

Neutral Citation Number: [2026] EAT 124

Case No: EA-2024-000954-JPD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 August 2026

Before:

HER HONOUR JUDGE JOFFE

Between:

PARAMJEET SINGH BHOGAL

- and -

NATIONAL EDUCATION UNION (NEU)

Appellant

Respondent

Mr Paramjeet Singh Bhogal the Appellant, in person
Mr Richard O’Keefe (instructed by the National Education Union) for the Respondent

Hearing date: 12 August 2026

JUDGMENT

SUMMARY

Certification Officer

The appellant complained to the Certification Officer that his union had disciplined him in breach of the union's rules. His application was struck out by the Certification Officer as having no reasonable prospects of success on the basis that the appellant's interpretation of the rules was incorrect.

It was an error law for the Certification Officer to strike out the application in circumstances where the rules were ambiguous, such materials as were before the Certification Officer did not demonstrate that the appellant's interpretation was not reasonably arguable, and the Certification Officer did not have before her all of the evidence necessary to decide the issue.

HER HONOUR JUDGE JOFFE:

Introduction

1. This is an appeal from a decision of the Certification Officer dated 18 June 2024 striking out the appellant's complaint. The issue on this appeal is whether strike out was a permissible option in this case in circumstances where there was a dispute between the appellant and the respondent as to the correct interpretation of the union's rules.

2. The appeal came before HHJ Auerbach on the rule 3(7) process and, by an order sealed on 1 October 2024, he allowed the appeal through to a full hearing. In his Reasons he said: 'I consider it arguable that the Appellant had an arguable case that his suspension by the Officers was contrary to the rules.... The issue of interpretation merits consideration at a full contested hearing in the EAT.'

Background

3. The relevant background can be stated briefly. The appellant was a member of the respondent union. On 7 November 2023, the respondent commenced disciplinary proceedings against the appellant. The letter commencing the complaint said that the complaint was from the National Officers and related to concerns raised by a number of members about the appellant. There was reference to paragraph 3.3 of Appendix A to the respondent's rules. An email of 27 November 2023 said: 'The Officers' complaint is brought against you is [sic] for repeated and longstanding course of conduct which is alleged to be in breach of the Code of Professional Conduct. This included aggressive and overbearing behaviour and verbal attacks on social media platforms.' The Code of Professional Conduct formed part of the respondent's rulebook. On 20 December 2023, the appellant was suspended from trade union membership pending the outcome of the disciplinary proceedings. The letter suspending him referred to alleged disciplinary offences under paragraphs 1.1 (a) and (g) of Appendix A of the rules.

4. The details of the complaints against the appellant were not made clear in any material which

was in front of me. Concerns which the appellant raised in oral submissions about the lack of particulars of the complaints were not however relevant to the narrow issue the Certification Officer was considering.

The relevant rules

5. For the purposes of this appeal, it was relevant for me to consider paragraphs 1 and 3 of Appendix A to the respondent's rulebook. The version in force at the relevant time was effective from 6 April 2023. Appendix A was entitled 'National Disciplinary Committee and National Appeals Committee':

Appendix A

1 Disciplinary Offences

1.1 A member of the Union commits a disciplinary offence if that member:

- (a) acts contrary to the Code of Professional Conduct of the Union;*
- (b) acts contrary to the Rules of the Union;*
- (c) refuses to comply with a lawful instruction of the Union;*
- (d) is knowingly involved in any fraud on the Union or misappropriation of Union funds or property;*
- (e) misuses protected data contrary to the Data Protection Act Licence of the Union;*
- (f) frustrates any decision or penalty of the National Disciplinary Committee or National Appeals Committee; or*
- (g) in any other way engages in conduct which brings injury or discredit to the Union.*

...

3 National Disciplinary Committee

3.1 (a) A complaint made by a member of the Union against a member of the Union, which may consist of one or more alleged disciplinary offences, will be heard by a National Disciplinary Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee.

3.1 (b) A complaint may be formulated by the Officers of the Union under 1.1 (b), (c), (d), (e), (f), to be pursued by an employee of the Union. In such case, the procedure to be followed shall be as set out in paragraph 3.3(a).

3.2 A National Disciplinary Committee shall choose its own Chairperson.

3.3 A complaint under these proceedings may be made by a member of the Union or by an Officer of the Union acting on behalf of the Officers of the Union. If the complaint is formulated by an Officer of the Union then the Officers of the Union may suspend that member or members from membership of the Union pending the hearing of the disciplinary proceedings. The General Secretary of the Union shall notify the relevant Local District and Branch of any such suspension.

