

Neutral Citation Number: [2022] EAT 154

Case No: EA-2021-000455-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 October 2022

Before:

HIS HONOUR JUDGE JAMES TAYLER

Between :

Simpson (2)
- and -
Unite The Union

Appellant
Respondent

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

Hearing date: 22 September 2022

JUDGMENT

SUMMARY

TRADE UNION MEMBERSHIP

The certification officer 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.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. By a decision dated 18 February 2021, the Certification Officer refused the application of Tom Simpson, pursuant to Section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULR(C)A”), for a declaration that he had been disciplined in breach of the rules of Unite the Union (“the Union”).

2. The Certification Officer takes considerable care to identify the precise nature of complaints before they are determined. On 4 November 2020 the Certification Officer wrote to the Union giving notice of the application, and stated that “Mr Simpson has confirmed that the complaints he seeks to make are as set out in the attached annex”. The relevant complaint was set out 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

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.

3. Mr Simpson confirmed that this was the complaint at the outset of the hearing before the Certification Officer.

The facts

4. Mr Simpson was a member of the Community Branch of the Union. He lives and works in Scotland. He was the Branch Secretary for the Greater Glasgow Unite Community Branch.

5. The Union operates pursuant to its rules. The parties agreed that the relevant version of the rule book was that introduced in 2018 (“the Rules”).

6. The government, management and control of the Union is vested in the Executive Council (Rule 14.9).

7. The Union operates regional administration. Each region has a Regional Committee (Rule 8.2). The Regional Committee is responsible for “management of the Union’s affairs in their Regions in conformity with decisions of the Executive Council and responsible to it” (Rule 8.3).

8. Scotland is one of the regions. There is a Scottish Executive Committee (Rule 29.1). The Scottish Executive Committee takes the place and has “the powers, duties and responsibilities” of the Regional Committee for Scotland (Rule 29.4). The Scottish Executive Committee generally meets quarterly. It has the power to “appoint one or more sub-committees” and to “delegate to any such sub-committee all or any of its powers including therein the conduct of hearings, appeals, inquiries, investigations or any other proceedings or functions” that it is authorised by the Rules to undertake. The Scottish Executive Committee has appointed a Finance and General Purposes Committee (“the F&GP Committee”) that meets and conducts business in between the meetings of the Scottish Executive Committee. It also appoints disciplinary panels.

9. Rule 27 makes provision for Membership Discipline. A member may be “charged” (Rule 27) with a number of types of conduct set out in Rule 27.1:

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.

27.1.4 **Inciting, espousing or practising discrimination or intolerance** amongst members on grounds of race, ethnic origin, religion, age, **gender**, disability or sexual orientation.

27.1.5 **Bringing about injury to or discredit upon 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. ...

27.1.7 **Breach of the Union’s policies on diversity, bullying and harassment** in the workplace, which will include cyber bullying and harassment. [emphasis added]

10. Rule 27.2 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**. [emphasis added]

11. Rule 27.3 concerns the body that shall hear a charge:

27.3 A charge under this rule may be heard by a Branch, Branch Committee (where so determined by the Branch), Regional Committee or the Executive Council. The Executive Council may delegate to a subcommittee of the Executive Council. It would be usual practice that disciplinary charges would be heard at branch level in the first instance. Disciplinary charges deemed to be of a serious nature may be initiated by the Regional committee or Executive Council.

27.3.1 Serious allegations of breach of Clauses 27.1.1. to 27.1.7 may be referred directly to the General Secretary. The General Secretary will appoint a senior employee of the Union to conduct an investigation which may lead to disciplinary charges being laid on behalf of the Executive Council.

12. Allegations of a serious breach of Rule 27.1 that are “subsequently shown to be vexatious, malicious or defamatory” may be treated as a breach of the Rules and are “liable to be referred to” the disciplinary procedure.

13. The Executive Council and regional committees have power to impose disciplinary sanctions up to expulsion from the Union.

