

**DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS
MADE UNDER SECTION 108A OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR R RADFORD

v

EQUITY

Date of Decisions:

4 June 2009

DECISION ON A PRELIMINARY ISSUE

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

1. The Claimant’s first complaint is dismissed on withdrawal by the Claimant.
2. The remainder of the Claimant’s application that Equity breached its rules in the matter of disciplinary action against him following a hearing on 6 February 2008 is dismissed on the grounds that the application was made out of time.

REASONS

1. The Claimant is a member of Equity (“the Union”). By an application received at the Certification Office on 2 September 2008, the Claimant made complaints of breaches of rule against his Union, arising from disciplinary proceedings against him by the Union. Following correspondence with the Claimant, he put his complaints in the following terms:-

Complaint 1

That on or around 20 March 2007 the Union breached its rule 10(3) by establishing a Disciplinary Sub-Committee using an electoral system that it had not previously discussed or approved and on the basis of a report put to Council by the General Secretary that was accepted while being recognisably biased and defective in certain respects.”

Complaint 2

That the Union breached rule 10(5)(a) by not giving Mr Radford written notice of defined charges against him in sufficient detail to enable him to prepare his response despite his continual requests for such definition before the hearing was held on 6 February 2008.

Complaint 3

That the union breached rule 10(5)(b) by not giving Mr Radford reasonable notice of the time and place of the hearing which was held on 6 February 2008, having notified Mr Radford of the

hearing by a letter sent on Friday 1 February 2008 and sent by email on Saturday 2 February 2008 which Mr Radford did not see until Monday 4 February 2008.

Complaint 4

That the union breached rule 10(5)(c) by not allowing Mr Radford and his witnesses a reasonable opportunity to attend the hearing held on 6 February 2008 because in scheduling the hearing it ignored problems created by the resignation of two Disciplinary Sub-Committee members on 22 January 2008, the fact that the Council and the Disciplinary Sub-Committee members were aware that witnesses were in hospital or ill, the fact that new witnesses were to be introduced and would not be ready and that Mr Radford had told the Disciplinary Sub-Committee, hearing the case, that he could not trust its members.

Complaint 5

That the union breached rule 10(5)(d) by not allowing Mr Radford and any of his witnesses a reasonable opportunity to make a written submission and speak at the hearing held on 6 February 2008 in relation either to the charges or any penalty Mr Radford faced.

Complaint 6

That the union breached rule 10(5)(d) by not allowing Mr Radford and any of his witnesses a reasonable opportunity to make a written submission and speak in response to evidence given at the hearing held on 6 February 2008 in relation either to the charges or any penalty Mr Radford faced.

Complaint 7

That the union breached rule 10(5)(d) by accepting a report from the Disciplinary Sub-Committee that was recognisably biased and defective in certain respects and in the knowledge that Mr Radford and any of his witnesses had not been given a reasonable opportunity to make a written submission and speak in response to evidence given at the hearing held on 6 February 2008 in relation either to the charges or any penalty Mr Radford faced.

2. I caused the alleged breaches to be investigated in correspondence and decided that there should be a preliminary hearing to determine whether the application had been made in time in accordance with section 108A(6) and (7) of the 1992 Act. A preliminary hearing took place on 1 May 2009. At the hearing, the Claimant represented himself. The Union was represented by Mr R Pirani of Counsel, instructed by Mr P Statham of Pattinson and Brewer Solicitors. Both parties provided written skeleton arguments. The rules of the Union were before me, together with a 176 page bundle of documents. No formal oral evidence was given.

Findings of Fact

3. Having considered the documentary evidence and the submissions of the parties, I find the facts to be as follows:
4. Mr Radford is a professional writer and has been a member of Equity for about 35 years. From the late 1990s to the present time he has been a member of the Walk-on and Supporting Artists Committee and between 2006 and 2008 was a member of Council, the Union's Principal Executive Committee. He is a person with certain physical disabilities which give rise to difficulties with dexterity and mobility.
5. On 25 January 2007 a branch secretary made a written complaint to the General Secretary about Mr Radford's conduct, in particular about his duty to report to the South West Area Committee on the activities of Council. The complaint

was made under rule 10 of the Union's rules, which sets out the Union's disciplinary procedures. Under these procedures, the General Secretary made preliminary enquiries and submitted a written report to the meeting of Council on 20 March. Council decided that a disciplinary sub-committee should be elected to consider the charges that had been made against Mr Radford.

