Neutral Citation Number: [2020] EWCA Civ 736

Case No: A2/2019/1745

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Soole
UKEAT/0111/19/LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE SINGH
and
LADY JUSTICE CARR

- -

Between :

DOMINIC KELLY	**Appellant**
- and -	
THE MUSICIANS' UNION	**Respondent**

- -
- -

Mr David Reade QC and Mr Stuart Sanders (instructed by **Harbottle and Lewis Solicitors**) for the **Appellant**
Mr Oliver Segal QC and Mr Stuart Brittenden (instructed by **Thompsons Solicitors**) for the **Respondent**

Hearing date : 6 May 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Thursday, 11 June 2020.

Lord Justice Singh :

Introduction

1. The Appellant, Mr Dominic Kelly, appeals against the judgment of Soole J, sitting in the Employment Appeal Tribunal ("EAT"), dated 18 June 2019. The EAT allowed the appeal by the Respondent, the Musicians Union ("the Union" or "MU"), from the Certification Officer's decision dated 1 February 2019. The Certification Officer had granted a declaration that the Union had breached its rules by instituting disciplinary proceedings against the Appellant out of time. She also made an "enforcement order", requiring the Union to take certain remedial steps.

2. Permission to appeal to this Court was given by Bean LJ on 31 October 2019.

Factual Background

3. The Appellant is a professional oboist, who also acts as what is known as a "professional fixer" in the music industry, i.e. a contractor who assembles professional musicians to perform at commercial engagements. He is the Managing Director and professional fixer of the English Session Orchestra.

4. Prior to these proceedings, the Appellant had been a member of the Union since February 1999 and was an "Approved Contractor" pursuant to a separate commercial agreement with the Union dated 10 January 2000. An Approved Contractor is a designation given by the Union which, the Appellant contends, is needed to work as a professional fixer at a "premier commercial level". The Respondent does not concede that it is necessary but accepts that it is useful for that purpose.

5. In 2016-2017 the Union set up a "safe space" for members to report incidents of sexual harassment at work. A number of members raised complaints against the Appellant, which had occurred more than 28 days prior to their being reported to the Union.

6. By a letter dated 24 January 2018, the General Secretary of the Union informed the Appellant that the Union had received a number of serious complaints against him. These comprised allegations of sexual harassment, discrimination and bullying and threatening behaviour. The letter advised that, pursuant to Rule XVII of the Union's rules, the complaints had been investigated and disciplinary charges would be considered by the Disciplinary Sub-Committee of the Union's Executive Committee.

7. The Appellant was invited to submit a statement in response to the allegations and did so on 9 February 2018. The Appellant attended the meeting of the Disciplinary Sub-Committee held on 14 February 2018.

8. On 16 February 2018, the Disciplinary Sub-Committee wrote to the Appellant to inform him that the charges of sexual harassment and of bullying and threatening behaviour under Rule XVII(2)(c)(i) had been upheld, while the charge of discrimination had been dismissed. The Sub-Committee advised that the sanction to be imposed, pursuant to Rule XVII(9)(f), was expulsion from the Union, the period of which would be determined by the Executive Committee at its meeting in March 2018.

9. By letter dated 4 March 2018, the Appellant exercised his right of appeal to the Appeals Sub-Committee of the Executive Committee. In a letter dated 8 March 2018, the Union acknowledged the Appellant's appeal and, under the heading "Sanction", advised the Appellant that the Executive Committee had decided to remove his membership of the Union and his approved contractor status for a period of 10 years. In a paragraph headed "MU Approved Contractors Agreement" the letter stated that "the MU can and did treat your behaviour as a fundamental breach of your contract. No notice is required in the event of such a fundamental breach."

10. The Appeals Sub-Committee met on 20 April 2018. The Appellant did not attend.

11. The Appellant's appeal to the Appeals Sub-Committee was dismissed by letter dated 24 April 2018. This letter confirmed the Appellant's expulsion from the Union for a period of 10 years, stated that his approved contractor status had been removed and noted that he had been placed on an "Ask us First List." His placement on the latter list was later removed.

12. On 14 August 2018, the Appellant submitted a complaint to the Certification Officer pursuant to s. 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). The complaint alleged a breach of the Union rules in respect of the disciplinary proceedings of 16 February, 8 March and 24 April 2018. The attached particulars contended that consideration of the charges was in breach of a 28 day time limit in Rule XVII(4); and also made complaints of breaches of the rules of natural justice. This was the first time that the alleged breach of the time limit was raised; it had not been raised during the disciplinary process itself. The Certification Officer addressed the alleged breach of Rule XVII(4) as a preliminary issue.