14. The relevant direction of the Executive Council provides:

Investigation and Charge

A member **may be charged** with **one OR more of the offences detailed in Rules 27.1.1 to 27.1.7**. A member may not be charged with any matter falling outside of these rules, and at the end of these directions a general statement is provided concerning the law in this area. If there is any doubt as to the matter under consideration, then the body proposing to deal with the matter should seek legal advice from the union's Director of Legal Services.

Rule 27.3 provides that **charges are to be heard** by a Branch (or Branch Committee), a **Regional Committee** or the Executive Council (or a sub-committee of the Executive Council). **Where the charge is to be heard by a Branch (or Branch Committee) the charge shall be brought by the Branch. When the charge is to be heard by the Regional Committee, the charge shall be brought by the Regional Committee.** Where the charge is to be heard by the Executive Council (or a sub-committee of the Executive Council) the charge shall be brought by the Executive Council (or a sub-committee of the Executive Council) or the General Secretary.

If the union receives notice of a matter which may lead to a disciplinary charge against one more members, then **the situation should be investigated** to determine if there should be a charge. The means of investigation shall be determined by a body referred to in Rule 27.3 or by the General Secretary. Notice of the fact of an investigation being undertaken shall be sent to the office of the General Secretary.

The investigation shall be completed as soon as is practicable in the circumstances and **the outcome of the investigation shall be recorded in writing. The investigation shall report to the body (or the General Secretary) which commissioned the investigation with a recommendation as to whether there is a charge to answer.**

After receipt of the investigation report, there shall be no unreasonable delay before a member is charged.

If a charge is to be brought, a letter shall be sent to the member setting out the circumstances (in outline form) giving rise to the charge and specifying the rule which it is alleged has been breached. The member shall also receive a copy of the investigation report and any associated documents. A copy of the letter of charge shall be sent to the office of the General Secretary. [emphasis added]

15. On 2 March 2018 Mr Simpson made a complaint to the Union alleging, amongst other things, that he had been subject to “bullying, discriminatory and sexually harassing behaviour” by another member of the Union. He alleged that his shoulders had been squeezed, that he had been touched and squeezed on the leg above the knee, and been subjected to a “physical body push” against his left side while seated. He asserted that some of the alleged physical contact had been admitted in correspondence. On 19 March 2018, Mr Simpson raised a further complaint, including an allegation

against another member who he asserted had forwarded a statement about him that was “false, defamatory, harmful and discriminatory”.

16. On 7 March 2018, Pat Rafferty, Scottish Regional Secretary, asked Elaine Dougall, Regional Coordinator in the Scotland region, to investigate Mr Simpson's complaint. Mr Simpson and the members he had complained about were interviewed. Ms Dougall produced an undated report of her investigation. She could see “no evidence to substantiate both complaints” and considered the complaints could be construed as “vexatious”. She recommended that a F&GP panel be convened to determine if Mr Simpson had himself breached the Rules.

17. The F&GP Committee met on 4 September 2018. Mr Gillespie, Regional Chair of the Union in Scotland, chaired the F&GP Committee. He took part in the consideration of Ms Dougall’s report.

The minutes record:

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.

18. There was then a private session that is not recorded in the minutes, save that it is stated that:

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.

19. Mr Gillespie took part in the “private session”. The minutes record the decision taken after the private session:

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. [emphasis added]

20. In his statement for the hearing before the Certification Officer, Mr Gillespie stated of the F&GP Committee meeting on 4 September 2018:

6. Following receipt of Ms Dougall's report **the Committee had its second task to perform - to reach a conclusion and decision on whether to hold**

a disciplinary process having considered the investigation report. This report was presented to us as a Committee in September 2018. 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 our 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 Messrs Morrison and Stoddart 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 others, 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.** [emphasis added]

21. Mr Simpson was suspended by letter dated 7 September 2018 and was informed that an investigation was to be conducted into his conduct. Stephen Deans, Regional Coordinating Officer within the Scotland Region, conducted the investigation.

22. The F&GP Committee met again on 9 October 2018. Mr Gillespie was recorded as being in attendance. Mr Simpson had not met with Mr Deans. It was decided that a report would be put to the F&GP Committee once a meeting had taken place.