6. A disciplinary hearing of these charges was arranged for 21 November 2007 but had to be postponed due to Mr Radford's medical situation and the fact that he had commenced Employment Tribunal proceedings against the Union claiming a breach of the Disability Discrimination Act 1995. The disciplinary hearing was subsequently rearranged for 6 February 2008.
7. In early January 2008 Mr Radford wrote to the Certification Office with a description of his then situation, seeking guidance. He did not then bring an application. My office responded on 21 January enclosing a copy of the guidance booklet on complaints and a registration of complaint form. Mr Radford was informed of the importance of trying to resolve any outstanding issues through the Union's internal processes.
8. Mr Radford's case before the Employment Tribunal was heard on 24 and 25 January 2008. It was unsuccessful.
9. On 5 February 2008 Mr Radford wrote to the General Secretary informing her that he wished to make a complaint against her and the President jointly regarding the disciplinary proceedings which were ongoing against him. He referred to rule 34, which is headed "Complaints by members of a breach of rule", and commented that this gave him no indication of how a complaint against both the General Secretary and President would be dealt with. He asked for guidance on how he should proceed.
10. The disciplinary hearing of the charges against Mr Radford took place on 6 February 2008 in Exeter and the charges were upheld by the disciplinary sub-committee, subject to their consideration by Council. Mr Radford did not attend the hearing.
11. On 13 February 2008 Mr Radford wrote again to the General Secretary. He stated that he wished to present a rule 10 complaint against her and the President but continued, "*Neither rule 10 nor rule 34 provides me with a way which I can proceed to do this*". He explained that both these procedures required him to present his complaint to the General Secretary or President but that, as he was complaining against them, the rules did not cover his situation. He again asked the General Secretary for guidance. Mr Radford maintains that it was by this letter of 13 February 2008 that he invoked "any internal complaints procedure of the Union ... to resolve the claim", within the meaning of section 108A(6)(b) of the 1992 Act.
12. Council met on 19 February 2008 and upheld the charges against Mr Radford as found by the disciplinary sub-committee. It imposed a formal reprimand, which is the least serious penalty that was open to it. Mr Radford was informed of this decision by the General Secretary on 21 February.

13. On 22 February 2008 Mr Radford wrote to the Certification Office. He stated that he was nearing the point when he believed that he would need to complete the complaints form. He requested a hard copy of that form, which was sent to him on 28 February.
14. On 26 February 2008 the General Secretary wrote to Mr Radford informing him that she believed she had devised a procedure which would permit him to make a complaint against the General Secretary and President jointly under rule 10, which she would put to Council for its consideration at its meeting in March.
15. On 18 March 2008 Council approved the revised rule 10 procedure devised by the General Secretary under its power in rule 19(9) to determine anything upon which the rules are silent. The procedure required that any complaint against both the General Secretary and President should be presented to an Assistant General Secretary who would cause any preliminary enquiries to be made and then progress the charges in accordance with rule 10.
16. On 23 March 2008 the General Secretary wrote to Mr Radford offering him the opportunity to use this new procedure. Mr Radford replied on 27 March. He rejected the new procedure on the grounds that it would be inappropriate for his complaint to be presented to anyone on the Senior Management Team or any member of staff in the management chain.
17. By a separate email of 27 March 2008 Mr Radford informed the General Secretary that he wished his “matters” to be considered by the Appeals Committee. The General Secretary replied by an email of 31 March. She advised him that rule 10(8) does not allow an appeal to the Appeals Committee where the penalty imposed is only a formal reprimand.
18. On 14 April 2008 Mr Radford wrote to the General Secretary. He informed her that his attempts to resolve his complaint against her and the President had been “a complete failure” and that it was now time for him “to make progress elsewhere”.
19. On 16 May 2008 the General Secretary wrote to Mr Radford in response to his email of 14 April. She noted his rejection of the solution she had suggested. Mr Radford maintains that this letter marked the conclusion of the internal complaints procedure that he had invoked on 13 February.
20. On 20 June 2008 the Certification Office wrote to Mr Radford stating that it had noted he had not contacted the office following the letter from the Certification Office to him of 28 February, enclosing a blank registration of complaints form. He was informed that his previous correspondence had not constituted an application and no further action would be taken on the matters he had raised in the absence of a specific application.
21. Following correspondence from Mr Radford and a telephone conversation with him, the Certification Office wrote to Mr Radford on 9 July stating that it was