3.3(a) This paragraph applies where the Officers of the Union become aware of a

matter within the scope of paragraph 3.1(b) which in the opinion of the Officers requires further investigation in order that the proper functioning of the Union and standards of behaviour are maintained. In these circumstances the Officers shall request the General Secretary to appoint an investigating officer who shall investigate the circumstances of the case. If in the opinion of the Officers it is appropriate, the Officers of the Union may suspend the relevant member. The investigating officer's report shall be presented to the Officers of the Union who shall determine whether a complaint should proceed. Where it appears to the Officers of the Union that the matter can be resolved by training or other process outside the scope of the disciplinary procedure, that route shall be pursued with the member. The time limits for pursuit of a complaint shall not run whilst such alternative process is in train. Should the member refuse such resolution or if it is unsuccessful, the complaint may be pursued further. For the avoidance of doubt the Officers of the Union may instead determine that the matter should proceed immediately to a disciplinary panel.

3.4 The conduct of National Disciplinary Committee proceedings shall be in accordance with the rules of natural justice. The member making the complaint and the member being complained about have the right to a fair hearing, without bias, conducted with reasonable promptness consistent with fair opportunity to present their respective cases. Before a National Disciplinary Committee, the parties may call witnesses of relevance to the matters in dispute.

The complaint to the Certification Officer

6. On 29 January 2024, the appellant sent an email to the Certification Officer complaining about the disciplinary process. It is necessary to consider the detail of what then occurred to understand what opportunities the appellant had to put forward his case and what material would have been in front of the Certification Officer when she made her decision.

7. On 4 February 2024, the Certification Officer's office ('CO's office') wrote to the appellant to say that the appellant's complaint was understood to be a complaint that the officers did not have the power to bring the complaints they did against the appellant on behalf of other members of the union; they had breached union rules Appendix 1.1(a) and (g) and Appendix A3.1(b). The appellant was asked to forward various documents which he had referred to in his application.

8. On 12 February 2024, the appellant forwarded the documents.

9. On 14 February 2024, the CO's office wrote to the appellant to say that his complaint had passed the initial assessment and been accepted. I note in passing that the process apparently followed

at the relevant time by which the Certification Officer sifted out or rejected some complaints at the outset will have been outwith the Certification Officer's powers unless any rejection of a complaint refusal fell within section 108B Trade Union and Labour Relations (Consolidation) Act 1992 powers or the provisions of section 256ZA of that Act were complied with: **Chandra v The University and College Union** [2025] EAT 70. The appellant's complaint was not rejected.

10. The letter asked the appellant to confirm the ambit of his complaint:

Your complaint has passed the above three tests and can be accepted by this office.

However, before it is put to the Union, can you please confirm that the complaint as set out below, clearly, and precisely captures the issue you are complaining about? If not, please amend.

Complaint

That on 7 November 2023, the NEU breached Rule Appendix A Rule 3.1(b) when National Officers made a complaint against Mr Bhogal under Rule Appendix A Rule 1.1 (a) for acts contrary to the Code of Professional Conduct of the Union which resulted in Mr Bhogal's suspension under Rule Appendix A 3.3.

It is important that you, as the applicant in the case, ensure that your complaint wording accurately reflects the issue which you wish the Certification Officer to determine. You do not have to use the wording above, but you must set out the date of the breach, the Rule which you allege has been broken and how it was broken. Once the complaint wording has been agreed, I will put it to the union for their formal response. I will then put both your submissions, and the Union's, to the Certification Officer, for her to consider whether to take your complaint forward. The whole process, from receiving your complaints to a final determination, can take up to six months to complete and may involve a formal hearing.

11. On 15 February 2024, the appellant wrote to the CO's office confirming that he was happy for the complaint as formulated to proceed. That is an important point to note in the context of this appeal because the appellant pursued at the appeal hearing various other complaints about the disciplinary process followed by the respondent which did not fall within the ambit of the complaint defined by the CO's office and agreed by the appellant.

12. On 26 February 2024, the respondent responded to the complaint as follows:

The Officers are authorised under Appendix A, paragraph 3.3 to bring a complaint under any or all seven of the disciplinary headings (a-g). The

provisions of paragraph 3.3(a) permit the Officers to request that the General Secretary appoints an investigating officer to investigate a matter within the scope of paragraph 3.1(b). These powers are not available to the Officers in relation to a complaint brought under disciplinary headings (a) and (g). The National Officers have acted within the Union Rules in respect of bringing the complaint against Mr Bhogal and agreeing to suspend him for the duration of the disciplinary proceedings.