Material Legislation

13. The 1992 Act, so far as material, provides:

> "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.
>
> …
>
> (6) A declaration made by the Certification Officer under this section may be relied on as if it were a declaration made by the court.
>
> (7) Where an enforcement order has been made, any person who is a member of the union and was a member at the time it was made is entitled to enforce obedience to the order as if he had made the application on which the order was made.
>
> (8) An enforcement order made by the Certification Officer under this section may be enforced in the same way as an order of the court.
>
> …"

The decision of the Certification Officer

14. The decision of the Certification Officer (Sarah Bedwell) was issued on 1 February 2019. The Certification Officer held that Rule XVII(4) was clear and allowed no room by process of construction or implied term to permit a disciplinary process where the alleged disciplinary offence had taken place more than 28 days before the date of the complaint. At para. 1 she granted a declaration that the Union had breached its rules in that regard. It followed that the Appellant had to be restored to the membership of the Union: see the enforcement order, at para. 2(a).

15. The enforcement order also included the following steps. At para. 2(b), it was required that the Appellant should be reinstated to the Recording and Broadcast Committee. At para. 2(c), it was required that the Appellant should be restored as an Approved MU Contractor.

16. Furthermore, the enforcement order included, at para. 2(d), an order restraining the Union from taking any future steps to remove the Appellant's Approved Contractor status "… which is based on information which was considered as part of the disciplinary process which began with the General Secretary's letter of 24 January 2018".

17. The Certification Officer set out her "considerations and conclusions" from para. 16 of her decision.

18. At para. 35 she said that there was no discretion in Rule XVII(4). She said that the reasonable union member would read the Rule so that there are two pre-conditions. They include the pre-condition which requires that the incident be reported within 28 days. She said:

> "There is no lack of clarity around the wording of the Rule and no disciplinary route available where either, or both, of the pre-conditions are not met."

19. The Certification Officer recognised that a 28 day time limit seems to be "surprisingly short" and would undoubtedly generate problems for the Union in dealing with many complaints. However, she continued:

> "That does not mean … that the Rule should be ignored or treated as guidance."

20. From para. 38 of her decision the Certification Officer considered the issue of implied terms. She concluded, at para. 41, that she was not persuaded that Rule XVII(4) was "sufficiently unclear as to require a term to be implied into it for it to be effective." She observed that counsel for the Union (Mr Brittenden) had suggested two possible implied terms.

21. At para. 47 she therefore concluded that the Union had breached Rule XVII(4) in taking forward the complaints made by Mr Kelly. From para. 48 the Certification Officer considered an issue about waiver or affirmation, which is no longer material.

22. The Certification Officer set out her "conclusions and observations" from para. 54. At para. 54 she acknowledged that the allegations against Mr Kelly were serious and she found herself "in the uncomfortable position of finding that a Union's Rules prevent it from dealing with serious allegations about one of its Members …".

23. At para. 55 she acknowledged that the consequence might be "absurd" but concluded that "the Union's Rule book is clear about when complaints can be taken forward for investigation."

24. From para. 58 the Certification Officer considered what enforcement orders she should make in the light of her conclusions. She set out the terms of her order again at para. 68, as she had at para. 2.

The EAT judgment

25. Allowing the Respondent's appeal, the EAT (Soole J) held that, on a proper construction of the Union rules, it had a discretion to instigate disciplinary proceedings in respect of alleged offences occurring more than 28 days before the date of the complaint.

26. Soole J said that, to construe Rule XVII(4), it was necessary to consider the other rules which relate to disciplinary offences. He identified Rule X(4) and Rule XVII(2) as rules without time limits, which provide obligations or powers for disciplinary reporting or action. Against this background, it was held that Rule XVII(4) imposes a mandatory obligation of investigation where the relevant complaint gives reasonable grounds to

think that a member might be guilty of a disciplinary offence and the complaint was made within 28 days of the alleged offence; however, it does not contain an express prohibition against initiation of an investigation in any other circumstances.

27. Soole J then considered whether Rule XVII(4) contains such a prohibition of investigation by necessary implication, as the Certification Officer in effect had held. Considering both the tests of business efficacy and obviousness, he found no basis to imply a term which prohibits the initiation of an investigation; and every basis to imply a term which provides the General Secretary with a discretion do so.