up to him whether and when to make a complaint and reminding him of the limitation period in which to do so.

22. On 2 September 2008 a registration of complaint form dated 29 August was received at the Certification Office from Mr Radford.
23. On 8 December 2008 Mr Radford confirmed the wording of the seven complaints that he wished to pursue against his Union.

The Relevant Statutory Provisions

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

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) ...
 - (b) *disciplinary proceedings by the union (including expulsion);*
 - (c) – (e) ...
- (6) *An application must be made -*
 - (a) *within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or*
 - (b) *if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).*
- (7) *Those days are -*
 - (a) *the day on which the procedure is concluded, and*
 - (b) *the last day of the period of one year beginning with the day on which the procedure is invoked.*

The Relevant Union Rules

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

10 Disciplinary procedures

- 10(1) *A Member or Officer of the Association (or the personal representative of a deceased Member or Officer) who considers that another Member or Members, or any Officer, Council Member or Trustee, has:*
 - (a) *acted in a manner prejudicial to the interests of the Association;*
 - (b) *committed a breach of these Rules;*
 - (c) *failed to obey a lawful instruction of the Association; or*
 - (d) *neglected his or her duties to the Association may lay charge(s) to that effect by written notice marked "Complaint" sent to the General Secretary by post or delivered to the Association's Office except a charge by or against the General Secretary in which case a notice shall be sent to the President.*

10(2) *On receipt of such notice the General Secretary (or, in the case of a complaint by or against the General Secretary, the President), shall cause such preliminary enquiries to be made as the General Secretary (or President) thinks fit and shall report the matter to the next meeting of the Council.*

10(3) *If the Council considers that the complaint is not sufficiently serious or particularised to justify disciplinary action, or the consideration of the possibility of it, it shall so inform the person laying the charge(s). Otherwise the Council shall either establish a Disciplinary Sub-Committee consisting of not less than three Members of the Council to act as provided for in the following provisions of this Rule; or in the alternative the Council shall direct the appropriate Officers or members of staff to make enquiries and to report to a subsequent meeting of the Council. On receipt of such report the Council shall either establish a Disciplinary Sub-Committee as above or inform the person laying the charge(s) that it has resolved not to proceed with the charge(s). Any person who is the subject of or materially affected by the charge(s) shall take no part in the investigations into or the consideration of the charge(s) or any penalty as provided for in this rule.*

10(8) *The person charged may appeal against any penalty imposed by the Council under Rule 10(6) (a), (b), (c), or (d) to the Appeals Committee (elected in accordance with Rule 17B). Notice of appeal shall be in writing addressed to the General Secretary (or, in a case where the matter concerns a charge by or against the General Secretary, the President) and must be received by the General Secretary (or, as the case may be, the President) at the Association's Office not later than the 28th day after the date of the Council's decision. The Appeals Committee will consider the appeal as soon as practicable.*

34 *Complaints by Members of a breach of Rule*

- (1) *A member of the Association who wishes to complain of an alleged breach or threatened breach of any of the Rules of the Association, may lodge a complaint by written notice to the General Secretary or, in a case where the alleged breach or threatened breach is by the General Secretary, to the President.*
- (2) *The Council may from time to time make, amend or revoke regulations providing a procedure for the handling of complaints lodged under Rule 34(1)*