13. On 11 March 2024, The CO's office wrote to the Appellant:

Your complaint to this office is that the union breached Appendix A Rule 3.1(b) when National Officers made a complaint against you under Appendix A Rule 1.1 (a). However, from the letter dated 15 December 2023 from Beth Farhat, NDC Secretary and the letter dated 20 December 2023 from Emma Rose, National President to you it is clear that the rule that has been used to make a complaint against you and suspend you is Appendix A Rule 3.3. This rule reads as follows: 3.3 A complaint under these proceedings may be made by a member of the Union or by an Officer of the Union acting on behalf of the Officers of the Union. If the complaint is formulated by an Officer of the Union then the Officers of the Union may suspend that member or members from membership of the Union pending the hearing of the disciplinary proceedings. The General Secretary of the Union shall notify the relevant Local District and Branch of any such suspension. This rule appears to give Officers, who have formulated a complaint, the power to suspend a member pending the hearing of the disciplinary proceedings. The rule contains no restrictions regarding which charges can be made. I therefore cannot see how the union can have breached Appendix A Rule 3.1(b) in the manner that you have set out. If you disagree with my understanding, can you please provide further comment.

14. On 20 March 2024, the appellant replied with his comments. He made the point that paragraph 3.3 referred to a 'complaint under these proceedings'. In essence he said that 'these proceedings' referred back to paragraphs 3.1(a) and (b) which defined the types of complaint each class of person could make, that is officers and members. He said that officers could only bring the complaints at 3.1(b), which did not include complaints under 1.1 (a) or (g).

15. On 4 April 2024, further comments were invited from the respondent, which were provided on 11 April 2024. The respondent said that the officers had always been able to bring a complaint against a member under the Appendix A disciplinary processes. The rulebook had been updated to introduce paragraph 3.1(b) in 2022 (this appears to have been an error for 2023) to permit officers to

commission an investigation prior to bringing a complaint. Those powers were not available in respect of disciplinary complaints under 1.1 (a) and (g).

16. The respondent attached a copy of the 2020 rulebook which set out the unamended text. This was relied on by the respondent in submissions and the relevant section was as follows:

3.1 A complaint made by a member of the Union against a member of the Union, which may consist of one or more alleged disciplinary offences, will be heard by a National Disciplinary Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee.

3.2 A National Disciplinary Committee shall choose its own Chairperson.

3.3 A complaint under these proceedings may be made by a member of the Union or by an Officer of the Union acting on behalf of the Officers of the Union. If the complaint is formulated by an Officer of the Union then the Officers of the Union may suspend that member or members from membership of the Union pending the hearing of the disciplinary proceedings. The General Secretary of the Union shall notify the relevant Local District and Branch of any such suspension.

3.4 The conduct of National Disciplinary Committee proceedings shall be in accordance with the rules of natural justice. The member making the complaint and the member being complained about have the right to a fair hearing, without bias, conducted with reasonable promptness consistent with fair opportunity to present their respective cases. Before a National Disciplinary Committee, the parties may call witnesses of relevance to the matters in dispute.

3.5 The decisions of a National Disciplinary Committee or a National Disciplinary Committee Chairperson acting on behalf of the Committee are final subject only to the right of appeal to the National Appeals Committee.

3.6 A complaint made by a member of the Union calling for a matter to be considered by a National Disciplinary Committee must be made in writing to the General Secretary specifying matters which come within one or more of the disciplinary offences referred to above at (a) to (g). The complaint will not be considered unless made within six months of the circumstances giving rise to the complaint unless the National Disciplinary Committee find exceptional reasons for doing so. The complaint will be dealt with in accordance with the written procedures made under these Rules.

17. On 29 April 2024, the CO's office wrote to the appellant saying that the Certification Officer had taken a preliminary view that his complaint had no reasonable prospect of success and was minded to strike out the complaint. The Certification Officer's preliminary view was set out:

It is the CO's current view on her reading of the Rules that, where a complaint against a member has been formulated by Officers of the Union:

a) The Officers may, under Rule 3.1(a) and 3.3(b) commission an investigation into that complaint and, if so, may suspend the member pending a disciplinary hearing. This power is, however limited to complaints under 1.1(b), (c), (d), (e)

and (f). It does not, therefore appear to be open to the officers to suspend a member under 1.1 (a) or (g) during the investigation of a complaint.

b) Alternatively, the Officers may proceed to a disciplinary hearing under Rule 3.3 without commissioning an investigation. If so, Rule 3.3 enables them to suspend a member from membership pending a disciplinary hearing under Rule 3.3. This power to suspend does not appear to be restricted.

