

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION
MADE UNDER SECTIONS 55(1) and 108A(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR J McDERMOTT

V

UNISON

Date of Decisions

27 April 2010

DECISIONS

Upon applications by Mr McDermott (“the Claimant”) under sections 55(1) and 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

1. I refuse to make the declaration sought by the claimant that on or around 23 March 2009 UNISON (“the Union”) breached paragraph 24 of schedule D of the rules of the Union by allegedly imposing a penalty on Mr McDermott by debarring him from standing for the post of Branch Publicity Officer.
2. I refuse to make the declaration sought by the claimant that on or around 15 April 2009, UNISON breached paragraph 24 of schedule D of the rules of the Union by removing him from his seat on the National Executive Council (“the NEC”).
3. I refuse to make the declaration sought by the claimant that on or around 15 April 2009, UNISON breached rule D 2.6.1 of the rules of the Union by removing Mr McDermott from his NEC post before the end of the two year period of office.
4. I refuse to make the declaration sought by the claimant that on 19 June and 8 and 9 July 2009, UNISON breached rule D2.6.1 of the rules of the Union by preventing Mr McDermott from attending and or participating in NEC meetings after the 2009 NEC elections.
5. I refuse to make the declaration sought by the claimant that on or around 4 June 2009, UNISON breached rule D2.2.1 of the rules of the Union by electing five seats for the Yorkshire and Humberside Region instead of four.

6. I refuse to make the declaration sought by the claimant that on or around 4 June 2009, UNISON breached section 51 (6) of the 1992 Act by not declaring Mr McDermott as having been elected in the 2009 NEC elections.
7. I refuse to make the declaration sought by the claimant that on or around 4 June 2009, Unison breached paragraph 7 of schedule C of the rules of the Union by not declaring Mr McDermott as having been elected in the 2009 NEC elections.
8. I refuse to make the declaration sought by the claimant that on or around 15 April 2009, UNISON breached rule C2.4.2 of the rules of the Union by the President having refused to accept a proposal that a vote be taken at the NEC meeting that day on whether the NEC should exercise its discretion under rule C2.4.2 to permit Mr McDermott to continue to hold office on the NEC as an unemployed member.

REASONS

1. Mr McDermott is a member of UNISON (“the Union”). Upon applications received at the Certification Office on 15 June and 23 July 2009, he made a complaint of a breach of the 1992 Act in relation to the elections to the National Executive Council (“the NEC”) in 2009 and seven complaints of breaches of rules in relation to his exclusion from standing for branch office in 2009, his removal from the NEC in 2009, during the 2007-2009 electoral period, and the conduct of the NEC elections in 2009, for the 2009-2011 electoral period. Following correspondence with the Claimant, the complaints were confirmed by him in the following terms:-

Complaint 1

“That on or around 23 March 2009 UNISON breached paragraph 24 of Schedule D by imposing a penalty on Mr McDermott by debarring him from standing for the post of Branch Publicity Officer before his appeal made under rule C 5.6 regarding his membership status had been determined.”

Complaint 2

“That on or around 15 April 2009, UNISON breached paragraph 24 of Schedule D by removing Mr McDermott from his seat on the NEC before the determination of his appeal made under rule C5.6 against the change in his membership status”

Complaint 3

“That on or around 15 April 2009, UNISON breached rule D 2.6.1 by removing Mr McDermott from his NEC post before the end of the 2 year period of office”

Complaint 4

“that on 19 June and 8 and 9 July 2009 UNISON breached rule D2.6.1 by preventing Mr McDermott from attending and or participating in NEC meetings”

Complaint 5

“that on or around 4 June 2009 UNISON breached Rule D2.2.1 by electing five seats for the Yorkshire and Humberside Region instead of four”

Complaint 6

“that on or around 4 June 2009, UNISON breached section 51 (6) of the 1992 Act by not declaring Mr McDermott as the elected candidate for a position on the NEC with effect from 19 June 2009 despite receiving the greatest number of votes”

Complaint 7

“That on or around 4 June 2009 Unison breached Paragraph 7 of schedule C of its rules by not declaring Mr McDermott elected to the post of male regional seat for Yorkshire and Humberside Regional seat on the National Executive Council despite him being the candidate that secured the greatest number of votes.”

Complaint 8

“ That on or around 15 April 2009 Unison breached rule C2.4.2 because the President refused to accept a proposal that a vote be taken at the NEC meeting. The proposal was that the NEC should exercise its discretion to entitle Mr McDermott to hold office as an unemployed member”

2. I investigated the alleged breaches in correspondence. A hearing took place on 23 March 2010. At the hearing, the Claimant represented himself. Oral evidence for the Claimant was given by Mr Jon Rogers, who provided a witness statement. Mr McDermott also produced written witness statements from Ms Helen Jenner and Mr Brian Mulvey and a letter from Mr Adrian O’Malley. The Union was represented by Mr Segal of counsel instructed by Mr Chris Benson of Leigh Day solicitors. Oral evidence for the Union was given by Mr Nelson and Ms Thompson, who both provided written witness statements. A 254 page bundle of documents was prepared for the hearing by my office containing documents submitted by the parties. The 2008 rules of the Union were also in evidence. Mr McDermott submitted a written skeleton argument. No skeleton argument was submitted on behalf of the Union. Its solicitors had previously provided a lengthy written submission.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows:
4. Mr McDermott has been a member of UNISON (“the Union”) and its predecessor since 1982. He has held office in his branch, the Leeds Local Government Branch, and at national level. He was elected to the NEC in 2005 and 2007 for terms of office of two years each. He has also served on the Local Government Service Group Executive. The Leeds Local Government Branch had been placed in regional supervision for a period of about 5 years, ending on or about 14 April 2009. This supervision had the effect that all major decisions concerning the branch were taken at regional level.
5. Mr McDermott’s complaints concern the branch elections that were held in 2009 in the newly reconstituted Leeds Local Government Branch and the 2009 NEC elections. Mr McDermott was excluded from standing in the branch officer elections, he was removed from the NEC that had been elected to serve to June 2009 and his candidacy in the NEC elections for the period 2009-2011 was treated as having been withdrawn, despite him having received the highest number of votes in that election. Mr McDermott contends that he was wrongly excluded from the branch elections, wrongly removed from the NEC and that he should have been declared elected in the 2009 NEC elections. The Union maintains that he was ineligible

for either election and ineligible to remain a member of the 2007-2009 NEC as he lacked the necessary membership status due to a period of unemployment at the relevant time. Mr McDermott's fifth and eighth complaints concern other aspects of the 2009 NEC elections.

6. The Union holds elections for membership of its NEC every two years. The period of office of members of the NEC begins and ends on the last day of the National Delegate Conference in the relevant year, which is usually held in June. Rule D7 of the rules of the Union provides that all elections required to be held under the rules are to be conducted in accordance with Schedule C and any regulations made by the NEC. Paragraph 7 of Schedule C confirms that the NEC shall have the power to determine any matters of procedure or organisation or administration of or relating to the election.
7. In accordance with paragraph 7 of Schedule C of the rules, the NEC agreed the relevant election procedures ("the election procedures") on 3 December 2008. These in effect determined the number of vacancies to be filled, as they fixed the date on which the membership figures used in the calculation of the vacancies was to be taken. It set this date as being 30 September 2008; the same date which rule D1.3.1 requires to be used in the calculation of the number of delegates to the National Delegate Conference. On 30 September 2008 the membership of Mr McDermott's region, the Yorkshire & Humberside region, was 161,105. This is significant as it is the membership figure which was used to allocate five seats on the NEC to the region. Had the membership been between 100,000 and 150,000, the region would have been entitled to only four seats. Mr McDermott's fifth complaint alleges that, as the Union distributed only 146,028 ballot papers in the election in the Yorkshire & Humberside region, it was entitled to elect just four regional members to the NEC. The Union explains the discrepancy by reason of the decline in membership between the 30 September 2008 and the date it gave its independent scrutineer, Electoral Reform Services ("ERS"), the details of those eligible to vote, in or about early April 2009.
8. The election procedures also set out the electoral timetable for the NEC elections. It included the following:
 - period of nomination 5 January to 13 February 2009;
 - period of voting 14 April to 15 May 2009;
 - declaration of result 9 June 2009.

The results were in fact delivered to the Union by ERS on 4 June.