23. Mr Deans and Mr Simpson were not able to agree terms for a meeting. Mr Deans produced an undated report that recommended that a “Rule 27 panel” be put together. At a meeting on 12 March 2019 the F&GP Committee accepted this recommendation and selected a panel of 3 members of the F&GP Committee, including Mr Gillespie, who was to be the chair of the disciplinary panel. Mr Gillespie described his involvement in his witness statement:

11. The panel deliberated on his 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 that there was sufficient evidence to proceed to the next stage and commence a disciplinary process.

24. On 3 April 2019, the Union wrote to Mr Simpson:

Following an investigation and consideration by the Scottish Executive' s F&GP committee, **you are charged** with having breached Rules 27.1.1, 27 .1.3 and 27 .1.5 of the Unite rule book.

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

25. On 30 April 2019, Mr Simpson wrote to Mr Gillespie asserting that, because of his involvement in organisations that the complainants were also involved with, he should recuse himself from the panel:

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 compromises 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.

26. Mr Gillespie did not reply to this letter, or inform his fellow members of the disciplinary panel of its contents.

27. The disciplinary hearing took place on 8 May 2019. Mr Simpson did not attend. By letter dated 27 May 2019, Mr Simpson was informed that the charges against him had been upheld and he was expelled from the Union with immediate effect.

28. Mr Simpson appealed against the decision. His appeal was considered by a sub-committee of the Executive Council on 5 August 2019. By letter dated 4 September 2019, Mr Simpson was informed that his appeal had been dismissed.

The Hearing before the Certification Officer

29. The Certification Officer described the hearing and material she received at paragraph 3 of

her decision:

A hearing took place by Video Conference. Three sessions, each lasting three hours, were timetabled over three days on 26, 27 and 28 January 2021. Mr Simpson represented himself. He submitted a skeleton argument and made oral submissions. He chose not to give written or oral evidence. The Union was represented by Mr Michael Potter of counsel, instructed by Mr Neil Gillam, of the Union's Legal Department. The Union submitted a skeleton argument and written statements from Mr Rafferty (Scottish Regional Secretary), Ms Dougall (Regional Coordinating Officer, Scotland Region), Mr Gillespie (Regional Chair of Unite the Union, Scotland), Mr Woodhouse (Chair, Unite the Union) and Mr Deans (Regional Coordinating Officer, Scotland Region). Mr Rafferty, Ms Dougall, Mr Gillespie and Mr Woodhouse gave oral evidence. There was also in evidence a bundle of documents consisting of over 512 pages containing correspondence and a bundle consisting of the rules of the Union, policies and procedures for consideration at the hearing. Mr Simpson and Mr Potter both submitted legal authorities to support the arguments set out in their skeleton arguments.

The jurisdiction of the Certification Officer

30. Section 108A TULR(C)A provides that

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

(2) The matters are— ...

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

31. Section 108A TULR(C)A provides that:

(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.

The Decision and Reasons

32. The specific complaint raised by Mr Simpson in his complaint of 4 November 2020 was that the role of Mr Gillespie as chair of the F&GP Committee and of the disciplinary panel was in breach of natural justice and was not procedurally fair (“the primary complaint”). The Certification Officer’s decision in respect of the primary complaint was:

I refuse to grant Mr Simpson’s application for a declaration that between 4 September 2018 and 8 May 2019 the Union breached rule 27.2 and the principles of Natural Justice and procedural unfairness by arranging for John Gillespie, the Chair of the Finance and General Purposes Committee to also act as chair of the disciplinary panel set up to consider disciplinary charges brought by the F&GP Committee against Mr Simpson.

33. The certification officer concluded in her reasons for dismissing the primary complaint:

74. The core of this second complaint is whether, having chaired the Committee which commissioned the investigation into Mr Simpson’s conduct, received Mr Deans’ report and referred the charges against Mr Simpson to the disciplinary panel, Mr Gillespie should have chaired the disciplinary panel.

75. Mr Simpson’s view is that Mr Gillespie raised the initial concern about Mr Simpson’s conduct, prosecuted it through the disciplinary process and then acted as the final decision maker by finding against Mr Simpson and expelling him from the Union. He argued that this is a breach of natural justice and, consequently, a breach of Rule 27.2 and the EC Guidance. Mr Simpson also argued that this introduced bias, whether real or perceived, into the Union’s handling of the case.