28. Soole J further said that, if he had not held that the Certification Officer was wrong in law in her interpretation of Rule XVII(4), he would have set aside para. 2(d) of her enforcement order, as it may have left the Union in doubt as to whether it could terminate the contractual agreement underpinning the Appellant's Approved Contractor status.

Submissions of the parties

29. On behalf of the Appellant Mr David Reade QC, who appeared before us with Mr Stuart Sanders, submits that the Certification Officer:

    (1) correctly directed herself as to the law and reached a clear and unimpeachable conclusion, on the clear and unambiguous wording of Rule XVII(4), that there are two preconditions for an investigation into a member's conduct under Rule XVII: reasonable grounds and a timely complaint made within 28 days;

    (2) correctly concluded that there was no basis for the implication of a term within the rules as asserted by the Union. It is submitted that the EAT wrongly concluded that it was possible to imply words into Rule XVII(4) to permit a discretion as to the initiation of an investigation into a complaint, which might then lead to disciplinary proceedings, where that complaint had been made more than 28 days after the alleged offence; and

    (3) correctly interpreted the breadth of her powers under the 1992 Act and made orders that she was entitled to make.

30. In support of his submissions on the construction issue, Mr Reade seeks permission to adduce new evidence concerning a version of the Union's Rules which dates from 1983. At the hearing before us Mr Reade undertook on behalf of the Appellant that an application notice, with the appropriate fee, would be filed with the Court. That was done shortly after the hearing. Without objection we considered the evidence and heard submissions about it without deciding that the application should be granted. I will return to consider that application at the appropriate juncture later in this judgment.

31. On behalf of the Respondent Mr Oliver Segal QC, who appeared with Mr Stuart Brittenden, submits that:

    (1) Rule XVII(2) confers a general power on the Union to take disciplinary action;

(2) Rule XVII(4) places an obligation on the General Secretary to investigate potential offences in specified circumstances, but does not prohibit investigation in other circumstances;

(3) the Union's rules are silent as to what happens when an apparent offence is reported more than 28 days after its occurrence (or reported to someone other than the General Secretary within that period) and in those circumstances the EAT was correct in holding that there was no term to be implied into the rules to the effect that the Union has no power to investigate such an offence; and

(4) although not necessary to do so, the EAT was correct to find that a term could/should be implied into the rules, on grounds of business necessity and/or obviousness, that the Union has the power to investigate such an offence where there appear to be reasonable grounds to think that a member might be guilty of that offence.

32. Furthermore, the Respondent objects to the Appellant's attempt to introduce new evidence concerning a version of the rules which dates from 1983. It is noted that this evidence was not before the Certification Officer or EAT. It is submitted that the Appellant cannot rely upon this new evidence or arguments based on the earlier rules which were not advanced below.

33. On the enforcement orders made by the Certification Officer, the Respondent submits that the Appellant's designation as an Approved Contractor is a contractual status entirely separate to, and distinct from, membership of the Union. It is argued that, in so far as the relevant enforcement order, at para. 2(d), indefinitely prevents the Union from exercising its right to terminate its agreement designating Approved Contractor status, on the basis of information reported via its "safe space", the Certification Officer exceeded her jurisdiction.

Relevant legal principles

34. There is no dispute between the parties as to the relevant legal principles, which can be derived from well-established authority. It is common ground that those principles were helpfully summarised by HHJ Jeffrey Burke QC (acting as a Certification Officer) in *Coyne v Unite the Union* (D/2/18-19), a decision of 4 May 2018, at paras. 24-30:

> "24. The starting-point of any examination of authority in this area is to be found in the speech of Lord Wilberforce, giving the joint opinion of the House of Lords in *Heatons Transport (St Helens) Limited v Transport General Workers Union* [1972] ICR 308. As is common ground between the present parties, each person who becomes a member of a trade union enters into an agreement with the union the basic terms of which are to be found in the union's rules. At pages 393G to 394C of his speech, Lord Wilberforce said:-
>
> > 'The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by

parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the TUC Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:

> "Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union."'