The Union's letters to you of 15th December from Beth Farhat, NDC Secretary and 20th December 2023 from Emma Rose, National President confirmed that your suspension was under the powers afforded to Officers under Appendix A Paragraph 3.3 of to the NEU Rules. Rule 3.3 states that if a complaint is formulated by Officers of the Union, then the Officers can suspend a member from membership pending a disciplinary hearing. Further there are no restrictions to the areas that an Officer can bring a complaint in Appendix A Paragraph 3.3.

18. The appellant was invited to reply to any of the points in the letter by 13 May 2024 and did so on that date. He disputed the respondent's interpretation of the rules and continued to maintain that it was not open to officers of the union to pursue complaints under 1.1 (a) and (g).

19. He attached two documents. The document relevant to this appeal was what the appellant described as a paper from the Strategy Committee: Member Defence's Disciplinary Process – Review Group (“the review group”). The review group had met on 21 September 2023 to consider amongst other things a proposed rule change. The paper referred to the rule change adopted at the 2022 Annual Conference to add rules 3.1 (b) and 3.3(a). The paper highlighted the fact that 3.1 (b) said that a complaint might be formulated by the officers of the union under 1.1 (b), (c), (d), (e) and (f).

As you will see from the highlighted text, complaints under the Code of Professional Conduct and behaviour that brings injury / discredit to the Union (1(1)(e) and (g) were excluded from these provisions, The Officers have expressed concern that the current Rules at Appendix A do not protect the Union from potential allegations of a failure to extend sufficient duty of care to members in cases where there's been an alleged breach of the Code of Professional Conduct (disciplinary heading (a)) and / or conduct that brings injury or discredit to the Union (disciplinary heading (g)).

20. The review group agreed to refer to the committee consideration of whether the rule change should be extended to 1.1(a), 1.1(g), or both of those provisions.

The Certification Officer's decision

21. On 18 June 2024, the Certification Officer gave a written decision striking out the appellant's application. The Certification Officer set out the rules at Appendix A paragraphs 1 – 3.3(a). She recorded the appellant's argument that paragraph 3.1(b) restricts the circumstances in which officers can pursue a complaint and/or suspend a member pending a disciplinary hearing to offences under 1.1 (b) – (f). She recorded that the appellant argued that 'these proceedings' in paragraph 3.3 must refer to paragraph 3.1(b) and this limits the disciplinary offences in respect of which officers may pursue a complaint. In her conclusions, she treated paragraph 3.1(b) and paragraph 3.3(a) as presenting one pathway by which officers might pursue a complaint against a member and 3.3 as a different pathway. She said that the appellant was not suspended under paragraph 3.1(b) but under paragraph 3.3 and that the letters to the appellant made that clear. She found that there was nothing in paragraph 3.3 which prevented the officers from considering complaints about disciplinary offences under Appendix A 1.1(a) and (g). She commented:

Mr Bhogal has not provided any evidence that the Union suspended him under Appendix A Rule 3.1(b). Nor has he provided any evidence that the Officers should have pursued the matter under Appendix A Rule 3.1(b).

22. The Certification Officer went on to refer to the appellant's letter of 13 May 2024 and the attached documents, including the minutes of the review group meeting on 21 September 2023. She said that these did not support the appellant's interpretation of the rules nor provide evidence that the officers should not have relied on the powers in paragraph 3.3.

23. For those reasons the Certification Officer concluded that the appellant's application had no reasonable prospects of success and struck it out.

The legal framework

24. The relevant powers and duties of the Certification Officer are contained in the following provisions of the Trade Union and Labour Relations (Consolidation) Act 1992:

“Section 108A – Right to apply to Certification Officer.

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

(2) The matters are—

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

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

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

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

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

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

Section 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.

Section 256ZA Striking out

(1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may— (a) order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived, (b) order anything in the application or complaint, or any response, to be amended or struck out on those grounds ...”

25. Appeals from the Certification Officer are governed by section 108C, which at the material time provided:

“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.”

Construction of trade union rules

26. Eady J conducted a survey of the authorities in **Embery v Fire Brigades Union** [2023]

EAT 134:

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

- (1) A trade union's rulebook is in law a contract between all of its members from time to time (*Heatons Transport (St Helens) Ltd v Transport General Workers Union* [1972] IRLR 25, [1972] ICR 308 ; *Evangelou and ors v McNicol* [2016] EWCA Civ 817, paragraph 19 ; **Kelly** , paragraph 36(1))
- (2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts (**Evangelou** , paragraph 20; **Kelly** paragraph 36(2)).
- (3) Nevertheless, context is important. Trade union rule books are not drafted by parliamentary draftsmen and should not be read as if they were. Further, unlike commercial contracts, it is not to be assumed that all the terms of the contract will be found in the rule book alone (particularly as regards the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf) and may be informed by custom and practice developed over the years (**Heatons Transport** per Lord Wilberforce at pp 393G-394C; **Kelly** , paragraph 36(3)).
- (4) It is also important to recall that what falls to be construed in this context is in substance the constitution of a trade union. Although in law its status is that of a multilateral contract, it is the document which sets out the powers and duties of a trade union (**Evangelou** , paragraph 19; **Kelly** , paragraph 36(4)).
- (5) The rules of a trade union should thus be given an interpretation which accords with what the reasonable trade union member would understand the words to mean; a court should be slow to adopt a construction which, on the face of it, is contrary to what both the members and common sense would have