9. On 4 January 2009, Mr McDermott indicated to the Union his intention to stand for election to the Yorkshire & Humberside Region (male) seat on the NEC. He submitted his nomination form on 12 February.
10. In the meantime, Mr McDermott had been suspended from his employment with East North East Homes Limited since about July 2008 and faced dismissal in March 2009. On 26 February 2009, Mr McDermott registered with Eden Brown Limited, a recruitment agency which attempts to find its clients either full time or temporary employment. In fact, Mr McDermott did not secure either a full time job or a temporary placement through this agency, although his name was put forward for four temporary placements.
11. On or about 27 February 2009, Mr McDermott attended at his branch office to secure the continuation of his Union membership, anticipating dismissal in March. He was given and he

completed an application form to join the Union as a new entrant and a direct debit mandate. On this application form he stated that his employer was Eden Brown Limited.

12. By a letter dated 27 February 2009, the Union's in-house Election Coordinator, Ms Sterling, informed Mr McDermott that various checks had been carried out and he had been confirmed as a candidate in the NEC election.
13. On 3 March 2009 Mr McDermott was dismissed by East North East Homes Limited. His Union membership contributions for March were shown as having been deducted on his last payslip.
14. On 4 March 2009 there was a meeting of the Branch Officers' Consultative Committee of the Leeds Local Government Branch. The status of this meeting is uncertain, having regard to the fact that the branch itself was then in regional supervision. However, I find, on somewhat unsatisfactory evidence, that it was vested with sufficient authority to carry out certain functions on behalf of its members. It had before it a schedule of new members as at 4 March 2009. On that schedule appeared the name of Mr McDermott with his employer named as Eden Brown Housing and his job description as agency worker. There were no minutes of that meeting in evidence but there was a letter, dated 7th May 2009, from the Branch Secretary, Mr Mulvey which stated, amongst other things:

"I attended the Branch Officers meeting on 4th March 2009 and at that meeting John was accepted into full membership. I believe that this is appropriate as John registered with an agency, and also is in line with Rule C7.1.2."

Mr McDermott contends, that on the basis of this decision of the Branch Officers' Consultative Committee, he remained a full member of the Union.

15. On the other hand, the Union contends that when Mr McDermott became unemployed, he automatically ceased to be a member as he was not then eligible for membership under rule C7.1 and, as he was unemployed on 4 March, he was ineligible to be admitted as a new member under rule C5.2.
16. I find that by registering with the Eden Brown Agency, Mr McDermott did not become an employee of that company and he therefore fell outside the category of person eligible for membership under rule C2.1, namely any person employed in the provision of public services. Accordingly, I find that Mr McDermott was not eligible for new membership of the Union on 4 March 2009 and the purported acceptance of him by the Branch Officers' Consultative Committee was ineffective.
17. Over this same period, the region was preparing for the Leeds Local Government Branch to be reconstituted. It was to be re-launched at an AGM on 21 March. In advance of this AGM, revised branch rules had been prepared and it was decided that the election of branch officers should take place under those branch rules before the AGM. The timetable for these elections was to be as follows:
 - period of nomination 26 January to 9 March 2009;
 - period of voting 30 March to 20 April 2009;
 - declaration of result 21 April 2009.

18. On or about 6 March 2009 Mr McDermott submitted his nomination form for election as the branch publicity officer.
19. By a letter dated 9 March 2009 the Union's membership department sent a proforma letter to Mr McDermott in response to the membership application form he had submitted. Mr McDermott was informed that his application had not yet been processed as it was unlikely that the Union would be able to negotiate with the employer he had named. He was told that no action would be taken on his application unless he confirmed that he wanted to proceed.
20. Mr McDermott being a reasonably prominent member of the Union, the region soon became aware of his application for new membership. Mr Mitchell, the Regional Manager for Finance & Resources, wrote to him on 12 March 2009. This letter states that, in order to protect Mr McDermott's membership position, his record had been amended to identify him as an unemployed member. Mr Mitchell went on to ask questions to ascertain whether the alleged employment with Eden Brown Limited would be qualifying employment for eligibility for full membership.
21. On 14 March 2009 Mr McDermott replied to Mr Mitchell. He stated that, having registered with the agency, he was not seeking new membership but the retention of his old full membership, paying by direct debit rather than payroll deduction. He pointed out that the Union was supporting his claim in the Employment Tribunal against his former employer for interim relief. He sought an assurance that he remained a full member.
22. By an email dated 17 March 2009, Mr Mitchell informed Mr McDermott that if he wished to retain full membership, he should submit the details previously requested about his relationship with Eden Brown Limited. Mr McDermott responded the same day, stating that he could see no reason to comply with Mr Mitchell's request if other agency workers are not also asked for details of their registration.
23. By a letter dated 20 March 2009, Ms Sterling informed Mr McDermott that the scrutineer had confirmed him as a candidate in the NEC election.
24. As to the branch officer elections, the Regional Returning Officer, Margaret Thomas, wrote to Mr McDermott on 23 March 2009 informing him that as he was currently an unemployed member, he was not eligible to stand in that election, referring to the ballot procedures contained in Appendix E of the rules to be applied to the newly reconstituted branch. On the following day, 24 March, Mr McDermott wrote to Miss Thomas stating his wish to appeal against that decision.
25. On 3 April 2009, Mr McDermott agreed to work as a volunteer for 10 hours a day for 4 weeks for PAFRAS (Positive Action for Refugees and Asylum Seekers). Mr McDermott did not allege that this was qualifying employment for the purpose of Union membership.
26. By an email dated 14 April 2009, Mr Cliff Williams, the Regional Secretary in the Yorkshire & Humberside Region, replied to Mr McDermott's request to appeal against the decision that he was not eligible to stand in the branch officer elections. Mr Williams confirmed that, in the absence of formal evidence to the contrary, he appeared to be unemployed and no longer in full membership. He stated that in these circumstances rule C2.4 applied and Margaret Thomas had been correct in advising him that, as an unemployed member, he was no longer

eligible to hold branch office or to be a candidate. Mr Williams stated that Mr McDermott could appeal against his decision to reject his application for full membership to the Regional Appeals Committee under rule C5.6. He also stated that he would have all the rights of an unemployed member if he wished to apply for that category of membership in accordance with the rules.

27. On the following day, 15 April 2009, Mr McDermott informed Mr Williams by email that he wished to appeal.
28. The NEC was due to meet in London on 15 April 2009. Mr McDermott had travelled to London the previous evening. Prior to the meeting, Mr McDermott was called to a meeting with the President, Ms Sue Highton. He took with him Mr John Rogers and Ms Helen Jenner. Also at the meeting were the Deputy General Secretary, Mr Sonnet and two senior head office employees, Mr Nelson and Mr Appleby. I shall call this 'the pre-meeting'. Mr McDermott was handed a letter dated 15 April from Mr Gilby, Director of Executive Office and Programmes. This letter informed Mr McDermott that under rule C2.4.2 and D2.2.4 he was no longer eligible to hold office as an NEC member from the date he was dismissed and that his full membership automatically lapsed under rule C7.1. Mr Gilby went on to record that Mr McDermott had been informed that he could become an unemployed member or re-apply for full membership under rule C5.1, if and when appropriate, but that he had rejected each of these offers as well as refusing to provide evidence of his relationship with Eden Brown Limited. Ms Highton confirmed that Mr McDermott was no longer eligible to attend meetings of the NEC. This pre-meeting became heated. It was suggested that Ms Highton should ask the NEC to exercise its discretion under the rules to allow Mr McDermott to take his seat on the NEC even though he was an unemployed member. She refused to do so. As a compromise, she agreed to put to the NEC a proposal that Mr McDermott should be allowed to attend as an observer.
29. The minutes of the NEC meeting of 15 April 2009 record the President as informing the meeting that Mr McDermott was no longer eligible to hold office as an NEC member under rule C2.4.2 and D2.2.4. A proposal to allow Mr McDermott to attend the meeting as an observer was lost. I find that no member of the NEC raised or attempted to raise at the meeting itself the possibility of the NEC exercising its discretion to allow Mr McDermott to take his seat on the NEC even though he was an unemployed member.
30. The AGM of the newly reconstituted Leeds Local Government Branch took place on 21 April 2009. Mr McDermott was not elected as a branch officer.
31. Also on 21 April 2009, Mr Williams sent an email to Mr McDermott in which he stated that Mr McDermott would be retained on the system as an unemployed member.
32. On 19 May 2009, Mr McDermott's appeal to the Regional Appeals Sub Committee Panel against being disqualified from the branch officer elections was held.
33. On 20 May 2009 Mr McDermott received written confirmation of an offer of employment from the Mid Yorkshire Hospitals NHS Trust, to work as a receptionist in the out-patients department at Pinderfields Hospital from 1 June. He returned a signed copy of the written particulars of employment the same day, accepting the terms of the offer.