25. In *Taylor v NUM (Derbyshire Area)* [1985] IRLR 99, Vinelott J, when considering a question of construction of the rules of the respondent union, described that passage as containing the 'correct approach to construction of the rules as a union'; see paragraph 33 of his judgment in the Chancery Division. He referred to the principle there set out as having been applied by Lord Diplock in *Porter v NUJ* [1980] IRLR 404 and by Lord Dilhorne *in British Actors' Equity Association v Goring* [1978] ICR 791. Lord Diplock, in *Porter*, said:-

> 'I turn then to the interpretation of the relevant rules, bearing in mind that their purpose is to inform the members of the NUJ of what rights they acquire and obligations they assume vis-à-vis the union and their fellow members, by becoming and remaining members of it. The readership to which the rules are addressed consists of ordinary working journalists, not judges or lawyers versed in the semantic technicalities of statutory draftsmanship.'

26. In *Jacques v AUEW* [1986] ICR 683, Warner J had to resolve an issue as to the meaning of the rules of the defendant union. The union had abrogated the provision to members of certain benefits. The rules provided that such abrogation could

> only take place if 40% of the members affected by the benefit voted in favour of the abrogation. However, there was no rule that the rule which required that level of support could not itself be amended at a rules revision meeting without that level of support. Thus, issues as to the construction of the rules had as to correct implications to be drawn from them arose.
>
> 27. The judge, at page 692A to B said:-
>
> > 'There are, of course, in those dicta differences of emphasis and of formulation, but not, I think, differences of principle. It is to be observed that Lord Pearson and Lord Salmon agreed both with what was said by Lord Wilberforce in the *Heatons Transport* case and with what was said by Viscount Dilhorne in *British Actors' Equity Association v Goring* [1978] ICR 791. The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authority, their purpose, and the readership to which they are addressed.'
>
> …
>
> 30. In argument both Mr Millar and Mr Segal agreed, by way of summary of the authorities, that the principle can be expressed as 'what would the reasonable trade union member understand the words to mean'."

35. Our attention was drawn to the decision of this Court in *Evangelou and Others v McNicol* [2016] EWCA Civ 817. Although that case did not concern a trade union, as it concerned the Labour Party, the judgment of Beatson LJ helpfully summarised the relevant principles at paras. 19-23:

> "19. The nature of the relationship between an unincorporated association and its individual members is governed by the law of contract:-
>
> > (a) The contract is found in the rules to which each member adheres when he or she joins the association: see *Choudhry v Tresiman* [2003] EWHC 1203 (Comm) at [38] *per* Stanley Burnton J.
> >
> > (b) A person who joins an unincorporated association thus does so on the basis that he or she will be bound by its constitution and rules, if accessible, whether or not he or she has seen them and irrespective of whether he or she is actually aware of particular provisions: *John v*

Rees [1970] 1 Ch 345 at 388D – E; *Raggett v Musgrave* (1827) 2 C & P 556 at 557.

(c) The constitution and rules of an unincorporated association can only be altered in accordance with the constitution and rules themselves: *Dawkins v Antrobus* (1881) 17 Ch D 615 at 621, *Harington v Sendall* [1903] 1 Ch 921 at 926 and *Re Tobacco Trade Benevolent Society (Sinclair v Finlay)* [1958] 3 All ER 353 at 355B – C.

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.'"

36. 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) Limited v Transport General Workers Union* [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.

37. Our attention was also drawn to the decision of the High Court in *McVitae and Others v Unison* [1996] IRLR 33 (Harrison J). That case arose out of the merger of three unions, including the National Association of Local Government Officers ("NALGO"), in 1993, to form Unison. The plaintiffs were members of NALGO at the time of the alleged offences. Disciplinary proceedings had already commenced against them. The issue for the court was whether those proceedings could continue now that NALGO no longer existed. Harrison J held that they could but that the proceedings had to continue under the rules of NALGO rather than Unison's. What is of more general interest is what Harrison J said about implied terms in the context of disciplinary proceedings, at paras. 48-59. I would respectfully agree with what he said.

38. At para. 48 Harrison J disapproved of a statement in the then edition of Harvey on Industrial Relations and Employment Law that a power of a union to discipline or expel a member will not be implied. He continued, at para. 50:

> "… In my view, the court can imply such a disciplinary power, although the court's power to do so is one which should be exercised with care and only where there are compelling circumstances to justify it. The reason why the court should be slow to imply a disciplinary power is that it is penal and could include serious consequences affecting the reputation and livelihood of the union member."

39. Harrison J also made the point that a union rulebook should be interpreted having regard to "common sense" and "the expectation of members": see e.g. para. 57. In similar vein, at para. 59, Harrison J said:

> "Although, as I have said, the court should be slow to imply disciplinary powers, it should equally be slow to reach a decision which, on the fact of it, is contrary to what both the members and common sense would have expected. I have come to the conclusion, for the reasons that I have given, that the particular circumstances of this case are sufficiently compelling to warrant a disciplinary power being implied in relation to pre-inception conduct. It is, however, necessary to consider the scope of such an implied term."

