

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

MR A DARKEN

v

POA

(No 2)

Date of Decisions:

16 November 2007

DECISIONS

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

- (i) I refuse to make the declaration sought by the Claimant that on or around 18 December 2006 the POA breached rule 25.5 of its rules by taking disciplinary action against the Claimant for conduct allegedly contrary to rule 25.1(a) and (b).
- (ii) I make the declaration sought by the Claimant that on or around 15 February 2007 the POA breached rule 28.3(c) of its rules by failing to allow the Claimant to cross-examine the witnesses who gave evidence to the POA Disciplinary Sub-Committee.

When I make a declaration I am required by section 55(5A) of the 1992 Act to consider whether an enforcement order is appropriate. I make an enforcement order in the following terms: the Union shall forthwith treat as void and as of no effect those parts of the decision of its Disciplinary Committee of 10 April 2007 that barred the Claimant from holding local office for five years.

- (iii) I refuse to make the declaration sought by the Claimant that on or around 22 May 2007 the POA breached an implied term of rule 28.7(b) of its rules by not allowing the Claimant to speak at its Annual Conference on the matter of his appeal to Conference against the decision of the Disciplinary Committee of 10 April 2007 to discipline him.

REASONS

1. The Claimant is a member of the POA (“the Union”). By an application dated 11 June 2007, the Claimant made complaints against his Union arising from disciplinary proceedings taken against him. Following correspondence with the Claimant, he identified three complaints which he confirmed in the following terms:-

Complaint 1

“that on or around 18 December 2006 the POA breached rule 25.5 of the rules of the POA by charging and taking disciplinary action against Mr Darken for actions alleged to be contrary to subsections (a) and (b) of rule 25.1.”

Complaint 2

“that on or around 15 February 2007 the POA breached rule 28.3(c) of the rules of the POA by failing to call and allow Mr Darken to cross-examine witnesses requested by Mr Darken at a meeting before the POA Disciplinary Sub-Committee”

Complaint 3

“that on or around 22 May 2007 the POA breached an implied term in rule 28.7(b) of the rules of the POA by allowing members of the POA Disciplinary Committee and the General Secretary but not Mr Darken to speak at the POA Annual Conference on Emergency Motion (1)(b) relating to Mr Darken’s appeal to Conference against the decision of the Disciplinary Committee regarding disciplinary cases 89 and 90”

2. I investigated the alleged breaches in correspondence and a hearing took place on 2 November 2007. At the hearing, the Claimant represented himself. A witness statement was provided by Mr Maltby who also gave evidence on the Claimant’s behalf. The POA was represented by Mr Marriott of Lees Lloyd Whitley, solicitors. Mr Caton, POA General Secretary, provided a witness statement and gave evidence on the Union’s behalf. Mr Oxby, Chair of the Disciplinary Sub-Committee, also provided a witness statement but did not attend the hearing to give evidence. Both parties provided a written skeleton argument. A 563 page bundle of documents was prepared for the hearing by my office to which a further letter was added at the hearing by the Union.

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. The Claimant has been a member of the POA since 1988. He first held office in his local branch in 1993. Between 2001 and 2002 he was the elected Chairman of the Union and he was an elected member of the National Executive Committee (“the NEC”) between 2003 and 2007. He is experienced in the democratic structures of the Union.
5. On 12 July 2006, there was a meeting of the NEC at the Union’s premises in Edinburgh. I find that it was not unusual for there to be robust exchanges between

members at the meetings of the NEC but on this occasion there was an exchange between the Claimant and Mr Adams, and possibly others, to which the Claimant took exception.

6. On 15 July 2006, the Claimant wrote to the National Chairman, Mr Moses, complaining that he had been harassed, bullied, intimidated and insulted at the NEC meeting. He informed Mr Moses that if he did not take appropriate action against the members concerned he, the Claimant, would be “*compelled to report the matter to my employer to protect my rights under their code of conduct and discipline and performance standards*”. The Claimant and the other members of the NEC are employees of the Prison Service but they are on full-time release, enabling them to devote their working time to the POA whilst still being paid by the Prison Service.
7. The code to which the Claimant was referring is Prison Service Order 1215. Paragraph 3.1.1 of that document states “*All staff working in the Prison Service must report wrongdoing by others in the Service that they either witness or become aware of. Failure to report wrongdoing by others may itself be a disciplinary offence ...*” Only those words in italics are regarded by the Prison Service as being mandatory. The Claimant also relied upon the passage in Annex A to PSO1215 which states “Staff must not take any action on or off duty that could affect, cast doubt on or conflict with the performance of their official duties. For example, outside activities or membership of organisations which promote racism.”
8. Mr Moses replied to the Claimant by memo dated 20 July 2006. He noted the Claimant’s comments but said that he did not share his view. Mr Moses, who had chaired the NEC in question, stated that he would await production of the approved and accepted NEC minutes before commenting any further. There was no evidence before me as to when the minutes of this meeting were agreed at a subsequent NEC meeting but a decision was taken that they should not be published until after the Claimant’s disciplinary process had been completed. In any event, Mr Moses did not comment further to the Claimant in writing on this matter.
9. On or about 13 August 2006, the Claimant wrote to the Prison Service complaining about the unprofessional conduct of a colleague at the NEC meeting on 12 July.
10. It would appear that the Prison Service took no action on the Claimant’s complaint for some four months. On 6 December 2006, Mr Moses received a letter from the Prison Service informing him that, following a complaint from the Claimant to the Professional Standards Unit, the Prison Service was to conduct a Code of Discipline Investigation. The Investigation would be commissioned by a prison governor and carried out by a retired senior Prison Service official. The investigation was to commence on 15 December. The Union’s reaction was prompt and firm. By a letter dated 8 December, Mr Moses sought a meeting with the Director General of the Prison Service regarding their intention “*to take the unprecedented action of investigating the internal workings of NEC meetings*”.
11. On 10 December 2006, the Claimant wrote to the Union’s General Secretary, Mr Caton, having been advised to do so by the Prison Service. He explained why he was aggrieved and why he had reported the matter to the Prison Service. A response to that letter was sent by Mr Freeman, Acting General Secretary, on 12 December.