34. By a letter dated 22 May 2009 Mr Cafferty, secretary to the Regional Appeals Sub Committee Panel, informed Mr McDermott that his appeal had been dismissed and that the proper class of membership for his current circumstances continued to be as an unemployed member. The appeal was from Mr Williams' letter of 14 April in which Mr Williams upheld the decision of Margaret Thomas to disqualify Mr McDermott from the branch elections.
35. On 1 June 2009 Mr McDermott began work at Pinderfields Hospital. On that day he met with the branch secretary of the Wakefield & Pontefract Hospitals branch (now the Mid Yorks Health Branch), Mr O'Malley, and filled out a membership and payroll deduction form, enabling Mr O'Malley to arrange for his membership to be transferred to that branch. The Union accepts that from 1 June 2009 Mr McDermott was once again a full member of the Union.
36. On 2 June 2009 Mr McDermott sent an email to Mr Gilby, with copies to the General Secretary and President. He indicated his wish to appeal against his exclusion from the NEC and from standing for branch office. He also stated that he had secured employment as of 1 June and had arranged for his membership to be transferred and reinstated. He concluded by commenting that there was now no dispute about his membership and ability to hold office.
37. On 4 June 2009 ERS provided the Union with the results of the NEC elections. In the particular election in which Mr McDermott stood, he received 4,670 votes and his only rival, Mr Campbell, received 4,577 votes. However, ERS had marked against Mr McDermott's name "Withdrawn" and against Mr Campbell's name "Elected". On the same day, ERS wrote to Mr McDermott informing him what it had done. It stated that it had received notification from the Union that his current membership status had resulted in his candidacy being deemed ineligible in respect of that contest.
38. Mr McDermott protested about this decision through a number of channels but to no avail.
39. The first meeting of the new NEC was due to take place on 19 June 2009, the last day of the 2009 National Delegate Conference. Mr McDermott attended that meeting. He was asked to leave, but refused to do so. As a consequence, the meeting was not called to order but postponed to the next scheduled date, 8 July.
40. By a letter dated 1 July 2009, Mr Gilby informed Mr McDermott that he was not to attend the NEC meeting on 8 July as he was not an NEC member and, if he attended, he would not be admitted to the building.

The Relevant Statutory Provisions

41. The provisions of the 1992 Act which are relevant for the purposes of this application are as follows:-

Section 51 Voting

(6) The ballot shall be so conducted as to secure that the result of the election is determined solely by counting the number of votes cast directly for each candidate.

Section 55 Application to Certification Officer

(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

(5A) *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 more of the following requirements -*

- (a) to secure the holding of an election in accordance with the order;*
- (b) to take such other steps to remedy the declared failure as may be specified in the order;*
- (c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.*

The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.

(5B) *Where the Certification Officer makes an order requiring the union to hold a fresh election, he shall (unless he considers that it would be inappropriate to do so in the particular circumstances of the case) require the election to be conducted in accordance with the requirements of this Chapter and such other provisions as may be made by the order.*

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)-(e)*

Section 108B Declarations and orders

(1) *The Certification Officer may refuse to accept an application under and orders 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.*

(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.*

The Relevant Union Rules

42. The Rules of the Union which are relevant for the purpose of this application are as follows:-

C Membership

1 Scope of representation

1 The Union shall seek to represent:

1.1 those employed by any body, authority, company or corporation which has a public, charitable, educational, or statutory function, including those employed in the local government service, the health services, the electricity supply industry, the gas, transport and water industries, the education services, and in the voluntary and community sectors.

1.2 those employed in such other areas of work and such other persons as may be provided for in these Rules, and as the National Executive Council may from time to time determine

2 Categories of membership

2.1 Membership shall be open to any person employed in the provision of public services and in such other employment as may come within the meaning of Rule C.1 above.

2.3 Full membership

2.3.1 Full members shall be eligible for full rights and benefits.

2.3.2 Membership shall extend to persons who have previously been members of the Union in employment within the meaning of Rule C.1 and who are currently:

1 On unpaid maternity, paternity, adoption, medically approved compassionate leave or other unpaid leave from their employment.

2 On strike or locked out from their employment.

2.4 Unemployed members

2.4.1 Members dismissed or made redundant from employment within the meaning of C.1 who notify the branch secretary in writing within six months of loss of their employment may acquire unemployed membership for two years from the date of dismissal or redundancy. This entitles them to receive benefits from the Union for up to two years after that date, provided they remain unemployed.

2.4.2 Unemployed members shall be entitled to attend branch meetings and to vote on issues not relating to pay and conditions of members in employment. They are not entitled to hold office in the union unless otherwise decided by the National Executive Council.

3 Allocation of categories

In the event of uncertainty as to which category of membership it is appropriate for a member or members to belong, the National Executive Council may allocate the member(s) to the category it deems most appropriate

5 Becoming a member

5.1 Every person wishing to become a member shall complete and sign a prescribed form of application for membership, using her or his full name and giving her or his address, and shall return it either to the branch secretary of the appropriate branch or to the office specified on the form. Any person who is, or has been, in membership of the Freemasons must declare this, in writing, at the time of completing the application form for UNISON membership.

5.2 Providing that the applicant is eligible for membership within these Rules and has not previously been expelled or barred from membership of the union, or has previously ceased to be a member whilst a disciplinary charge against her/him was outstanding, she/he shall become a member of the appropriate branch following receipt of her/his properly completed application form, having due regard for the Disability Discrimination Act, by the branch, region or head office.

5.5 Where the branch has reason to believe an applicant may be ineligible for membership, the applicant shall be given notice in writing by the branch secretary of the proposal to exclude or expel him/her and the reasons for that proposal; the individual will be given a fair opportunity to make representations in respect of that proposal, and those representations will be considered fairly.

5.6 Any person whose application for membership or transfer has been rejected has the right of appeal to a regional appeals committee against the decision of the Branch. The procedure to be adopted will be the same as in the case of a disciplinary hearing.

7 Ceasing to be a member

7.1 Loss of eligibility

Any member ceasing to be eligible for membership within Rule C.1, and who does not fall within the classes of membership set out at Rule C.2, shall automatically cease to be a member unless:

7.1.1 the National Executive Council decides otherwise; or

7.1.2 she or he intends to be absent from the employment defined in Rule C.1 for a temporary period only, in which case she or he may be allowed by decision of her or his branch to retain membership.

7.2 Arrears of subscriptions

7.2.1 Any person owing more than three months' subscriptions shall cease to be a member of the Union (unless the National Executive Council decides otherwise) and shall forfeit all that she or he has paid to the Union.

D Structure of the Union at National Level

2 National Executive Committee

2.2.1 Each Region shall elect representatives according to the following table:

<i>Regional membership</i>	<i>No of representatives</i>	<i>Conditions</i>
<i>Less than 100,000</i>	<i>2</i> <i>+ 1 low pay reserved seat</i> <i>(see Rule Q Definitions)</i>	<i>1 female, 1 male</i>
<i>100,000 or more and 3</i> <i>less than 150,000</i>	<i>+ 1 low pay reserved seat</i> <i>(see Rule Q Definitions)</i>	<i>2 female, 1 male</i>
<i>150,000 or more</i>	<i>4</i> <i>+ 1 low pay reserved seat</i> <i>(see Rule Q Definitions)</i>	<i>At least 2 female, 1 male</i>

2.2.4 Any member elected to the National Executive Council shall remain in office only for the period for which she/he meets the requirements of the seat to which she/he was elected unless otherwise provided for in these Rules.

2.6 Elections

2.6.1 The period of office of every representative shall be from the close of National Delegate Conference immediately following the declaration of the result of the election to the close of the National Delegate Conference two years later.

7. Elections

All elections required to be held under these rules shall be conducted in accordance with Schedule C and any regulations made by the National Executive Council.