Interpretation of the Union's Rules

40. The current version of the Union's Rules dates from 1 March 2018. Rule I sets out the objects of the Union, in particular at para. (2):

> "The MU's objects are:
>
> a. To secure the complete organisation of all musicians for their mutual protection and advancement;
>
> b. To regulate members' relations with their employers and/or employers' associations, and with each other;
>
> c. To improve members' status and remuneration;
>
> d. To advance members' knowledge and skills;
>
> e. To give financial and/or other help to members and members of the families of members in times of need;
>
> f. To maintain a fund for the furtherance of such political objects as are permitted by law;

> g. To promote the welfare and the interests of its members in all ways; and,
>
> h. To promote equality for all including through:
>
> (i) collective bargaining, publicity material and campaigning, representation, Union organisation and structures, education and training, organising and recruitment, the provision of all other services and benefits and all other activities;
>
> (ii) The Union's own employment practices.
>
> i. To oppose actively all forms of harassment, prejudice and unfair discrimination whether on the grounds of sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age, or other status or personal characteristic."

41. Rule I also includes definitions of expressions used in the Rules, except where the context otherwise requires. Para. (4)(b) gives the following meaning to the word "official": it means "the General Secretary, Deputy General Secretary, Assistant General Secretaries, an Assistant Secretary, a Regional Organiser, and any other official of the Union appointed as such by the Executive Committee."

42. Rule X concerns duties of Members. Of particular importance in the present context is para. (4):

> "It shall be the duty of members to report in writing to an appropriate Official any disciplinary offence or breach of Rule of which they have knowledge."

43. It is important to note that the reference in that paragraph to "an appropriate Official" is clearly much wider than the General Secretary: see the definition in Rule I(4)(b).

44. Secondly, it is important to note that that paragraph refers not only to any breach of the Rules; it also specifically refers to "any disciplinary offence". Mr Reade was therefore incorrect when he submitted to this Court that the only place in the Rules where reference is made to disciplinary matters is in Rule XVII.

45. Thirdly, it is important to note that Rule X(4) imposes a duty on all Members, including the Member who may have committed a disciplinary offence.

46. Fourthly, that paragraph does not have any limit of time.

47. The consequence is that, as Mr Reade accepted at the hearing before us, it would be entirely possible that a member might report a disciplinary offence to an appropriate official, for example their Regional Organiser, well within 28 days but that the matter might not be referred to the General Secretary until after the expiry of the 28 day period.

On the Appellant's submission as to the correct interpretation of Rule XVII(4), the Union in those circumstances would have no power to investigate the alleged disciplinary offence. In my view, that interpretation does not accord either with the reasonable expectation of union members or with common sense.

48. In order to mitigate the difficulty to which his interpretation would give rise, Mr Reade suggested at the hearing before us that there might be an implied term making it possible for the Union to investigate a disciplinary offence in circumstances where a complaint had been made to an appropriate official within 28 days. The difficulty with that approach is that it undermines the apparently absolute nature of the time limit in Rule XVII(4). It therefore undermines the central plank of the reasoning of the Certification Officer.

49. Another scenario which was debated at the hearing before us is where a member commits a disciplinary offence, for example misappropriation of the Union funds, but this is not discovered until after the 28 day period has expired. It may even be that the reason why it is not discovered is because the member concerned has taken steps to conceal their wrongdoing. On the interpretation given to the Rules by the Certification Officer, the Union would have no power to investigate the offence of misappropriation of funds in those circumstances. Again, in my judgement, that does not accord with common sense or the reasonable expectation of Union members.

50. Mr Reade sought to dilute the impact of that interpretation by submitting that it would still be possible to take disciplinary action against the member concerned for breach of Rule X(4) because that duty to report an offence is a continuing one. In my view, this would lead to the strange outcome that the Union would be able to discipline the member concerned for failure to report an offence but not for committing the underlying offence itself, which may be much more serious. It would also have the consequence that the Union would still be able to, and indeed would have to, investigate whether the underlying offence had been committed. If the underlying offence had not been committed, there would be no duty to report it. Accordingly, even on the interpretation accepted by the Certification Officer, there would in truth be no protection given to the Member concerned by the 28 day time limit. The only consequence would be that the Union could not punish the member for the underlying offence.