expected. (*Jacques v AUEW* [1986] ICR 683 per Warner J, at p 692A-B; **Coyne v Unite the Union** (D/2/18-19) per HHJ Jeffrey Burke QC (acting as a CO), paragraph 30; *McVitae and ors v Unison* [1996] IRLR 33 per Harrison J, paragraph 57; **Kelly**, paragraph 39).”

27. It is helpful for the purposes of this appeal to look in more detail at the general contractual principles as set out by Singh LJ in **Kelly v The Musicians' Union** [2020] EWCA Civ 736. At paragraph 35 of the judgment, Singh LJ quotes from the judgment of Beatson LJ in **Evangelou and others v McNicol (sued as a representative of all members of the Labour Party except the claimants)** [2016] EWCA Civ 817, [2016] All ER (D) 50(Aug):

“20. Because the nature of the relationship between an unincorporated association and its individual members is governed by the law of contract the proper approach to the interpretation of the constitution and rules is governed by the legal principles as to the interpretation of contracts, and is a matter of law for the court. The approach is thus that set out in cases such as *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14], *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15] and [18], and *Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843 . The intentions of the parties to a contract will be ascertained by reference to what a reasonable person having all the background which would have been available to the parties would have understood the language in the contract to mean, and it does so by focusing on the meaning of the words in the contract in their documentary and factual context.

21. The meaning has to be assessed in the light of the natural and ordinary meaning of the words, any other relevant provisions of the contract, the overall purpose of the clause in the contract and the facts and circumstances known or assumed by the parties. In this context, this means the members of the unincorporated association, the Labour Party. In *Foster v McNicol* Foskett J, relying on *Jacques v AUEW* [1986] ICR 683 at 692, stated that the court can take into account 'the readership to which' the rules of an unincorporated association are addressed when interpreting them.

22. The effect of the cases, in particular *Arnold v Britton* , is that the clearer the natural meaning of the centrally relevant words, the more difficult it is to justify departing from it. In *Arnold v Britton* the majority of the Supreme Court adjusted the balance between the words of the contract and its context and background by giving greater weight to the words used. ...

23. The court will more readily and properly depart from the words of a contract where their meaning is unclear or ambiguous, or where giving them their natural and ordinary meaning would lead to a very unreasonable result. As to the latter, while it is illegitimate for a court to force on the words of a contract a meaning which they cannot fairly bear, in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 Lord Diplock stated (at 251) that:

'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more necessary it is that they shall make that intention abundantly clear'.

In both categories of case the court will consider the relevant context, being concerned to identify the intention of the parties by reference to 'what a reasonable person having all background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.'

28. Singh LJ said further at paragraph 36 of **Kelly**:

“It will be apparent therefore that: (1) A trade union’s rulebook is in law a contract between all of its members from time to time.

(2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts.

(3) Nevertheless, the context is important. Recent authorities, which have tended to concern the interpretation of commercial contracts, have not cast doubt on the approach to the interpretation of a trade union’s rulebook, which was set out in, for example, *Heatons Transport (St Helens) Ltd v Transport General Workers Union* [1972] IRLR 25, [1972] ICR 308.

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

Certification Officer’s power to strike out

29. The approach to be taken by the Certification Officer was considered by Eady J in **Embery**:

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

30. I was taken by Mr O’Keefe to the judgment of Jacob LJ in the case of

Khatiri v Cooperative Central Raiffeisen-Boerenleenbank [2010] EWCA Civ 397 for the

approach in relation to summary judgment in the civil courts:

“3. There was no dispute as to the principles applicable to a claim for summary judgment. Counsel agreed the recent convenient summary by Lewison J in *Nigeria v Santolina Investment* [2007] EWHC 437 (Ch):

1. The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success.

2. A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable.

3. In reaching its conclusion the court must not conduct a “mini-trial”.

4. This does not mean that the court must take at face value and without analysis everything that a defendant says. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

5. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

4. I would only add this – that one has to be careful not to take the last point too far when the case concerns construction of a written contract. The factual matrix is key to understanding what the parties must have intended by the words they used. But it far from follows that the need to know what that matrix was requires a full trial with discovery, evidence and cross-examination of witnesses. If there is no actual conflict of evidence on a relevant point of background matrix, it is only when there really are reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe the contract on a summary judgment (including strike out) application.