I Disciplinary action

11 The procedure to be adopted for disciplinary hearings and appeals shall be as set out in Schedule D.

Schedule C - Elections

7 The National Executive Council shall have the power to determine any matter of procedure or organisation or administration of or relating to the election, including the power to determine the method of voting (whether to be by simple majority; by single transferable vote; by multi transferable vote; or by some other system) provided that the person(s) securing the greatest number(s) of votes according to the system employed shall be the person(s) declared elected, so long as they are and remain eligible for election.

Schedule D – Disciplinary Procedures

24 Any penalty imposed on a member will not take effect until the expiry of the time limit within which the member can submit an appeal or, if an appeal has been submitted, until such time as the appeal has been determined.

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11. To be eligible for nomination the National Executive Council the candidate must have been in membership for at least 3 months prior to the beginning of the election period and be a full member of UNISON

18. Checks will be made to ensure that each candidate is eligible to stand for the post.

Conclusions

43. Many of Mr McDermott’s complaints concern the same or similar issues. I will therefore deal firstly with the two issues which concern more than one complaint. These are the issues of jurisdiction and membership status. I will then deal with each complaint individually.

Jurisdiction

44. Mr Segal, for the Union, helpfully narrowed the issue of jurisdiction from those raised in the Union’s written response to the complaints to just the first two complaints. These allege a breach of paragraph 24 of Schedule D of the Union’s rules. Schedule D deals with disciplinary procedures and paragraph 24 states as follows:

Schedule D – Disciplinary Procedures

24 Any penalty imposed on a member will not take effect until the expiry of the time limit within which the member can submit an appeal or, if an appeal has been submitted, until such time as the appeal has been determined.

In Mr Segal’s submission, this rule, on the facts of the present case, does not fall within my jurisdiction as provided for in section 108A(1) and (2) of the 1992 Act. He argued that the first two complaints relate to the disqualification of Mr McDermott from standing for office and would therefore appear to fall within section 108A(2)(a) but that the rule allegedly breached had no relevance to the election or removal of a person from office. He further argued that, whilst paragraph 24 does relate to disciplinary proceedings, it has not been suggested that Mr McDermott was disciplined by the Union and no penalty had been imposed on him.

45. Mr McDermott argued that section 108A(1) of the 1992 Act provides that a rule is within my jurisdiction if it “relates” to any of the matters in sub-section (2). In his submission, a rule relates to a particular type of complaint if it impacts upon it. He argued that the Union brought paragraph 24 of Schedule D into play by processing his appeal against disqualification from the branch officer elections under rule C5.6. He observed that rule C5.6 states that the procedure to be used in an appeal against a membership issue is to be “the same as in the case of a disciplinary hearing” and schedule D is headed “Disciplinary Procedures”. Thus, Mr McDermott concluded, paragraph 24 of Schedule D is a rule which impacts upon his membership status and thus upon the Union’s decision both to disqualify him from the branch and NEC elections and to remove him from office as a member of the NEC, which are clearly matters within section 108A(2)(a) of the 1992 Act.

46. Section 108A(1) and (2) of the 1992 Act provide as follows:

(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)*

(e)- (f)

47. The above provisions restrict my jurisdiction over alleged breaches of union rules to certain categories of rule. They provide that the rule allegedly breached must “relate” to any of those “matters” set out in sub-section (2). In my judgment, this formulation was intended to and does give me jurisdiction to consider alleged breaches of rules beyond those which are overtly and only concerned with those matters. The concept of rules which impact upon the matters in sub-section (2), as suggested by Mr McDermott, cannot be substituted for the statutory test. Whether a rule does relate to any of the prescribed matters is to be considered firstly on an objective reading of the rule, disregarding the facts of the instant case. If it does not objectively and obviously relate to any of the matters in sub-section (2), I may exceptionally consider whether it is rule which is so closely connected with any of the prescribed matters that it can properly be found to “relate” to one or more of them. On the facts of this case I find that paragraph 24 of Schedule D does relate objectively and obviously to the matter set out in sub-section (b) of section 108A(2) – disciplinary proceedings. Indeed, it is contained in a schedule dealing exclusively with disciplinary procedures. I also find that, on the case advanced by Mr McDermott, paragraph 24 of Schedule D relates to the matter set out in sub-section (a) – the appointment or election of a person to or the removal of a person from office – as the whole of Schedule D is brought into play by the reference in rule C5.6 to the relevant procedure being ‘the same as in the case of a disciplinary hearing’. I accept Mr McDermott’s submission that, on his argument, his disqualification from eligibility for and his removal from office can be traced through the rules in a sufficiently direct manner that enable me to find that paragraph 24 of Schedule D does relate to the matters about which he complains. Accordingly I find that complaints one and two are within my jurisdiction.

Membership Status

48. Mr McDermott argued that he retained full membership status throughout 2009 and was therefore (a) eligible to stand in the branch officer election; (b) should not have been removed as a member of the 2007-2009 NEC; (c) should have been declared elected as a member of the 2009-2011 NEC. He accepted that he had not been in paid employment between 3 March and 1 June 2009 but submitted that he had nevertheless retained full membership on a number of grounds: namely:-

- (i) that he had unpaid employment throughout this period by virtue of having registered with Eden Brown Limited on 26 February.
- (ii) that the meeting of the Leeds Local Government Branch Officers’ Consultation Committee on 4 March had preserved his membership status by either (a) accepting the new membership application he had made on 27 February or (b) exercising its discretion under rule C7.1.2.
- (iii) that from the time of his appeal against the decision of Margaret Thomas that he was ineligible to stand for branch office (made by email of 24 March 2009) his former status was preserved by virtue of the incorporation of paragraph 24 of Schedule D into the appeals procedure under rule C5.6. Paragraph 24 of Schedule D provides that no penalty shall have effect until such time as the appeal has been determined. Mr McDermott’s appeal was not determined until 22 May 2009.

- (iv) that he had entered into a contract of employment with the Mid Yorkshire Hospital NHS Trust on or about 20 May 2009 when he had returned the form of written particulars of employment, duly signed.
49. For the Union, Mr Segal submitted that Mr McDermott was unemployed between 3 March and 1 June 2009 and this had the effect that he was, at the very least, not a full member in accordance with the rules in that period and, arguably, not a member at all. Mr Segal argued that each of the ways in which Mr McDermott put his case should be rejected. Specifically, he argued that:-
- (i) Mr McDermott was not employed by Eden Brown Limited at any time. He submitted that the Union considered Eden Brown to be a recruitment agency which found permanent jobs for candidates and not a temp agency which employed those for whom it could find temporary work. He noted that Mr McDermott had registered with this agency a few days before his dismissal. However, even if Eden Brown was both a recruitment and a temp agency, Mr Segal observed that it in fact provided no work for Mr McDermott.
- (ii) the meeting of the Branch Officers' Consultative Committee on 4 March 2009 did not change Mr McDermott's membership status. Mr Segal submitted that it was clear from the Branch Secretary's letter of 7 May 2009 that the meeting did not purport to exercise the discretion contained in rule C7.1.2 but that, in any event, that rule was not appropriate for someone in Mr McDermott's position. He argued that rule C7.1.2 only applied to someone who was taking a break from and returning to the same employment and who would be absent for a defined period, not someone who was to be unemployed for an indefinite period. Mr Segal further submitted that the meeting could not approve an application for new membership as on 4 March Mr McDermott was ineligible by virtue of being unemployed. He also referred to the Union's letter to Mr McDermott of 9 March, which stated that his application for membership had not yet been processed and would not be processed unless Mr McDermott confirmed that he wished to proceed.
- (iii) Mr McDermott did not automatically transfer to unemployed member status as defined in rule C2.4 upon being dismissed. Mr Segal submitted that a person must normally demonstrate an intention to gain this status before it can be acquired and Mr McDermott had not done so. However, Mr Segal considered that the effect of Mr Mitchell's letter to Mr McDermott of 12 March informing him that the Union's records had been amended to record him as an unemployed member had the effect of putting Mr McDermott in that category and arguably had the effect of putting him into the category retrospectively from the date he became unemployed.
- (iv) rule C5.6, taken together with paragraph 24 of Schedule D, did not have the effect of preserving Mr McDermott's full membership status pending the determination of his appeal on 22 May 2009. Mr Segal submitted that rule C5.6 had no application to someone who had lost full membership through being unemployed and who had been placed in the unemployed members category by the Union. He argued that this rule only applied to those who had applied for membership of the Union or applied for a transfer between branches and whose applications had been rejected by a branch. Mr Segal went on to submit that, even if rule C5.6 did apply, its effect was not to incorporate paragraph 24 of Schedule D into the appeals procedure under rule C5.6. He observed that Schedule D was drafted to apply to disciplinary proceedings and argued

that a number of its provisions, including paragraph 24, are inappropriate to an appeals procedure under rule C5.6. He also submitted that a branch's refusal of an application for membership or transfer could not be regarded as a penalty within the meaning of paragraph 24. He further maintained that it would be illogical if someone refused membership could nevertheless obtain membership by appealing under rule C5.6. As the intention of paragraph 24 was to retain the status quo pending a disciplinary appeal, the status quo on membership applications was the position which applied prior to the application.