51. Rule XVII needs to be set out in full because of its importance in this appeal:

> "Rule XVII: Disciplinary procedures
>
> 1. All MU members have a duty to observe the Rules of the MU.
>
> 2. Disciplinary action may be taken against any member who does any of the following (including doing so as a member of a political party):
>
> a. Disregards, disobeys or breaks any of the Rules or regulations of the MU applicable to them, or any instruction issued in accordance with the Rules;
>
> b. Acts in a manner prejudicial or detrimental to the MU or their Region;

c. Commits:

(i) Any act of discrimination or harassment on grounds of age, colour, disability, marital status, race, religion, sex or sexual orientation; or,

(ii) Any other discriminatory conduct which is prejudicial to the objects of the MU set out at Rule I;

d. Misappropriates any money or property belonging to the MU which is under their control, or fails properly to account for money which was, is or should be under their control or defrauds the MU in any way;

e. Evades payment of the correct rate of subscriptions.

3. Disciplinary action may not be taken against a member where the conduct complained of consists solely of acting as an Officer or Official of the MU for or on behalf of or in accordance with the decision of a committee or other body of the MU.

4. Where a complaint of an alleged disciplinary offence is made to the General Secretary within 28 days of the alleged offence and there appear to the General Secretary to be reasonable grounds to think that a member might be guilty of a disciplinary offence the General Secretary shall investigate whether charges are justified.

5. It shall be open to the General Secretary to delegate all or part of the investigation to such person or persons as the General Secretary thinks fit.

6. The General Secretary shall consider the result of such investigation and consider whether there are reasonable grounds to think that a member might be guilty of a disciplinary offence and whether charges are justified and should be brought.

7. If the General Secretary considers that a charge (or charges) should be brought the General Secretary shall appoint an Assistant General Secretary (or other Official) to prepare and prosecute the case on behalf of the MU and a different Assistant General Secretary (or other Official) to act as secretary to the Disciplinary sub-committee appointed in accordance with Rule V.16.

8. A disciplinary charge shall be heard by the Disciplinary subcommittee of the EC appointed in accordance with Rule V.16.

9. Where the Disciplinary sub-committee considers a disciplinary charge is proved against a member, it may impose any one or more of the following penalties:

a. Censure of the member;

b. Debarring the member from attending any Delegate Conference and/or Regional meeting for whatever period it deems appropriate;

c. Debarring the member from holding any MU office for whatever period it deems appropriate;

d. Suspension of the member from all or any of the benefits of membership for whatever period it deems appropriate;

e. Suspension of the member from holding any MU office for whatever period it deems appropriate.

f. Expulsion of the member from the MU.

A member suspended under this rule shall, during the period of suspension, remain liable for subscriptions and levies and all the obligations of membership.

10. A member of the MU who is dissatisfied with the decision of the Disciplinary sub-committee in respect of charges against them may exercise their right of appeal to the Appeals sub-committee of the EC appointed in accordance with Rule V.16. Any such appeal must be in writing to the General Secretary within 14 days of notification of the decision of the Disciplinary sub-committee. The appeal shall be by way of review and shall not be a re-hearing. Each party shall be entitled to make written submissions to the Appeals sub-committee. The Appeals subcommittee may, in exceptional circumstances, call either party or any witness to attend before the Appeals sub-committee.

The Appeals sub-committee may confirm or vary the decision and/or penalty of the Disciplinary subcommittee but may not increase the penalty imposed by the Disciplinary subcommittee.

11. The decision of the Appeals sub-committee shall be final and binding upon the MU and the member(s) concerned.

12. The procedure to be adopted for disciplinary hearings and appeals shall be as determined by the EC from time to time."

52. On any view, there are difficulties with the drafting of Rule XVII but I have come to the conclusion that the interpretation reached by the Certification Officer was wrong.

53. She held that the effect of para. (4) is to preclude the investigation of any alleged disciplinary offence if it occurred more than 28 days before a complaint is made to the General Secretary. The fundamental reason why that interpretation is wrong is that it

is not what para. (4) says. The effect of para. (4) is to impose a duty on the General Secretary to investigate whether charges are justified ("shall investigate") where two conditions are satisfied. One condition is that there must appear to be reasonable grounds to think that a member might be guilty of a disciplinary offence. The other condition is that the complaint must be made within 28 days of the alleged offence. Where either of those conditions is not satisfied, the duty does not arise. However, the absence of a duty does not entail the absence of a power. The error into which the Certification Officer fell was to confuse the concept of a duty with the concept of a power.