5. The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to “pure” construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application.”

31. In the **Easysair** judgment referred to in **Embery**, Lewison J also said:

“v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available

at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550.*”

New evidence on appeal

32. The test for whether to admit new evidence on appeal derives from **Ladd v Marshall** [1954] EWCA Civ 1, CA and is uncontroversial. The party seeking to introduce new evidence on appeal must show:

- the evidence sought to be introduced could not with reasonable diligence have been obtained for use before the tribunal;
- the evidence is so relevant that it would probably have had an important influence on the result of the case, although it need not be decisive in itself, and
- the evidence is apparently credible, though it need not be incontrovertible.

The appeal and the appellant’s submissions

33. The appellant said that the Certification Officer erred in law in concluding that his claims had no reasonable prospect of success, because there was an issue to be tried as to the interpretation of the respondent’s rules which required evidence to be considered about the ‘factual and drafting’ history. The interpretation of the rules had to be determined objectively by looking at the wording of the rules read as a whole and in their proper context. He contended for an interpretation of the 2023 rules which gave the officers no power to pursue complaints under paragraphs 1.1(a) and 1.1(g).

34. The appellant said that, had there been a full hearing, he would have relied on further contemporaneous documents, including documents demonstrating that senior committees of the respondent had subsequently acknowledged that 1.1(a) and 1.1(g) had been excluded from the types of complaint officers could pursue and that the respondent had subsequently sought to change the rule further because the existing wording did not expressly provide for officers to have powers in respect of 1.1(a) and (g). He contended that the Certification Officer should have heard witnesses capable of explaining the purpose of the amendments.

35. The appellant very frankly told me in oral submissions that he had no knowledge of the drafting history. He was a member of the respondent union and not an official. He did not himself have access to any documents which might cast further light on the interpretation of Appendix A. The only document he had was the review group document referred to above. The appellant argued that this document showed that the respondent understood the rules in the way he had interpreted them, ie the committee perceived there to be a lack of power on the part of officers to pursue complaints under paragraphs 1.1 (a) and (g) and contemplated amending the rules to create such a power. At the very least, this showed that his interpretation was reasonably arguable and was evidence which should have been examined, with other documents, at a full hearing.

36. Further, the Certification Officer had not sought an explanation of why paragraph 3.1(b) was limited to the disciplinary offences under 1.1(b) to (f).

37. The appellant also raised some arguments in his skeleton about what he described as victimisation. He contended that he had been subjected to an ongoing detriment as a result of making complaints about matters such as institutional racism in the form of a three year suspension of his membership.

The respondent's arguments

38. The respondent says that the relevant rules are clear. There are two groups of disciplinary offences. They are not treated differently in terms of who may raise the complaint, whether member or officer, but they are treated differently in terms of the powers available to officers pursuing them.

39. Offences under 1.1(a) and 1.1(g) can be pursued by either officers or members. Complaints under 1.1 (b) - (f) can be pursued by officers or members but in respect of these complaints, officers have greater powers. Officers may request the appointment of an investigating officer and may seek to resolve the matter by training or other process after such an investigation.

40. The respondent said that a reading of the rules which seeks to ascertain the objective intentions of the parties in respect of the 2023 amendments shows that the respondent has sought to provide for additional investigatory powers for particular types of misconduct and that these powers have been added by providing the more specific rules in addition to the original ‘blanket’ provision. The original provision has not been removed.

41. There was no core of disputed facts which made strike out impermissible. Looking at the authorities, this was a case of contractual interpretation which was suitable for summary determination. The appellant, having been given opportunities to do so, had not put forward a factual case that there was a commercial background or custom and practice arguably supporting his construction of the rules.

42. I asked Mr O’Keefe whether an ordinary member of a union such as the appellant could be expected to put forward specific contextual material relevant to interpretation; such an ordinary member would not have the same access to material as a party to a commercial contact. Mr O’Keefe said that it would be for the member in such case to at least say that the drafting history or other aspects of the context would be relevant and ask for those to be looked into.

43. The Certification Officer had in any event obtained the information about the drafting history sent by the respondent and properly had regard to that. That context supported the respondent’s interpretation of the rules. The word ‘proceedings’ was present in the earlier version of the rules and referred to all the complaints which could be made by members or officers to be heard by the National Disciplinary Committee, which in turn comprised all categories of complaint. The insertion of new 3.1(b) did not have the effect of altering the meaning of the word ‘proceedings’. Looking at the current rules against the earlier version supported the interpretation that the amendment was simply to add new powers and processes for a limited class of offences without removing the existing powers in relation to all classes.