- (v) Mr McDermott did not achieve employment status by accepting an offer of employment from the Mid Yorkshire Hospitals NHS Trust on 20 May 2009 under which he would commence work on 1 June. Mr Segal submitted that Mr McDermott may then have entered into a contract to become an employee on 1 June, but he only became employed within the meaning of rule C2.1 when he started working in accordance with that contract.

Conclusion on Membership Status

- 50. A person's eligibility for membership of UNISON is dealt with simply in rule C2.1 which provides:

"Membership shall be open to any person employed in the provision of public services and in such other employment as may come within the meaning of Rule C.1 above."

- 51. Loss of eligibility is dealt with in rule C7 which provides:

7 Ceasing to be a member

7.1. Loss of eligibility

Any member ceasing to be eligible for membership within Rule C.1, and who does not fall within the classes of membership set out at Rule C.2, shall automatically cease to be a member unless:

7.1.1 the National Executive Council decides otherwise; or

7.1.2 she or he intends to be absent from the employment defined in Rule C.1 for a temporary period only, in which case she or he may be allowed by decision of her or his branch to retain membership.

- 52. Accordingly, when Mr McDermott became unemployed on 3 March 2009 he ceased to be eligible for membership within rule C1 and would automatically cease to be a member unless any of the saving provisions in rule C7 had effect. There are three such provisions which may have applied to Mr McDermott; namely:

- (i) Did Mr McDermott fall within the classes of membership set out in rule C2? The only relevant class of membership to be considered is that of an unemployed member, which is dealt with in rule C2.4. This provides:

2.4 Unemployed members

2.4.1 Members dismissed or made redundant from employment within the meaning of C.1 who notify the branch secretary in writing within six months of loss of their employment may acquire unemployed membership for two years from the date of dismissal or redundancy. This entitles them to receive benefits from the Union for up to two years after that date, provided they remain unemployed.

2.4.2 Unemployed members shall be entitled to attend branch meetings and to vote on issues not relating to pay and conditions of members in employment. They are not entitled to hold office in the union unless otherwise decided by the National Executive Council.

Members may acquire unemployed status if they have been dismissed or made redundant and if they notify their branch secretary in writing within 6 months of loss of employment. On the facts of this case, I find that Mr McDermott's application for new membership made on or about 27 February constituted a notification that he had been dismissed, having regard to the knowledge of Mr McDermott's circumstances by the branch. Subsequently, Mr Mitchell informed Mr McDermott by a letter of 12 March that his records had been amended to show him as an unemployed member. An issue arises as to whether Mr Mitchell had the authority to do this without any express application by, or even the consent of, Mr McDermott. In my judgment, Mr Mitchell did have the necessary authority. When a person applies for membership, it is the responsibility of the Union to place that person in the correct category of membership. This would normally be done by the branch or regional administration. In the event of a dispute about correct allocation, rule C3 provides for the ultimate decision to be taken by the NEC, regardless of the member's wishes. The consent of the member is not therefore regarded by the rules as being a determinative factor. Accordingly, I find that Mr McDermott was an unemployed member from the time of his reallocation by Mr Mitchell. But what about the period between 3 and 12 March? I observe that rule C2.4.1 makes possible the allocation of someone to unemployed member status if the Union is notified of dismissal or redundancy within 6 months of loss of employment and that unemployed member status can be retained for 2 years from loss of employment. I find that these provisions are intended to permit someone who would otherwise be no longer eligible for membership to retain membership even if there is a gap between dismissal and any amendment of the membership records. Having regard to these provisions, I find that once unemployed member status is acquired, it is acquired from the date of dismissal. Accordingly, I find that, following his dismissal, Mr McDermott did fall within one of the classes of membership set out in rule C2, namely unemployed membership. Accordingly he did not automatically cease to be a member in accordance with rule 7. Should I be wrong about this, I shall consider the other two saving provisions.

- (ii) The second saving provision within rule C7 operates if the NEC decides that the unemployed member should remain a full member. This did not occur.
- (iii) The third saving provision within rule C7 requires a decision of the branch in the circumstances of a temporary absence from qualifying employment. This provision requires a positive decision of the branch taken pursuant to rule C7.1.2. I observe, however, that the letter from Mr Mulvey, the branch secretary of Leeds Local Government Branch of 7 May 2009 states that the branch officers' meeting of 4 March decided to accept Mr McDermott into full membership as he had registered with an agency and that this "is in line with rule C7.1.2". It is therefore apparent that the branch made no decision to implement rule C 7.1.2. In these circumstances it is not necessary for me to make any finding on Mr Segal's argument that rule C7.1.2, properly interpreted, applies only to specific periods of 'absence from the employment' pending return to the same employer.

53. Accordingly, as none of the savings provisions within rule C7 applied to Mr McDermott when he became unemployed on 3 March 2009, I find that he then automatically ceased to be a member, unless his membership was retained in some other way. Mr McDermott advanced four arguments as to how his membership was preserved.

54. First, Mr McDermott submitted that he remained in qualifying employment by virtue of having registered with Eden Brown Limited on 26 February. Although I accept Mr McDermott's evidence that Eden Brown Limited was both a recruitment and temp agency, it is not suggested that Mr McDermott obtained any work through that agency. In my judgment, the mere fact of registering with a temp agency which operates in the area of public services is not sufficient to satisfy the requirement of being eligible for membership by virtue of being employed in the provision of public services, as defined in rule C1. I therefore reject this submission.
55. Secondly, Mr McDermott argued that the meeting of the Branch Officers' Consultative Committee of the Leeds Local Government Branch on 4 March 2009 accepted him into membership. Rule C5 is headed "Becoming a member" and rule C5.2 provides as follows:

5.2 Providing that the applicant is eligible for membership within these Rules and has not previously been expelled or barred from membership of the union, or has previously ceased to be a member whilst a disciplinary charge against her/him was outstanding, she/he shall become a member of the appropriate branch following receipt of her/his properly completed application form, having due regard for the Disability Discrimination Act, by the branch, region or head office.

The application of rule C5 to Mr McDermott is not straightforward, as he was a full member when he made his application for membership on or about 27 February 2009. In reality, Mr McDermott was only seeking to transfer the name of his employer to Eden Brown Limited and to change his method of paying contributions from payroll deduction to direct debit, whilst remaining a full member. Be this as it may, I find that Mr McDermott cannot rely upon the actions taken by the Branch Consultative Committee on 4 March on his application for membership as he was then unemployed and the operation of rule C5.2 is premised upon the applicant being eligible for membership within the Union at the time the application is considered, which Mr McDermott was not.

56. Thirdly, Mr McDermott argued that from 24 March 2009, the time of his appeal against his exclusion as a candidate in the branch officer elections, his membership status was preserved, by virtue of paragraph 24 of Schedule D, to the conclusion of the appeal on 22 May. Rule C5.6 provides:

5.6 Any person whose application for membership or transfer has been rejected has the right of appeal to a regional appeals committee against the decision of the Branch. The procedure to be adopted will be the same as in the case of a disciplinary hearing.