Summary of Submissions

26. The Claimant accepted that his first complaint was out of time on any consideration, as it alleged a breach of rule on 20 March 2007. He withdrew this complaint.
27. As to the remainder of his complaints, Mr Radford accepted that complaints two to six had occurred on or before 6 February 2008 and complaint seven had occurred on 21 February 2008. He conceded that his application, which was received at the Certification Office on 2 September 2008, was made more than 6 months after these dates and was therefore outside the primary limitation period provided for in section 108A(6)(a) of the 1992 Act. He nevertheless argued that these complaints were in time by virtue of sub-section (b) of section 108(A)6 in that they had been made within 6 months of 16 May 2008, which was the date on which he alleged that the internal complaints procedure (initiated by him on 13 February 2008) had been concluded. He submitted that his complaints were not only against the General Secretary and President but also against all the members of Council, as even those who voted in his favour on his disciplinary issue were bound by the principle of collective responsibility. In these

circumstances, Mr Radford submitted that the procedural solution proposed by the General Secretary was unacceptable. He commented that he had suggested the solution of using someone brought in from outside the Union to accept his complaint but that this had not been taken up by the General Secretary. Mr Radford argued that by writing to the General Secretary on 13 February 2008 as he did, he had invoked the only route which was open to him and that this letter should be seen as a continuation of his letter of 5 February.

28. Mr Pirani, for the Union, argued that, even on Mr Radford's submissions, his seventh complaint could not take advantage of the extended limitation period. He submitted that this complaint was of a breach of rule on 21 February 2008 and Mr Radford was relying on his letter to the General Secretary of 13 February as being his invocation of an internal complaints procedure to resolve his claim. Mr Pirani argued that this letter cannot have been the invocation of a complaints procedure in relation to a matter which had not yet occurred. With regard to the other complaints, Mr Pirani made three basic points. First, he argued that there was no relevant internal complaints procedure, certainly not one that had been identified by Mr Radford. Mr Pirani submitted that even if rules 10 and 34 could be considered complaints procedures, they were not applicable to this situation. He noted that Mr Radford accepted that these procedures were inappropriate in his letter to the General Secretary of 13 February 2008 and his letters to the Certification Office of 10 October, 5 November and 3 March 2009. Secondly, he argued that, even if rules 10 and 34 could be considered as relevant internal complaints procedures, they were never invoked by Mr Radford. Mr Pirani argued that the effect of Mr Radford's letters to the General Secretary was to acknowledge that these rules did not provide him with a procedure he could use and to ask for guidance on the procedure he should adopt. Thirdly, Mr Pirani submitted that, even if Mr Radford did invoke a complaints procedure, he did not do so to resolve the complaints that he subsequently brought to the Certification Office. Mr Pirani noted that Mr Radford gave no particulars of his proposed complaint in his letter to the General Secretary of 13 February and thereafter resolutely refused to do so on the point of principle that his complaint was in part against the General Secretary. Mr Pirani submitted that for someone to invoke a complaints procedure to resolve a claim, the invocation must as a minimum, state the issues to be resolved and that, for these proceedings, the issues must include those brought as complaints to the Certification Office. Mr Pirani argued that Mr Radford had never engaged any alleged internal complaints procedure to this extent. He further argued that Mr Radford could not rely on the contents of his letter of 5 February as this preceded the date upon which he had stated the breaches had occurred, 6 February.

Conclusions

29. The time within which applications must be made to me is provided for in section 108A(6) and (7) of the 1992 Act. Sub-section 6(a) provides for a primary limitation period of 6 months, starting with the day on which the breach is alleged to have taken place. Sub-section 6(b) provides for an extended limitation period of up to 18 months, if the Claimant has invoked any internal complaints procedure of the Union to resolve the claim within the primary limitation period. By sub-section (7), the extended period ends six months after

the date when either the complaints procedure is concluded or one year after the date the procedure was invoked, whichever is the earlier. These provisions require me to make findings of fact on various matters. They do not require me to consider the reasonableness of the Claimant's conduct or give me any general discretion to extend time.