54. Unlike Soole J, I do not consider that there is any need for an implied term conferring a power to investigate outside the 28 day period. In my view, there is an express power to take disciplinary action, which is to be found in para. (2): "disciplinary action *may* be taken against any Member who does any of the following …" (emphasis added).

55. At the hearing before us Mr Segal acknowledged that some provisions in Rule XVII can only relate to a complaint made within 28 days, in accordance with para. (4). At the very least those provisions are paras. (5) and (6). This is because they refer back to "the investigation" and "such investigation", which must be a reference back to an investigation which is required under para. (4). Mr Segal was also prepared to accept, although the wording does not necessarily mandate this, that para. (7) is also concerned only with such investigations.

56. However, Mr Segal submits that paras. (8)-(12) are capable of standing by themselves and have no necessary link to para. (4). I accept that submission. In my view, those provisions can also sensibly apply to the exercise of the discretionary power which exists in para. (2).

57. This does lead to what is at first sight a curious situation. In the case of a complaint made outside the 28 day period, one has to go straight from para. (2) to para. (8). There is therefore nothing expressly in the Rule which governs the need for an investigation or the laying of a charge. There is, in particular, no express requirement that, before an investigation can be made, there must appear to have been reasonable grounds that the alleged offence has been committed. I do not, however, regard that as fatal to this interpretation of the Rule. Like Soole J, I take the view that it would be irrational for the Union to launch an investigation unless it appears that there are reasonable grounds that an offence has been committed. At the hearing before us Mr Segal properly conceded that the Rules should be read in that way.

58. Furthermore, as was common ground and is well established in law, the power to investigate must be exercised in a manner which is fair. What used to be called the rules of natural justice will be implied into a union rulebook: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA).

59. In my view, there could in principle be circumstances in which the delay in the making of a complaint is so long that it would be unfair and/or irrational for the Union to investigate and/or lay a charge. The power to investigate outside the 28 day period is not therefore unlimited. This is not a problem unique to this context. For example, criminal courts are used to dealing with complaints which are so old that a fair trial may not be possible, because crucial witnesses may no longer be available or for some other reason. Everything will depend on the facts of a given case.

The application to adduce fresh evidence

60. Before this Court the Appellant makes an application to adduce fresh evidence, namely the 1983 version of the Union's Rules.

61. There is no dispute about the relevant principles which apply when a party seeks to adduce fresh evidence in the Court of Appeal. Those principles were helpfully set out by Laws LJ in *Terluk v Berezovsky* [2011] EWCA Civ 1534, at paras. 31-32.

> "31. It is convenient first to consider the law relating to the deployment of fresh evidence in civil appeals. The *locus classicus* is *Ladd v Marshall* [1954] 1 WLR 1489, 1491 where three criteria were articulated by Denning LJ as he then was: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible.
>
> 32. The admission of fresh evidence in this court is now addressed in the Civil Procedure Rules. CPR 52.11(2) provides in part:
>
> > 'Unless it orders otherwise, the appeal court will not receive ... (b) evidence which was not before the lower court.'
>
> The impact of the CPR on the established approach set out in *Ladd v Marshall* has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice (see for example *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 per Hale LJ as she then was at paragraph 35, *Sharab v Al-Sud* [2009] EWCA Civ 353 per Richards LJ at paragraph 52). The *Ladd v Marshall* criteria remain important ("powerful persuasive authority") but do not place the court in a straitjacket (*Hamilton v Al-Fayed (No 4)* [2001] EMLR 15 per Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the Ladd v Marshall criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in *Banks v Cox* (17 July 2000, paragraphs 40 – 41):

> 'In my view, the principles reflected in the rules in *Ladd v Marshall* remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below.' "

62. In support of his submission that the 1983 Rules are relevant to the interpretation of the current Rules, Mr Reade relies on a passage in Lewison, The Interpretation of Contracts (6th edition), at p. 99:

> "Where a contract expressly purports to vary another contract, there can be no reason for excluding the varied contract from consideration. In such a case the parties can be taken to have had the common intention that the contract as varied should not mean the same as the contract before the variation. Consequently, the case is far stronger than that of looking at words deleted from printed forms, for in the case of a variation there are two expressions of common intention to which to appeal. Since it may be assumed that each expression bears a different meaning, valuable light and shade may throw a problem of construction into sharper relief. Thus in *Punjab National Bank v de Boinville,* Staughton LJ said:
>
> > '… if the parties to a concluded contract subsequently agree in express terms that some words in it are to be replaced by others, one can have regard to all aspects of the subsequent agreement in construing the contract, including the deletions, even in a case which is not, or is not wholly, concerned with a printed form.'"