On its face, rule C5.6 only applies to appeals against the decision of a branch. Mr McDermott purported to appeal against the decision of a returning officer, Margaret Thomas, as upheld by the Regional Secretary, Mr Williams. Further, in the context of rule C5 as a whole, I find that rule C5.6 applies only where a person's application for membership or application for transfer between branches has been rejected by a branch. It does not apply to disputes about the correct category of membership. I therefore accept Mr Segal's submission that on a correct construction of the rules rule C5.6 was not engaged on the facts of this case. Notwithstanding this finding, however, Mr McDermott was offered an appeal through this procedure by Mr Williams in a letter dated 14 April. It would appear that Mr Williams' decision to offer such an appeal to Mr McDermott was an ad hoc pragmatic decision without any obvious basis in the rules. Should I be wrong about the applicability of rule C5.6, I further find that paragraph 24 of Schedule D is not apt for incorporation into the

procedure to be used in an appeal under rule C5.6. Not all the provisions of the Schedule D disciplinary procedure are appropriate to an appeal under rule C5.6. In relation to paragraph 24 of Schedule D, I find that the preservation of the status quo under a disciplinary procedure is conceptually different to the preservation of the status quo in an appeal against the rejection of an application for membership or transfer.

57. Fourthly, Mr McDermott argued that his acceptance of a contract of employment with the Mid Yorkshire Hospitals NHS Trust on 20 May 2009 rendered him eligible for full membership from that date, despite the fact that he only commenced work for the Trust on 1 June. Eligibility for membership of the Union is dependent upon a person being “employed in the provision of public services” within the meaning of rule C.2.1. I find that this expression does not include a person who has entered into a contract to be employed in the future in the provision of public services. Such a person has not yet entered into an employment relationship with an employer, merely an agreement to enter into such a relationship at some time in the future. Accordingly I find that Mr McDermott only became eligible for full membership again when he commenced work for the Trust on 1 June.
58. In conclusion, therefore, on the issue of membership status, I find that Mr McDermott automatically ceased to be a member of the Union after he was dismissed on 3 March 2009 but that he acquired unemployed member status on 12 March, which was then retrospective to the date of his dismissal.
59. I now turn to deal with the individual complaints.

Complaints 1 and 2.

60. Mr McDermott submitted that his first and second complaints are essentially the same, but on different facts, and could be considered together. His first complaint is in the following terms:

“That on or around 23 March 2009 UNISON breached paragraph 24 of Schedule D by imposing a penalty on Mr McDermott by debarring him from standing for the post of Branch Publicity Officer before his appeal made under Rule C 5.6 regarding his membership status had been determined.”

His second complaint is in the following terms:

“That on or around 15 April 2009, UNISON breached paragraph 24 of Schedule D by removing Mr McDermott from his seat on the NEC before the determination of his appeal made under Rule C5.6 against the change in his membership status”

Paragraph 24 of Schedule D is in the following terms:

Schedule D – Disciplinary Procedures

24 Any penalty imposed on a member will not take effect until the expiry of the time limit within which the member can submit an appeal or, if an appeal has been submitted, until such time as the appeal has been determined.

61. Mr McDermott submitted that the Union imposed penalties upon him by excluding him from the branch elections in 2009 and removing him from his seat on the NEC for 2007-2009 on 15 April 2009. He argued that he was in full membership at all relevant times and that these complaints hang upon paragraph 24 of Schedule D coming into play through his appeal under rule C5.6, its reference to disciplinary procedures and rule I.11, in those disciplinary

procedures, giving effect to Schedule D. Mr McDermott argued that, as he had appealed, paragraph 24 of Schedule D protected his full membership status until his appeal was dismissed on 22 May and that any action by the Union before then to exclude him from the branch elections or remove him from the NEC was a penalty.

62. For the Union, Mr Segal submitted that these complaints were not within my jurisdiction on the grounds set out in paragraph 44 above. If they were within my jurisdiction, Mr Segal argued that rule C5.6 is not engaged on the facts of this case. If it is engaged, Mr Segal argued that it did not have the effect of incorporating paragraph 24 of Schedule D into the rule C5.6 appeals procedure as it is inappropriate for incorporation. Whether or not paragraph 24 of Schedule D was incorporated, Mr Segal argued that no penalty or disciplinary sanction had been applied to Mr McDermott by the Union.
63. I have found above at paragraph 47 that these complaints are within my jurisdiction. However, I have also found at paragraph 56 that, on its proper construction, rule C5.6 is not engaged on the facts of this case. If rule C5.6 is not engaged, it follows that Schedule D is also not engaged. Should I be wrong about that, I have also found, at paragraph 56, that paragraph 24 of Schedule D is not incorporated into any appeals procedure that is provided for by rule C5.6. Furthermore, as regards Complaint One, I am not persuaded that Mr McDermott had an appeal which was outstanding as at 23 March. Following the receipt of Mr Mitchell's letter of 12 March informing him that he had been put in the unemployed category, Mr McDermott sent an email to Mr Mitchell seeking assurances that he remained a full member but Mr McDermott only indicated a wish to appeal upon receipt of Ms Thomas's letter of 23 March disqualifying him from the branch elections.
64. For the above reasons I refuse to make declarations that the Union breached paragraph 24 of Schedule D of the rules of the Union as alleged by Mr McDermott in Complaint 1 and Complaint 2.

Complaint Three

65. Mr McDermott's third complaint is in the following terms:

"That on or around 15 April 2009, UNISON breached rule D 2.6.1 by removing Mr McDermott from his NEC post before the end of the 2 year period of office"

66. Rule D2.6.1 of the rules of the Union is as follows:

2.6.1 The period of office of every representative shall be from the close of National Delegate Conference immediately following the declaration of the result of the election to the close of the National Delegate Conference two years later.

67. Mr McDermott submitted that he remained a full member of the Union after his dismissal on 3 March 2009 but that, in any event, he should have been treated as a full member as a result of his appeal under rule C5.6 and the requirement that the status quo should prevail pending that appeal. He argued that by the time his appeal was concluded on 22 May, he had already accepted an offer of employment, by having returned written particulars to the Mid Yorkshire NHS Trust, duly signed, on 20 May. Mr McDermott maintained that he was therefore entitled to remain a member of the 2007-2009 NEC until the conclusion of the 2009 National Delegate Conference on 19 June 2009.

68. For the Union, Mr Segal submitted that Mr McDermott ceased to be eligible to hold office on the NEC by reason of rule C2.4.2 and rule D2.2.4. By rule C2.4.2 an unemployed member is not entitled to hold office unless otherwise decided by the NEC. Mr Segal argued that Mr McDermott was an unemployed member from the time he was notified of his reallocation to that category by Mr Mitchell on 12 March. By rule D2.2.4, any member elected to the NEC shall remain in office only for the period for which he meets the requirements of the seat. Mr Segal argued that a requirement to be elected to the NEC was full membership and that accordingly Mr McDermott was ineligible to remain in office.
69. I have already found that Mr McDermott did not have full membership of the Union from the time of his dismissal on 3 March 2009 to the time he obtained alternative qualifying employment on 1 June. Further I have found that at the time of his exclusion from the NEC on 15 April Mr McDermott was in the unemployed category of member. He was therefore expressly not entitled to hold office by reason of rule C2.4.2. I also find that rule D2.2.4 provides that in order to remain on the NEC a member must retain the requirements of that seat, which includes full membership of the Union, unless otherwise provided in the rules. I observe that Mr McDermott accepted that once an NEC member ceased to be eligible for the NEC, he or she no longer held office and did not automatically regain office, should he or she become eligible at a later stage of the two year period of office.
70. For the above reasons, I refuse to make a declaration that on or about 15 April 2009 the Union breached rule D2.6.1 by removing Mr McDermott from the NEC before the end of his 2 year period of office.

Complaint 4

71. Mr McDermott's fourth complaint is in the following terms:

“that on 19 June and 8 and 9 July 2009 UNISON breached rule D2.6.1 by preventing Mr McDermott from attending and or participating in NEC meetings”

72. Mr McDermott submitted that he was lawfully elected to the NEC in the 2009 NEC elections and that the Union breached rule D2.6.1 in refusing to permit him to take up office at the first two meetings of the NEC in the 2009/2011 electoral period.
73. For the Union, Mr Segal in effect repeated his submissions regarding Mr McDermott's third complaint. He argued that Mr McDermott was not entitled to be declared elected in the 2009 NEC elections by virtue of him not being a full member at the relevant time. He again relied upon rule C2.4.2 and D2.2.4.
74. By rule D7 and paragraph 7 of Schedule C, the NEC elections are conducted in accordance with regulations and procedures made by the NEC. The NEC agreed such procedures for the 2009 NEC elections on 3 December 2008. These contain a heading “Eligibility and Candidacy”. Under that heading, paragraph 18 provides that checks will be made to ensure that each candidate is eligible to stand for the post. Paragraph 11 states:

“To be eligible for nomination the National Executive Council the candidate must have been in membership for at least 3 months prior to the beginning of the election period and be a full member of UNISON.”