30. It is common ground that Mr Radford's remaining applications are each outside the primary limitation period. Complaints two to six relate to breaches which occurred on or before 6 February 2008 and complaint seven to a breach which occurred on 21 February 2008. Mr Radford's registration of complaint form was received at my office on 2 September 2008, which is outside the period of six months from the date when the breaches were alleged to have taken place.
31. The issue for me to determine was whether his application was made within the extended limitation period. In so doing, I must consider the Union's submissions that there was no relevant internal complaints procedure, that (if there was) Mr Radford did not invoke it, and (if he did invoke it) that he did not do so to resolve the claim which he now brings to me.
32. Section 108A(6) and (7) have previously been considered by both me and the Employment Appeal Tribunal. In **Murphy v GMB (D/35-41/02)**, I stated at paragraph 23 that the requirement for there to be an internal complaints procedure:

“does not impose the requirement that there be a written procedure or that the written procedure should be the exclusive procedure. Other Unions have well established complaints procedures for members which are not in writing. Furthermore, some complaints may not be appropriate for the written procedure of the Union, where for example, the complaint is against the body which would determine the complaint. Given the many different types of complaints procedure that may exist and the many different types of complaint which members may wish to bring, it is appropriate to adopt a purposive approach to the interpretation of section 108A(6)(b). It is in the interests of all concerned that, where possible, disputes are resolved internally without resort to a third party adjudication and attempts by members to resolve their disputes internally should be encouraged. In this context I find that what constitutes “any procedure” is to be given a wide interpretation. These words not only comprehend a written procedure. They include any procedure generally known to the members as a way of raising and resolving complaints. This will exclude complaints raised in a purely ad hoc or arbitrary manner, outside what could reasonably be regarded as a procedure.”

In **Foster v. The Musicians Union (D/13-17/03)** I made a distinction at paragraph 54 between letters of protest written to the Union and letters which invoke an established procedure to resolve a complaint involving a breach of rule. I commented that it is only the latter which falls within the remit of section 108(6)(b).

In **Fradley v. TSSA (D/28-30/03)** I commented at paragraph 23.1 that:

“Although I previously accepted that “any internal complaints procedure” is not restricted to a written procedure, the requirement that there is a procedure does presuppose a mechanism for internal complaint resolution that is well known to members. The fact that a complaint is made does not mean that there is a complaints procedure. An applicant wishing to rely upon section 108A(6)(b) of the 1992 Act must establish that the Union has such a procedure.”

I went on to comment at paragraph 23.2,

“Any complaint pursuant to an internal complaints procedure must have been made ‘to resolve the claim’. Letters which merely abuse the Union for having taken a particular decision or those which make general political points may not come within that provision if their purpose was not to ‘resolve’ the claim.”

In **Bakhsh v UNISON (No. 2) (D/6-10/08)** the Union successfully appealed against my decision that the Claimant had invoked an internal complaints procedure when he wrote to the Union stating expressly that he was appealing from a disciplinary decision to suspend him and the Union dealt inconclusively with the issues he raised. The EAT found ((2009)IRLR 418) that the Claimant had not invoked an internal complaints procedure. It concluded that whilst the phrase “invoking an internal complaints procedure” can properly be given a fairly wide meaning (to include, for example, an appeal procedure) it is essential that some recognisably formal procedure be followed. It found that merely advancing points to those who were believed to be the effective decision takers about the validity of a disciplinary decision could not fairly be regarded as the invocation of an appeals procedure. The EAT also noted that the rules of UNISON provided for no appeal from a decision to suspend. It further commented that the Union would succeed both if there was an available procedure which was not invoked and if there was no procedure in the first place.

33. Against this background, I have considered firstly whether there was a relevant complaints procedure of which Mr Radford could avail himself. The most obvious such procedure from a disciplinary decision would be a formal right of appeal under the rules. However, rule 10(8) provides that there is no right of appeal when the sanction that has been imposed is only a formal reprimand. The other avenues explored by Mr Radford were rule 10 and rule 34.
34. Rule 10 is headed “Disciplinary procedures” and describes a process by which members can “lay charges” against other members or officers which could result in a disciplinary penalty being imposed on them varying from expulsion to a formal reprimand. In his correspondence to the General Secretary, Mr Radford stated that he wished to present a rule 10 complaint against her and the President regarding their conduct of the disciplinary procedure against him. In my judgment, a disciplinary procedure cannot, in the normal course of events, be a complaints procedure. The end result of a disciplinary procedure may be the imposition of a penalty on others. It could not result in the removal

of a disciplinary sanction on the person who laid the charges. The fact that disciplinary action might be taken in relation to the same matters that could be raised as a complaint does not automatically translate a disciplinary procedure into a complaints procedure.