44. Mr O’Keefe said that the appellant had put forward no case before the Certification Officer that there were contextual facts which would lead to a different construction. He had simply relied on a ‘pure construction’ argument. The reliance on the drafting history was a new argument raised on appeal in the appellant’s skeleton argument which should not be allowed. There was no exceptional reason to do so and this was not a question of pure law.

45. I raised with Mr O’Keefe the proposition that the rules themselves raised questions, investigation of which might lead to consideration of parts of the context which would present a necessary aid to interpretation. Why was there a distinction between the categories of offence at 1.1(a) and 1.1(g) and those at 1.1 (b) – (f)? Might an understanding of the problem which the new powers in respect of that more limited class of offences was intended to address also cast some light on which interpretation of the rules was correct? I understood Mr O’Keefe’s response to be in essence that looking at the wording of the rules itself suggested an answer to those questions. The investigatory powers were provided in those classes of complaint more closely concerned with the business of the union and this supported the respondent’s construction.

46. Mr O’Keefe said that the appellant’s arguments about victimisation / discrimination constituted an attempt to introduce new arguments and evidence which should not be allowed.

Discussion and conclusions

The powers of the EAT in this case

47. This appeal was brought during a period when the legislation allowed an appeal against the Certification Officer’s decision not restricted to questions of law. This might have raised interesting issues as to the ambit of the appeal had there been a challenge to a finding of fact by the Certification Officer. Ultimately, however, it seemed to me that the only question posed on this appeal was properly to be characterised as a question of law: whether the Certification Officer erred in law in concluding

that it was not reasonably arguable that the rules bore the construction proposed by the appellant.

48. Presented with a dispute about the meaning of union rules, there will no doubt be occasions where the Certification Officer is able to strike out an application without a hearing. That would be the case if there was no ambiguity on the wording of the rules and they could only realistically bear one meaning. That would also be the case if, on the basis of such contextual materials as were available, only one meaning was reasonably arguable. In those circumstances, adopting Eady J's analysis in Embery, the Certification Officer would have all the evidence necessary to determine the point of construction raised.

49. It is not clear from her decision whether the Certification Officer concluded that the respondent's construction was correct on the basis that there was no ambiguity in the rules or on the basis that she had all of the evidence necessary to resolve the ambiguity. In my conclusion, she erred in law however she reached her conclusion.

50. So far as ambiguity is concerned, the structure of the rules created that ambiguity for the reason the appellant himself pointed out. It was not clear in the 2023 rules whether 'these proceedings' in paragraph 3.3 referred to complaints brought in accordance with 3.1 (a) and (b), that is complaints by officers in respect of categories of offence at 1.1 (b) – (f) and by members in respect of all categories of complaint. Looking at the structure of the Appendix as a whole and the words used, this was at the very least a reasonably arguable construction. It is true to say that there are also some difficulties with the appellant's construction: 3.1(b) says that if the complaint is formulated by officers under 1.1 (b) – (f), the procedure to be followed 'shall be' as set out at 3.3(a). If proceedings in paragraph 3.3 are limited so far as officers are concerned to categories (b) – (f), the power given to officers in that paragraph to suspend a member would appear to be otiose. That would support an argument that paragraph 3.3 was intended to refer to officers having powers to bring complaints of classes (a) and (g), which are not covered by the procedure at para 3.3(a).

51. However, the paragraph 3.3(a) processes and powers, despite apparently being made mandatory by paragraph 3.1(b), arguably apply only to a subcategory of complaints under 1.1 (b) – (f), that is complaints which are not only within paragraph 3.1(b) but ‘which in the opinion of the Officers requires further investigation in order that the proper functioning of the Union and standards of behaviour are maintained.’ Another interpretation of the rules is that, where complaints (limited to classes 1.1(b) – (f)) are deemed to require further investigation, the 3.3(a) process is to be followed, but where such complaints do not require further investigation, officers may proceed to a disciplinary hearing without investigation under paragraph 3.3. The power of officers to suspend under paragraph 3.3 therefore continues to serve a real function. The suggestion by Mr O’Keefe that the investigatory powers are provided where matters more nearly touch the core business of the union seems to me to be neutral as to which interpretation of the rules it supports.

52. The Certification Officer had very limited materials in front of her which might have assisted her in resolving the issue: the 2020 rules produced by the respondent and the review group document produced by the appellant. Did those materials demonstrate that the respondent’s construction was correct, in other words that there was no reasonable prospect of the appellant establishing his construction?