75. Although there is no definition of “election period” in the procedures, I find that the electoral period in paragraph 11 is a reference to the period prescribed by the election timetable

decided by the NEC, beginning with the start of the nomination period and ending with the announcement of the results. On this construction, I find that Mr McDermott was in full membership for at least 3 months prior to the beginning of the electoral period on 5 January 2009. I also find that Mr McDermott was a full member of the Union both at the beginning and end of the nomination period, namely on 5 January and 13 February 2009. This finding has support in the letter from Ms Sterling of 27 February in which she states that various checks had been carried out and he had been confirmed as a candidate and the letter from her of 20 March informing Mr McDermott that the scrutineers had now confirmed him as a candidate.

76. As I have already found, Mr McDermott ceased to be a full member between his dismissal on 3 March 2009 and his re-employment on 1 June. However, his name was not withdrawn from the voting papers and members cast their votes both for him and his opponent between 14 April and 15 May. In this period Mr McDermott was pursuing his appeal against being excluded from the branch elections, the decision of which was made known on 22 May.
77. On 1 June 2009 Mr McDermott obtained qualifying employment and the Union accepts that he was once again a full member from that date. On 2 June Mr McDermott emailed Mr Gilby, with copies to the General Secretary and President, informing them of his new job and that he considered that there could now be no dispute about his membership status and ability to hold office.
78. On 4 June 2009 the ERS declared the election results. Mr McDermott had 4,676 votes and his opponent, Mr Campbell, had 4,577 votes. However, Mr Campbell was declared elected and the word “Withdrawn” was printed against Mr McDermott’s name.
79. On the same day, 4 June 2009, ERS wrote two letters to Mr McDermott. The first letter stated that ERS had received notification from the Union that his current membership status had resulted in his candidacy being deemed ineligible in respect of that contest and that this fact would be recognised by recording his candidacy as being withdrawn. The second letter responded to a complaint made by Mr McDermott and stated “*Having considered the evidence available, we are satisfied that you are no longer eligible to stand for this seat for the reasons already notified to you*”. ERS gave a further explanation of its position in a letter to Mr McDermott of 18 August. In that letter ERS stated that they were informed by the Union during the course of the ballot that he was no longer a full member of the Union and that his appeal against unemployed member status was rejected on 22 May. The letter continued:

“Accordingly, at the time of submission of the scrutineer’s report, the information received from the Union was that you were not a full member of UNISON, and that your membership status at that stage rendered you ineligible. The rule regarding the status of unemployed members is set out in Schedule C, 2.4.2. Inter alia, this provision states that unemployed members are not entitled to hold office in the Union unless otherwise decided by the National Executive Council. It was considered that in the event that your membership status was as an unemployed member, again section 2.4.2 would prevent you from being eligible to be elected.”

Against this background applying schedule C7, it was determined that, based on the information received from UNISON, you could not be declared the successful candidate as you were not and did not continue to be eligible at that point. You state that “you remained a member during the process” and that you “were eligible to hold office at the point the election was declared”. These assertions are contradicted by the information and evidence in our possession, in particular the said Report dated 22 May”.

80. I find that ERS was incorrect to state, on information received from the Union, that Mr McDermott was not a full member at the time of submission of the scrutineer's report. They were wrong to have regarded him at that stage as an unemployed member. They were also wrong to state that he was not and did not continue to be eligible "at that point". As I have already found, Mr McDermott was a full member at the close of nominations and on the date the election results were declared but he was not a full member during the balloting period.
81. The reference by the ERS to the time of submission of the scrutineer's report probably derives from their consideration of paragraph 7 of Schedule C of the rules. This states:

Schedule C - Elections

7 The National Executive Council shall have the power to determine any matter of procedure or organisation or administration of or relating to the election, including the power to determine the method of voting (whether to be by simple majority; by single transferable vote; by multi transferable vote; or by some other system) provided that the person(s) securing the greatest number(s) of votes according to the system employed shall be the person(s) declared elected, so long as they are and remain eligible for election.

Mr McDermott places emphasis on the words "*provided that the person(s) securing the greatest number(s) of votes according to the system employed shall be the person(s) declared elected.*" Mr Segal placed emphasis on the words "*so long as they are and remain eligible for election*". He submitted that these words require a candidate to be eligible for election throughout the entire election process. Mr McDermott submitted that they mean only that a person must be eligible at the time the results are declared and that the person remains eligible thereafter. Paragraph 7 of Schedule C to the rules is curiously worded. Its principal purpose is to give the NEC the power to make election procedures but its proviso has been taken as going beyond setting the parameters for what those procedures must contain, to having a separate existence as a substantive rule in itself. In this regard I note that the procedures agreed for the 2009 NEC elections deal with eligibility for nomination and candidacy but do not deal with eligibility at any other time. At this stage, however, I remind myself that I am construing the rulebook of a Union and that it is not to be expected that the rules will be written with the precision of a tax statute or commercial contract. I must give the words a reasonable interpretation which accords with my view of what they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they were addressed (**Jacques v. AUEW (1986) ICR 683**).

82. In my judgement, the proviso in paragraph 7 of Schedule C has effect as a substantive rule of the Union but only as regards the conduct of the election and for the period of the election. This is clear both from rule D7, which is the rule from which Schedule C derives its authority and which deals only with elections, and from Schedule C itself, which deals exclusively with election procedures. It is in this context that I have considered the expression "*so long as they are and remain eligible for election*". On Mr McDermott's interpretation, the word "remains" applies to the period after the declaration of the result. I find that this cannot have been the intention of the rule, which is expressly restricted to dealing with the period up to and including the declaration of the result. In my judgement, this expression requires the person who has the greatest number of votes to be declared elected, so long as he or she is eligible for election and remains so eligible to the end of the electoral process, that is the declaration of the result.

83. But what is required to be “eligible for election”? There is no express rule which determines eligibility for election or the date at which eligibility is to be determined. I contrast this with paragraph 11 of the election procedures dealing with eligibility for nomination and rule C7 which deals with loss of eligibility for membership. I note, however, that paragraph 11 is headed ‘Eligibility for Nomination *and Candidacy*’ (my emphasis). It provides that a person must have been in membership for at least 3 months prior to the beginning of the election period and that the person must be a full member. The reference to a person being in membership for a period of 3 months refers to a defined past period and is not therefore relevant to the present issue. The requirement that the person must be a full member applies most obviously to the time of nomination but, having regard to the heading, may also apply as a requirement to be a valid candidate. In considering whether or not this is the correct construction, I have had regard to the rules generally on eligibility. I note the very strict requirement of employment in the public services in rule C7, the disqualification of an unemployed member from holding office in rule C2.4.2 and the requirement of full membership for nomination in paragraph 11 of the electoral procedures. Against this background, and having regard to the heading of paragraph 11, I find that in order to be eligible for election within the terms of paragraph 7 of schedule C a person must remain a full member throughout the electoral process.
84. Applying my construction of the rules to the facts of this case, I find that the scrutineer and the Union acted lawfully in not declaring Mr McDermott to be the person elected, notwithstanding the fact that he secured the greatest number of votes. Mr McDermott had not remained a full member and thus eligible for election throughout the electoral process from the point of determination of eligibility for nomination to the declaration of the result. Accordingly, Mr McDermott was correctly excluded from the meetings of the NEC of 19 June and 8/9 July 2009.
85. I have not found the determination of this complaint easy. It has resulted in a person who was eligible for election at the beginning of the electoral period and at the declaration of the result and who has secured the most votes being effectively withdrawn from the contest. It is however a matter for the Union to determine the ground rules as to who is or is not eligible for election and it is not for me to rewrite those rules, especially where they are called into question in a case with such unusual facts.
86. For the above reasons I refuse to make a declaration that the Union breached rule D2.6.1 by preventing Mr McDermott from attending or participating in the NEC meetings on 19 June and 8/9 July 2009.