63. I am not persuaded that the criteria for the admission of fresh evidence are met in this case. First, the evidence could with reasonable diligence have been obtained earlier. Even if it might not have been anticipated that it might be necessary before the Certification Officer, no good reason has been advanced for why it could not have been put before the EAT. Secondly, and in any event, I do not consider that the evidence would probably have had an important influence on the case. For the same reason, I have come to the conclusion that, even if the evidence were admissible, it would not lead to any different outcome in this appeal.

64. I therefore turn to the relevant provisions in the 1983 Rules. In support of his submissions Mr Reade relies, in particular, on Part D of Rule XXI, which concerned offences:

> "A charge may be made by any member and shall be made in writing specifying the conduct in general terms.

> Except where the contrary is stated in these Rules the charge shall be made to the committee of the branch of which the person charged is a member and shall be made within 4 weeks of the offence or such longer period as such committee may allow."

65. Mr Reade submits that the difference in wording is revealing because the 1983 Rule expressly allowed for the possibility of "such longer period" as was allowed by the branch committee. He submits that the fact that there is no such express provision suggests that the omission was deliberate.

66. I do not accept that submission. In my view, the wording of the 1983 Rules does not assist in the correct interpretation of the current Rules. The structure of the 1983 Rules was very different. It is not only Rule XXI which must be examined but the Rules as a whole, including the objects of the Union. For example, public concern about issues such as harassment in the workplace has in recent years received more prominence, whereas it may not have done in 1983.

67. Secondly, the structure of Rule XXI, section D is entirely different from Rule XVII(4) of the current Rules. The old Rule did not refer to the General Secretary. It did not impose a duty of an investigation. In its terms it concerned the making of a charge "by any Member".

68. For those reasons I would refuse the application to adduce fresh evidence, but, in any event, having considered that evidence, I would reach the same conclusion as to the correct interpretation of the current Rules as I would have done in any event.

The enforcement order issue

69. Strictly speaking the enforcement order issue does not arise because it would only arise if otherwise this Court were to allow the appeal. Nevertheless, as this Court heard argument about the issue, I will, like Soole J in the EAT, address it briefly.

70. If a Certification Officer accepts an application under section 108A, he may make or refuse the declaration asked for: see section 108B(2)(d).

71. For convenience I will set out again the terms of subsection (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."

72. At the hearing before us Mr Segal made no complaint about sub-paras. (a) and (b) of the enforcement order made by the Certification Officer at para. 2 of her decision. He questioned whether she had the jurisdiction to make the order at sub-para. (c) but he acknowledged that the EAT had considered that to be within her powers and that there is no cross-appeal by the Respondent. What Mr Segal does complain about is the order made by the Certification Officer at sub-para. (d).

73. I accept Mr Segal's submission in this regard. In my judgement, that part of the order does not fall within either para. (a) or para. (b) of subsection (3). In my view, what those provisions concern is "the breach" or the "threat" of the same breach or a breach of a similar kind. In all of those cases the breach referred to is a breach of a union's rules. In my view, the Certification Officer did not have the power to restrain the Union from using the information lawfully obtained during the disciplinary process for the very different purpose of exercising its contractual power to remove a person from a list of Approved Contractors.

74. I also accept Mr Segal's submission that that would be inconsistent with the approach which the Certification Officer had taken in relation to the main issue before her. In that context she said that, even if the Union was prevented from taking disciplinary action, it had at its disposal other steps which it could take in response to a breach of its Rules. As Mr Segal put it, the consequence of her order would be that the Union would be required to recommend in a public way that a person should be used as an Approved Contractor even though it had concluded that that person was guilty of an offence under its rules such as harassment of another.

75. If the issue had arisen, I would therefore have dismissed the appeal against this part of the EAT's decision.

Conclusion

76. For the reasons I have given I would dismiss this appeal.

Lady Justice Carr :

77. For the reasons given by Singh LJ I too would dismiss this appeal.

Lord Justice Floyd :

78. I would also dismiss this appeal for the reasons given by Singh LJ.