53. So far as the 2020 rules were concerned, the respondent’s argument was that paragraph 3.3, which provided for a complaint to be made by officers or members, was unchanged as between the 2020 and 2023 rules. In the 2020 rules it referred back to paragraph 3.1, which was a complaint of ‘one or more disciplinary offences to be heard by the National Disciplinary Committee’. ‘Proceedings’ referred to any such complaint, that is a complaint of a disciplinary offence of any of the classes in paragraph 1.1. In the absence of any change to paragraph 3.3, ‘proceedings’ in that paragraph must bear the same meaning and so officers had powers to bring complaints in respect of any of classes 1.1(a) – (g).

54. In my conclusion, the fact that there has been no change to paragraph 3.3 in the 2023 rules does not compel the conclusion that ‘proceedings’ must bear the same meaning it does in the 2020 rules. The drafters, having described the two pathways for complaints to be made, may have left the wording of 3.3 unchanged in order to encompass complaints by officers in relation to offences in classes 1.1(a) and (g) or complaints in classes 1.1(b) – (f) which did not require investigation, or indeed to both of those types of complaint. The wording of the 2020 rules does not lead inevitably to a particular conclusion.

55. The review group document suffered from the same ambiguity as the rules themselves. The concern of the review group might have been that the officers had no powers to investigate complaints under paragraphs 1.1(a) and (g) or it might have been that officers had no powers to initiate disciplinary proceedings under paragraphs 1 (a) and 1 (g) at all. The document was in any event of doubtful utility as an aid to construction as it postdated the rules.

56. It follows that the Certification Officer did not have all of the evidence she required to resolve the construction issue. It is significant that the ambiguity had occurred in the context of a fairly recent rule change. Much might be revealed by an understanding of the context which would have been known to those effecting the rule change. What issues or needs were the changes intended to address?

57. The context was a necessary part of the tools of construction which would have to be brought to bear on the question of what the rules meant. Any contract requires to be construed on the basis of what a reasonable person having all the background knowledge available to the parties in the situation they were in at the time of the contract would have understood. That background knowledge was likely to include some aspects of the drafting history and an understanding of the reasons why amendment was considered to be necessary. It would exclude anything which could properly be said to fall within or be akin to ‘pre-contractual negotiations’ but would include evidence of the genesis and aim of the new rules. This was not a case where there was an agreed context and this was not a

question of the appellant simply hoping that something would ‘turn up’ at a hearing.

58. What of Mr O’Keefe’s contention that an argument that the Certification Officer should have taken into account matters of context, including the drafting history, in resolving the question of construction is a new argument raised on appeal, which should not be permitted to proceed?

59. The question on this appeal is whether the Certification Officer erred in law in striking out the appellant’s application. The position in my conclusion is that:

- if the Certification Officer concluded on the basis of the plain wording of the rules that the appellant’s construction was wrong, that was an error of law;
- if she so concluded on the basis of such interpretive materials as she had been provided with, that was an error of law.

60. In those circumstances it was an error of law for the Certification Officer to proceed to a summary determination without all of the necessary evidence. It was not necessary for the appellant to say in terms that the Certification Officer needed to interpret the rules by reference to the relevant context. She was not in a position to say that his construction had no reasonable prospects of success without considering whether there was relevant context to the words. That was not an obscure point of interpretation which the appellant was obliged to raise in terms; it was central to the issue in front of the Certification Officer.

61. In that respect, it is worth saying something further about the context in a case of this kind. In the case of union rules, although the individual member is in effect a party to the contract, the particular member may well have no real knowledge of the context. That member cannot be expected to raise particular contextual facts which the member has no way of knowing. In that sense the circumstances differ very significantly from those in a case of a traditional contract such as **Khatiri** where the parties to the dispute will both almost certainly have the knowledge the rule of construction

anticipates.

62. A Certification Officer, faced with that imbalance of information between the parties, does not have the full armoury of case management powers an employment judge would have, for example to order disclosure of documents or make orders for the attendance of witnesses. That makes the enquiries she does have power to make of particular importance in an application like this. It may be that with sufficiently focussed enquiries, she could have satisfied herself as to the proper construction without requiring a hearing.

63. As to the points raised in the appellant's skeleton about victimisation. I agree with Mr O'Keefe that this is new evidence and these are new arguments. More importantly they do not relate to the single issue which was before the Certification Officer. Those matters, insofar as they can be interpreted as grounds of appeal, are dismissed.

Disposal

64. The effect of allowing this appeal is that the Certification Officer's order striking out the appellant's application is set aside. The original application is therefore live and will need to be dealt with in accordance with the Certification Officer's powers and duties under statute.