76. Mr Potter’s view is that Mr Simpson’s conduct was first raised with the Committee by Elaine Dougall. The Committee, as the relevant Regional Committee, has responsibility for the conduct of the disciplinary procedures. In Mr Simpson’s case the Committee decided to investigate the concerns raised by Ms Dougall and then, once it had received that second investigation report, to charge Mr Simpson under Rule 27.1 and to hold a disciplinary panel. That disciplinary panel was chaired by Mr Gillespie and included a further two members of the Committee. In effect the Committee delegated its disciplinary powers, as provided for by Rule 8.8, to a sub-committee. Mr Potter explained that neither Mr Gillespie nor the Committee had raised the initial concerns; they had acted on issues which arose from Ms Dougall’s investigation. Whilst they commissioned the report, the Committee could not be seen as a prosecutor as they had asked Mr Deans to investigate the concerns and then taken a decision to charge Mr Simpson once his report had been received.

77. Having read the Rules, I agree with Mr Potter. **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.**

78. **Mr Simpson did not appear to make the argument that the rules themselves are unfair.** His argument was that, in his case, the process was unfair. In making his case he was clear that the argument that the **process adopted in his case was consistent across the Union** did not mean that it was bound to be consistent with natural justice. He is, of course, right on that point. Consequently, **I need to consider whether the application of the rules in his case was consistent with natural justice and whether the roles played by Mr Gillespie introduced an element of bias, whether real or perceived, and unfairness.**

34. The Certification Officer went on to consider and reject additional arguments that Mr Simpson had raised about alleged affiliations between Mr Gillespie and the people against whom Mr Simpson had made his original complaints (“the secondary complaints”):

79. Mr Simpson's principal concern appears to be that Mr Gillespie, Mr Rafferty and Ms Dougall were members of the same organisations or movements within, or linked to, the Union. He also argued that, as a result of that Mr Gillespie had links to the members about whom Mr Simpson had originally complained. In Mr Simpson's view this should have been sufficient for Mr Gillespie to have recused himself from the panel. He did not appear to argue, however, that the other two panel members should have recused themselves.

80. Mr Simpson has offered no evidence to show that there was real bias in the decision making process, either before or during the disciplinary panel. He has, however, made several allegations of bias to the Union, and to myself during the course of his complaint, but these have not been supported by any evidence. The evidence provided by the Union, in written statements and when giving evidence at the Hearing, supports their case that there was no real bias. Ms Dougall, Mr Rafferty and Mr Gillespie all told me that they approached the case without bias. Mr Woodhouse told me that the appeal panel took the view that Mr Gillespie had acted appropriately in his handling of the case. The documents also show that the Union undertook a second investigation to ensure that Mr Simpson had a chance to respond to the views expressed in Ms Rafferty's report. Mr Deans, who conducted the second investigation, made several attempts to meet with Mr Simpson to hear his views. On that basis I am satisfied that there was no real bias and the only question for me is whether the perceived bias which Mr Simpson raised was

sufficient to render the disciplinary process unfair and in breach of natural justice.

81. Mr Potter referred me to the test of actual or perceived bias which is set out in *Porter v Magill* [2002] 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 nor 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.

82. It is accepted by both parties that Mr Gillespie was a member of some of the organisations identified by Mr Simpson, as were Mr Rafferty, Ms Dougall and Mr Deans. Mr Gillespie told me that the two additional members of the Panel were also a member of some of those organisations. The question for me, however, is whether that in itself is sufficient for a fair-minded observer to question Mr Gillespie's fairness. Mr Simpson clearly believes that it was.

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, 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.

35. The Certification Officer said of the secondary complaint in respect of Mr Simpson's letter of 30 April 2019, in which he had asked Mr Gillespie to recuse himself from the disciplinary panel:

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 took and I make no criticism of him.

The Appeal

36. Mr Simpson appealed against the decision of the Certification Officer by a Notice of Appeal treated as received by the EAT on 19 March 2021. In his grounds of appeal he raises both the primary complaint and the secondary complaints, albeit in a form in which they are somewhat interwoven.

