial penalty in the circumstances of the instant case, since the successful candidate (ie candidate A) and incumbent is a biological woman. Further, as noted above the Respondent accepts that the UK Supreme Court ruling in For Women Scotland v The Scottish Ministers has now clarified that seats reserved for men and women under the positive action provisions of the Equality Act 2010 must be occupied by those of the relevant biological sex. Moreover, paragraph 6 of Schedule A4 of TULRCA 1992, relating to my powers to impose financial penalties on trade unions for failing to comply with statutory obligations, made provision for secondary legislation to set out maximum penalty amounts. Those relevant statutory limits are found in the Trade Union (Power of the Certification Officer to impose Financial Penalties) Regulations 2022, which establishes a

framework of specified caps and limits for penalties for non-compliance based on the severity of the breach. In the instant case before me, the requisite minimum penalty is £200.00 and the maximum cap is £5,000.00. None of these apply.

Remedy

22. Accordingly, by way of remedy, I hereby make a declaration that:

'UNISON did breach Rule D2.6 by permitting a biological male candidate to be nominated and stand in an election for seats ring-fenced for women'.

23. Further, I do not consider it appropriate to impose a financial penalty. Whilst the specific rule governing the election of the disabled members' seats contained in Rule D2.6 of the Rulebook:

Disabled Members' seats

There will be an additional two representatives, reserved for disabled members, one female and one general, elected from a national constituency of all regions. No member shall be a candidate for election to the disabled members' seats unless they have been nominated by at least two branches or a regional disabled members self-organised group. The period of office will be two years.

was breached; no financial penalty applies given the Respondent's endeavours since the promulgation of the *For Women Scotland v The Scottish Ministers* ruling to revise its guidance and procedures. Absent of any future threat and/or deliberate act(s) of non-compliance, no financial penalty applies.

Conclusion

24. For the reasons given above, I make a declaration that the Respondent was in breach of rule D2.6.
25. In addition, I would invite all trade unions and employer associations to ensure that they review their rules, procedures and guidance in respect of the UK Supreme Court's ruling in, *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, given its declaratory effect, should they have not already done so. It may also be helpful to remind all trade unions and employer associations that my power to make financial penalties applies, since 17 February 2026, only to those applications which were received prior to that date only; further the enactment of the Employment Rights Act 2025 and its removal of those powers, thereafter.
26. Finally, this has been both a complex and sensitive matter and I commend the manner in which all parties have conducted themselves.
27. In conclusion, the application is upheld and the declaration is made by way of remedy.

S T Hardy

STEPHEN HARDY

The Certification Officer