Complaint Five

87. Mr McDermott’s fifth complaint is in the following terms:

“that on or around 4 June 2009 UNISON breached Rule D2.2.1 by electing five seats for the Yorkshire and Humberside Region instead of four”

88. Rule D2.2.1 provides as follows:

2.2.1 Each Region shall elect representatives according to the following table:

<i>Regional membership</i>	<i>No of representatives</i>	<i>Conditions</i>
<i>Less than 100,000</i>	<i>2</i>	<i>1 female, 1 male</i>
	<i>+ 1 low pay reserved seat</i>	
	<i>(see Rule Q Definitions)</i>	

<i>100,000 or more and less than 150,000</i>	<i>3 + 1 low pay reserved seat (see Rule Q Definitions)</i>	<i>2 female, 1 male</i>
<i>150,000 or more</i>	<i>4 + 1 low pay reserved seat (see Rule Q Definitions)</i>	<i>At least 2 female, 1 male</i>

89. Mr McDermott submitted that the declaration of the result of the NEC election in the Yorkshire & Humberside Region disclosed that only 146,028 voting papers were distributed. He argued that, by applying rule D2.2.1 to that membership number, the region was only entitled to return four members to the NEC. Mr McDermott argued that the relevant time to perform this calculation was the time that the ballot papers were distributed, although he conceded at the hearing that it may have to be a little earlier as a matter of practicality.
90. For the Union, Mr Segal submitted that Mr McDermott’s principal submission must be wrong as the Union would need to know the number of seats to be filled before it went out for nominations. He argued that setting the date at which the regional membership is to be taken was a matter for the NEC under rule D7 and that the NEC performed this function on 3 December 2008. He maintained that they did so by approving the draft election procedure which provided expressly that the membership figures would be based on the RMS (Replacement Membership System) extract at 30 September 2008, which stood at 161,105. Mr Segal also referred to rule D1.3.1 which provides that the number of delegates to the National Delegate Conference shall be determined in accordance with the membership figures as at 30 September in the year preceding the conference.
91. Rule D2.2.1 does not specify the date at which the relevant membership figures are to be taken but, as a matter of practical common sense, it cannot be implied into that rule that the membership figures are to be taken as at the date that the voting papers are distributed. I accept Mr Segal’s submission that this matter is provided for by giving the NEC the power to make procedural rules relating to the election. I find that, within its broad discretion, the NEC did determine the date at which the membership figures were to be taken. The date that it decided upon was not so remote or devoid of good reason as to be successfully impugned on the grounds that it was outside the scope of the NEC’s discretion.
92. For the above reasons, I refuse to make a declaration that on or around 4 June 2009 the Union breached rule D2.2.1 by electing five seats for the Yorkshire & Humberside region, instead of four.

Complaint Six

93. Mr McDermott’s sixth complaint is in the following terms:

“that on or around 4 June 2009, UNISON breached s51 (6) of the 1992 Act by not declaring Mr McDermott as the elected candidate for a position on the NEC with effect from 19 June 2009 despite receiving the greatest number of votes”

94. Section 51(6) of the 1992 Act provides as follows:

Section 51 Voting

(6) The ballot shall be so conducted as to secure that the result of the election is determined solely by counting the number of votes cast directly for each candidate.

95. Mr McDermott in effect repeated the submissions he made in respect of complaint four. He argued that he was the candidate with the most votes and should therefore have been declared elected. He submitted that there was no justification for him being withdrawn as a candidate.
96. For the Union, Mr Segal also relied upon the submissions he had made in respect of complaint four. He argued that the expression “*so long as they are and remain eligible for election*” in paragraph 7 of Schedule C must relate to the period over which the election is held and not to the period after the election. Mr Segal submitted that Mr McDermott was not eligible for election over the whole period of election and section 51(6) of the 1992 Act only related to eligible candidates who received the greatest number of votes.
97. I accept Mr Segal’s submission that section 51(6) of the 1992 Act applies only to candidates in the election who qualify as eligible candidates under the rules of the Union. Although Mr McDermott was once again a full member of the Union at the time of the election results, I have found in relation to complaint four that he had not remained an eligible person throughout the electoral process, as required by paragraph 7 of Schedule C. He was not therefore a candidate within the meaning of section 51(6) of the 1992 Act, namely a person who qualified for election under the rules of the Union. As Mr McDermott was not a valid candidate, there was no breach of section 51(6) of the 1992 Act.
98. For the above reasons, I refuse to make a declaration that on or around 4 June 2009 the Union breached section 51(6) of the 1992 Act by not declaring Mr McDermott as having been elected in the 2009 NEC elections.

Complaint Seven

99. Mr McDermott seventh complaint is as follows:

“That on or around 4 June 2009 Unison breached Paragraph 7 of Schedule C of its rules by not declaring Mr McDermott elected to the post of male regional seat for Yorkshire and Humberside Regional seat on the National Executive Council despite him being the candidate that secured the greatest number of votes.”

100. Paragraph 7 of Schedule C of the rules of the Union provides as follows:

Schedule C - Elections

7 The National Executive Council shall have the power to determine any matter of procedure or organisation or administration of or relating to the election, including the power to determine the method of voting (whether to be by simple majority; by single transferable vote; by multi transferable vote; or by some other system) provided that the person(s) securing the greatest number(s) of votes according to the system employed shall be the person(s) declared elected, so long as they are and remain eligible for election.

101. This complaint is based on the same facts and raises similar issues of law to those raised in Complaints Four and Six. As I have found above, Mr McDermott did not retain eligibility for election throughout the electoral period and accordingly there was no breach of paragraph 7 of Schedule C by him not being declared elected, even if he did secure the greatest number of votes.
102. For the above reasons, I refuse to make a declaration that on or around 4 June 2009 the Union breached paragraph 7 of Schedule C of its rules by not declaring Mr McDermott as having been elected in the 2009 NEC elections.

Complaint Eight

103. Mr McDermott's eighth complaint is as follows:

“ That on or around 15 April 2009 Unison breached Rule C2.4.2 because the President refused to accept a proposal that a vote be taken at the NEC meeting. The proposal was that the NEC should exercise its discretion to entitle Mr McDermott to hold office as an unemployed member”

104. Rule C2.4.2 provides as follows:

2.4.2 Unemployed members shall be entitled to attend branch meetings and to vote on issues not relating to pay and conditions of members in employment. They are not entitled to hold office in the union unless otherwise decided by the National Executive Council.

105. Mr McDermott submitted that at the pre-meeting on 15 April 2009, prior to the NEC meeting that day, he was told that he was no longer eligible to sit on the NEC. He stated that he, or a colleague, Mr Rogers, asked the President, Ms Highton, if she would put a proposal to the NEC that it should exercise its discretion under rule C2.4.2 to permit Mr McDermott to continue to hold office on the NEC as an unemployed member. Ms Highton refused to do so but agreed to put a proposal that Mr McDermott be admitted to the meeting as an observer. This proposal was put to the NEC and lost. Mr McDermott submitted that by refusing to put the earlier proposal, Ms Highton prevented the NEC from taking a decision to exercise its discretion under rule C2.4.2.

106. For the Union, Mr Segal submitted that the pre-meeting in question had no status under the rules. He noted the evidence of Mr Rogers that no proposal had in fact been put to the NEC that it should exercise its discretion under rule C2.4.2 and that it was a political decision by Mr McDermott's supporters not to move such a motion either then or at the subsequent meeting of the NEC. Mr Segal submitted that Mr McDermott had failed to make out any breach of rule C2.4.2.

107. I find this complaint to be misconceived. Even the case advanced by Mr McDermott does not constitute a breach of rule C2.4.2. Mr McDermott was undoubtedly aggrieved at the President's refusal to put the motion he wished to the NEC but there is no obligation in rule C2.4.2 that she should do so. His case is further undermined by the failure of anyone else to put a motion to the NEC that it should use its discretion under rule C2.4.2, with the result that no motion was ever before the NEC. It is not alleged that such a motion was moved but that Ms Highton wrongly ruled it out of order. In these circumstances, rule C2.4.2 was simply not engaged at the pre-meeting or at the NEC meeting on 15 April 2009 and there was no breach of that rule.

108. For the above reasons, I refuse to make a declaration that on or around 15 April 2009 the Union breached rule C2.4.2 because the President refused to accept a proposal that a vote be taken at the NEC meeting on whether the NEC should exercise its discretion under rule C2.4.2.

David Cockburn

The Certification Officer