37. By an Order with seal date 14 July 2021, HHJ Shanks set the matter down for a preliminary hearing for directions. He concluded that the Notice of Appeal raised arguable points of law and that it should be listed for directions. The preliminary hearing was held on 30 September 2021. Directions were given to prepare for the full appeal.

The Jurisdiction of the EAT

38. At the relevant time, section 108C TULR(C)A provided:

An appeal lies to the Employment Appeal Tribunal on **any question of law** arising in proceedings before or arising from any decision of the Certification Officer under this Chapter. [emphasis added]

39. For any decision of the Certification Officer made on or after 1 April 2022, the section has been amended to replace the words “any question of law” with “any question”: Section 21 **Trade Union Act 2016** and Reg 16 **Trade Union Act 2016 (Commencement No 4 and Transitional) Regulations 2021** (SI 2021/1373)

Natural Justice

40. The Certification Officer accepted that the Union’s disciplinary process could be challenged on grounds that it did not comply with natural justice:

52. Mr Simpson raises the Union’s compliance with natural justice as a central thread through his complaint. Both he and the Union agree that the Union is required to comply with natural justice. In previous decisions my predecessors and I have taken the view that the principles of natural justice are to be regarded as incorporated as implied terms into union rule books. Unite the Union have, however, gone further than some unions as they have incorporated the principles into their rule book at Rule 27.2

“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.”

53. In addition the EC Guidance itself states that:

“The disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice. These directions are designed to ensure that this is the case.”

54. There is, therefore, no doubt that the Union should adhere to the principles of natural justice when proceeding with disciplinary action against a member. In previous cases my predecessors and I have established that, within this context, natural justice means that a union member facing disciplinary charges has a right to be given notice of those charges, the right to answer those charges and the right to be heard by an unbiased tribunal.

55. Mr Simpson, in written submissions and at the Hearing, argued that I should also take into account whether the proceedings were conducted in a way which was fair to him. The principles I have just outlined are intended to ensure that a process is, in a broad sense, fair and it is evident, from Rule 27.2 and from the EC Guidance, that the Union’s intention is that the process should be fair. I, therefore, have no difficulty in agreeing with Mr Simpson that the Union’s disciplinary process should be managed in a way which is fair.

41. Natural justice is, to an extent, context specific. For example, in considering dismissal from employment the focus is usually on fairness for the purposes of the **Employment Rights Act 1996** rather than on the concept of natural justice. Employment is generally a matter of pure private law. Full public law standards of decision making are generally not expected of employers.

42. Some aspects of natural justice are a little difficult to tie down. But, as Lord Reid put it in **Ridge v Baldwin** [1964] AC 40 64-65, the suggestion that “natural justice is so vague as to be practically meaningless” suffers from “the perennial fallacy that because something can-not be cut and dried or nicely weighed or measured therefore it does not exist”. The concept of natural justice is of sufficient utility that the Union has chose to refer to it specifically in Rule 27.2.

43. The component of natural justice that is most relevant to this appeal gives rise to the uncontroversial assertion that Mr Simpson had the right to be heard by an unbiased tribunal; one that was not actually or apparently biased.

44. A component of bias is prejudgment. As stated in chapter 8 of Judicial Review, Principles and Procedure “a decision-maker may not make up his or her mind in advance and refuse to consider a matter on its merits”. It is also noted that many of the cases that consider prejudgment might best be seen as determining whether there is an appearance of predetermination. The appearance of

predetermination can result from a person having taken part in an earlier decision before making the decision that is subject of challenge. In considering this issue in Disciplinary and Regulatory Proceedings the subheading chosen by the authors rather nicely encompasses the issue: “The problem of tribunal members having been involved in the investigation or the decision to bring proceedings”.

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* [2002] 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 not 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 “fairminded”, 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.

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 complainant 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.