35. Rule 34 is headed “Complaints by Members of a breach of rule” and would appear capable of being considered as a complaints procedure. However, the way it is drafted makes it inappropriate as a means of dealing with the situation in which a member is aggrieved about a disciplinary process to which he has been subject. The process it envisages is one of complaint against another person for breach of rule, not a complaint that the initiator has been dealt with wrongly. Whilst the issues that Mr Radford has with the disciplinary action against him would probably have been raised in any complaint under rule 34, that does not mean that a rule 34 complaint is automatically a complaint raised within a procedure envisaged by section 108A(6)(b) of the 1992 Act.
36. In my judgment, whether such a complaints procedure exists or not requires a consideration of the rules and practices of the Union as a whole. Whilst this case concerns a rule which is within my jurisdiction as it relates to disciplinary proceedings, I note that the same limitation provision also applies to the other categories of rule within my jurisdiction, including rules which relate to balloting, appointments and the constitution and proceedings of certain meetings. This helps to explain why the term ‘complaints procedure’ has been used where term ‘grievance procedure’ might seem more appropriate. In a disciplinary context, the type of complaints procedure one would normally expect is an appeal procedure. However, where, as in this case, an appeal against a formal reprimand is expressly excluded by the rules, there is an inference that the Union has decided that there should be no relevant complaints procedure. There may of course be situations where a rule or practice of the Union clearly provides for an alternative complaints mechanism in such circumstances but, in my judgment, there is no obvious alternative mechanism on the facts of this case. I therefore find that there was no internal complaints procedure capable of being invoked by Mr Radford and he was unable to take advantage of the extended limitation period. The remainder of his complaints, complaints 2 to 7, were therefore made out of time.
37. Should I be wrong about the existence of any internal complaints procedure, I find that Mr Radford did not invoke a complaint within the meaning of section 108(6)(b) of the 1992 Act. I find that he did not invoke a complaint by way of an appeal under rule 10(8) nor by way of rules 10(1) or rule 34. The letters he wrote to the General Secretary stated his conclusion that both rules 10 and 34 (although his letters mainly addressed rule 10) were inappropriate to raise the complaint he wished to make and he sought the advice of the General Secretary on the procedure he should adopt. This did not, in my judgment, constitute the invocation of a complaint. The General Secretary devised a procedure by which she considered he could invoke a complaint, which procedure was endorsed by Council. However, Mr Radford expressly refused to invoke that procedure.
38. Should I be wrong about both the existence of a complaints procedure and whether such a procedure was invoked by Mr Radford, I find that such a

procedure as he did allegedly invoke was not invoked “to resolve the claim”. The nature of the rule 10 and rule 34 complaints procedures is to blame others. A finding of fault by others would not, by itself, have any impact on the disciplinary decision taken against Mr Radford. I find that for a complaints procedure to be invoked to resolve the claim, it would normally be necessary for one of the end products of that procedure to be the resolution of the complaint. In my judgment, it is not enough that the end product of the procedure is a finding of fault in others which may or may not subsequently lead to political or other pressure on the Union to take the action sought by the complainant.

39. Sub-sections (6) and (7) of section 108A of the 1992 Act do not entitle me to consider the reasonableness of the claimant’s conduct in deciding whether the extended limitation period applies. However, even on the client’s case, he was aware that his letters to the General Secretary had been fruitless by 16 May 2008. He then had ample opportunity to lodge his application in time but he did not in fact lodge it until 2 September, despite, in the meantime, having been advised by my office about the limitation period.
40. Claimants should make every effort to submit their applications to me within the primary limitation period of six months. As is apparent from this decision, reliance upon the extended limitation period may not be a straightforward matter.

David Cockburn
The Certification Officer