49. There are a number of ways in which a person may be involved in disciplinary proceedings.

These include, amongst a number of others:

- (1) making a complaint
- (2) deciding that the complaint should be investigated
- (3) considering whether the member should be suspended
- (4) conducting the investigation
- (5) considering the outcome of the investigation, and deciding whether a charge should be brought
- (6) prosecuting the charge
- (7) deciding whether the charge is proven
- (8) if the charge is proven, determining any penalty

50. A person may be involved in such decision making independently or acting on behalf of an organisation.

51. Involvement in decisions may vary from deciding whether to accept a recommendation to determining the issue without any consideration of the previous stages.

52. It is tempting for lawyers to analyse the possible roles against the paradigms of criminal or civil litigation. The analogies are risky. On the one hand, judges are experienced in legal process and should be held to the highest standards of impartiality; but, on the other, having taken the judicial oath, may be better placed than others to compartmentalise differing responsibilities in ongoing legal proceedings, and often have to take a number of decisions in the course of managing and determining a case that may give some indication of the judge's initial thoughts on its merits. Judges are generally taken to be able to determine cases fairly irrespective of any provisional views, unless they have been expressed with excessive vehemence. There is potentially a greater risk of predetermination amongst those who are not legally trained and do not have long experience of compartmentalising stages of their decision making.

53. An internal procedure 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.

54. The issue of the appearance of predetermination has been considered on a number of occasions in the context of professional regulation. The approach adopted has tended to be strict, particularly as determining a person's ability to undertake their profession engages the Article 8 right to a fair hearing.

55. In **Preiss v General Dental Council** [2001] UKPC 36, [2001] 1 WLR 1926 the facts were as summarised in the headnote:

A complaint was made by a patient to the General Dental Council, the body responsible for the formulation and enforcement of disciplinary rules for dentists, about the standard of care given to her by a dentist when attempting to carry out major restorative dental treatment. In accordance with the council's usual practice the complaint was considered by a preliminary screener whose task was to decide if there was prima facie evidence of serious professional misconduct so as to require the council's Preliminary Proceedings Committee to consider whether the complaint should be referred to the council's Professional Conduct Committee for hearing. The complaint against the dentist was so referred. Unknown to him, the preliminary screener in his case was the president of the council, who thereafter chaired the Professional Conduct Committee hearing. Seven of the other ten members of that committee were members of the council.

56. Lord Cooke gave the judgement of the Court holding at [20]:

20. The contention for the appellant that the role of the preliminary screener is prosecutorial cannot be accepted. It is more akin to the role of examining justices or a judge ruling on a submission of no case to answer. But that by no means disposes of the appellant's points under article 6(1). In the opinion of the Board, when the participation of the President both as preliminary screener and as chairman of the PCC is seen in conjunction with the predominance of council members in both the PPC and the PCC, and in conjunction moreover with the fact that the disciplinary charge is brought on behalf of the council, the cumulative result is an appearance and a real danger that the PCC lacked the necessary independence and impartiality. Only the ultimate right of appeal to Her Majesty in Council saves the day.

57. Key to the determination was the lack of independence and impartiality of the PCC because it was made up predominantly of members of the General Dental Council. It is also to be noted that merely being involved in the preliminary screening of a complaint was not in the context of the case seen as being a prosecutorial role.

58. A similar approach was adopted in **In Re P (A Barrister)** [2005] 1 WLR 3019, in which it was held that a lay representative on the panel of the visitors to the Inns of Court, the body that considers appeals against disciplinary action against barristers, was subject to automatic disqualification at common law because of being a judge in her own cause because she was a member of the Professional Conduct and Complaints Committee of the Bar Council ("PCCC"), the body responsible under the Code of Conduct of the Bar of England and Wales for deciding whether to prosecute and, if appropriate, for conducting the prosecution, although she had not attended the meeting at which the PCCC took the decision to prosecute the appellant. It was also stated, albeit obiter, that despite not having attended the meeting at which the decision to prosecute P had been taken, had she regularly attended the PCCC and then acted as lay representative on the panel of the visitors, this would have created an appearance of bias.

59. A trade union is unlikely to be able to establish a similar level of independence in a disciplinary panel because all those involved are acting on behalf of the Union. A regulatory body like the General Dental Council or the panel of the visitors is acting as a public body, whereas a trade union is generally acting as a private body, which is relevant to the degree of independence that may

be required between those that take different decisions in the disciplinary process. As the editors of Harvey note [3384.02] “the union is both the offended party and the judge of the offence”.

60. In **White v Kuzych** [1951] AC 585 Viscount Simon considered that those taking part in a trade union tribunal could not be expected to have the “icy impartiality of a Rhadamanthus”. Rhadamanthus was credited in Greek mythology as being the justest of men, whose stern and inflexible judgement qualified him to become one of the judges of the dead.

61. However, it is well established that while trade unions may essentially be private bodies, they are subject to rules of natural justice, if not otherwise, by an implied term of the contract of association. While 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.

62. A union is subject to its rules. It has been held that the requirements of natural justice could be excluded by clear words: **Roebuck v National Union Of Mineworkers** [1977] ICR 573:

I accept, that one has to be very careful to draw a distinction between courts of justice, statutory bodies and voluntary bodies in this sense, that a voluntary body is a creation of its members by a contract between them. The contract, of course, in the case of a union is to be found in its rules. It is not for me in this court to suggest, even after the present legislation, that a union is not a voluntary body of its members. One has to look at the rules to find the contract between the members because the voluntary body can, by its contract prescribe in what way its disciplinary proceedings shall be conducted. The members of a voluntary body, if they are so minded, can by their contract exclude from their own domestic tribunal some one or more of what would normally be regarded as rules of natural justice. In my judgment, in construing the rules, a court, if it observes that there has been a clear exclusion of a rule of natural justice, will give effect to the rules of the society, and for the purposes of the particular piece of litigation will treat that rule of natural justice as excluded. However, what the court will not do is to infer from a set of rules that a rule of natural justice has been excluded. One has got to have clear words to exclude a rule of natural justice.

63. Far from there being any clear words in the Rules that excludes any component of natural justice, Rule 27.2 specifically refers to natural justice. I consider that it is clear that any directions issued by the Executive Council should be designed to promote natural justice and that such directives and the rules should be interpreted in conformity with principles of natural justice, insofar as they are

properly applicable to a trade union.

64. In **Roebuck** a disciplinary determination by a trade union was vitiated by apparent bias:

Turning now to apply those principles to the facts of the present case, one has here certain evidence which is undisputed. One has the original memorandum prepared by Mr. Scargill as a report on the libel proceedings in which he makes a complaint against these plaintiffs. It seems to me that in the special circumstances of this case he was setting himself up as a person complaining. It matters not what words he used, whether he is prosecutor or complainant. However one reads his own report, he was complaining about the conduct of these two men. He was setting the machinery in motion. What is more, in the very document in which he was making the complaint, he was not only making the complaint but was also expressing a view on their guilt or culpability. A man who not only makes a complaint but at the same time expresses his views about the guilt and culpability of the persons to be brought before the tribunal seems to me to fall well and truly under both heads, as a prosecutor and as a person who is biased. Be that as it may, anybody who then observes the tribunal, and sees that that man retires willingly as the chairman — whether he has got a vote or not seems to matter not one iota — must feel that justice is not seen to be done. One reaches that conclusion, in my judgment, without ever having reference to one word of what Mr. Walsh said did happen when the tribunal retired. If one adds that fact into the scale, the answer seems to me to be that any bystander, observing that fact would say not only that justice was not seen to be done, but knowing what Mr. Walsh has said, and knowing it is not disputed, would in those circumstances say: “I am certain justice was not done.”

65. Thus, in the context of a trade union, significant prior involvement can result in an appearance of bias by way of predetermination. The facts in **Roebuck** were particularly stark, but that does not mean that appearance of bias by way of predetermination is limited to such extreme situations.

The key arguments

66. Mr Simpson asserts that the Certification Officer erred in her approach to his primary complaint that the involvement of Mr Gillespie at a number of stages of the disciplinary process was in breach of natural justice; and in her determination of the secondary complaints in her reasons.

67. Oliver Segal KC, for the Union, contends that the only matter that was properly before the Certification Officer, and in the appeal to the EAT, is the primary complaint. That was the complaint identified by the Certification Officer and agreed with Mr Simpson. It was the complaint that the Union responded to and provided evidence to counter. It was the complaint that was determined by the Certification Officer in her decision, even though the secondary complaints were considered in her reasons.

68. Mr Segal contends that the answer to the primary complaint is simple. In his skeleton argument he states:

C complains that the CO erred in law by not recognising that JG acted as ‘prosecutor’ in being part of the Committee which commissioned Mr Deans to do the second investigation and which decided the charges to be answered by C. As set out above, the CO considered this argument and rightly rejected it for the reasons she gave.

C complains that the CO erred in not finding that JG (and presumably any member of the Committee) could not properly be part of the disciplinary panel because the Committee had decided, in accepting the recommendation in Mr Deans’ report, that there was “sufficient evidence to proceed”; and thus ended up acting as ‘judge in his own cause’. R disagrees. There is certainly nothing more objectionable in the extremely limited role JG played as part of a large committee accepting a recommendation that another person had already made, following investigation, than – in environments which are much a fortiori in terms of judicial formality – an employment judge refusing to strike out a claim and then hearing that claim, or indeed a member of the Court of Appeal granting permission to appeal and then being part of the court hearing the full appeal.

69. I do not consider that the matter is as simple as Mr Segal suggests. I am also far from convinced by the analogies with an employment judge refusing to strike out a claim and then determining the claim on the merits; or a judge of the Court of Appeal granting permission to appeal and then determining the appeal. There is a significant difference in that a judge may make a number of determinations in managing and deciding a case, but does not bring or prosecute the claim. A judge may indicate a preliminary view at various stages of the proceedings, ranging from a formal decision that a case should not be struck out, to indicating in a hearing the points the judge considers are important. The judge is not involved in bringing a charge or investigating the case. In criminal proceedings the Crown brings the charge. Generally, in civil proceedings the claim is brought by a party.

The approach of the Certification Officer

70. The core determination of the Certification Officer was that the involvement of Mr Gillespie at various stages of the disciplinary process had not involved him investigating the complaint and was permitted by the rules, and so was not in breach of the principles of natural justice. The specific consideration of the appearance of bias was in the section of the reasons dealing with the secondary

complaints. There was no consideration of the concept of the appearance of bias in the form of predetermination.

The involvement of Mr Gillespie in the disciplinary process

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 2018 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.
- (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.

72. The Certification Officer considered that the Rules of the Union permitted the process that was adopted. She stated that the Rules “clearly give the Committee oversight of the process”. The Rules permit disciplinary proceedings to be conducted at Branch, Regional or Executive Council level. There is specific reference in the Rules to disciplinary proceedings being undertaken by a Branch Committee or a subcommittee of the Executive Council (Rule 27.3), whereas there is no specific reference to a sub committee of a Regional Committee. The F&GP Committee is a sub-committee of the Scottish Executive Committee, which is the Regional Committee for Scotland. Mr Simpson has not argued that the F&GP Committee was not an appropriate body to conduct the disciplinary process, presumably because Rule 8.8 permits a Regional Committee to appoint a sub-committee.

73. The fact that a particular committee has the power to deal with a disciplinary issue does not mean that it has to do so. The fact that something is permitted does not mean that it is required. The disciplining of Mr Simpson, after his initial complaints had been dismissed, could under the Rules have been dealt with by reference to the General Secretary, the investigation being undertaken by a senior employee, with any disciplinary charges being laid on behalf of the Executive Council. The

process could have been overseen by the Scottish Executive Committee acting a Regional Committee for Scotland, rather than the F&GP Committee. The direction of the Executive Council provides that disciplinary charges shall be put at the same level of committee as that which decides the complaint. However, there was nothing that required Mr Gillespie to take part in any particular stage of a process (see **Roebuck**) . It is not unusual for members of a committee that may sit on a disciplinary panel to step out of the committee when a decision is made as to whether a charge should be brought.

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 “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.

76. Having concluded that the Certification Officer erred in law, which is the test appropriate to this appeal, I have requested submissions from the parties as to disposal; if there is only one possible answer I may substitute a decision, I could determine the matter if the parties agree; or I could remit it to the Certification Officer.