He informed the Claimant that on the facts now before him he considered that Rule 25.5 was engaged. Rule 25.5 is a provision in the Rules whereby the General Secretary may initiate internal disciplinary proceedings, but only after mediation has been attempted. Mr Freeman asked for the names of the individuals who would be party to that mediation. Also on 12 December, Mr Freeman sent a circular to members in which he acknowledged that any member of the Prison Service has the right to make a complaint to the employer if he feels it justified, but asserted that the POA would strongly resist any attempt by the Prison Service to interfere with its independence by investigating what was said and done at an NEC meeting.

12. At an NEC meeting on 13 December 2006, it was decided to instigate disciplinary proceedings against Mr Darken. Mr Freeman confirmed this in a letter to the full Disciplinary Committee dated 15 December 2006. The letter was copied to Mr Darken and all NEC members. The letter set out the breaches of rule as follows:

*“Under Rule 25.5(a)
'Filing a complaint with the Prison Service without exhausting the POAs
internal mechanism'
Contrary to Rule 25.1 (a) and (b).”*

13. From or about 18 December 2006, Mr Darken was suspended from Office within the POA.
14. On 9 January 2007, the Prison Service wrote to Mr Moses stating that it did not intend to proceed further with what it considered to be an internal POA matter *“bearing in mind your assurances that this issue will be dealt with through the POA internal process”*. On 23 January Mr Darken replied to Mr Freeman’s letter of 12 December informing him that the individuals who needed to be party to the mediation were Mr Adams and Mr Moses.
15. On 24 January 2007 Mr Freeman informed Mr Darken that there would be a meeting of a sub-committee of the Disciplinary Committee on 15 February to investigate the allegations against him and report its findings to the full committee. Mr Darken was notified that there were three disciplinary cases that were being brought against him. These were:
 - 15.1 Case 88 - an alleged breach of rule 25.1 (a) and (b) by misleading the NEC over an alleged practice at Feltham called *“Muslim Olympics”*.
 - 15.2 Case 89 - an alleged breach of rule 25.1 (a) and (b) by filing a complaint with the Prison Service without exhausting the POA’s internal mechanism.
 - 15.3 Case 90 - this complaint was in identical terms to case 89. The reason for there being two identical complaints was not made clear. It would appear that one originated from the NEC and one from Mr Adams. For all practical purposes, cases 89 made 90 proceeded as if one complaint.

16. On 29 January 2007, Mr Darken wrote to Mr Freeman informing him that he proposed calling one witness, Mr Chapple, and asking to be informed of the witnesses that were to be called against him so that he could prepare his cross-examination of them as envisaged in rule 28.3(c). On 6 February there were further exchanges of e-mails on the subject of witnesses which culminated in the General Secretary informing Mr Darken that the calling of witnesses was not a matter for him but for the Disciplinary Committee and that he had requested the Disciplinary Committee to inform Mr Darken of the identity of the witnesses as a matter of urgency. The Disciplinary Committee did not do this.
17. Also on 6 February 2007, Mr Caton wrote to Mr Darken informing him that the NEC and Mr Adams had made it clear that mediation was not an option in relation to Mr Darken's proposed disciplinary complaint. The letter continued "*It is therefore not possible to deal with this matter through mediation and this will now be placed before the POA Disciplinary Committee*". In fact, the POA took no further action on Mr Darken's proposed disciplinary complaint and it would appear that Mr Darken did nothing to follow it up.
18. On 13 February 2007, the Chairman of the Union's Disciplinary Sub-Committee, Mr Oxby, sent a circular memo to all members of the NEC and Officers. He asked anyone who attended the NEC meeting in Edinburgh on 12 July 2006 to make themselves available on 16 February to be interviewed by the Disciplinary Sub-Committee. He went on to state that, alternatively, they could forward a written statement of their recollection of that meeting. Mr Oxby described himself in that memo as "Chair of Investigation Disciplinary Team".
19. The Disciplinary Sub-Committee met on 15 February 2007 at Cronin House, the Union's headquarters in London. The Claimant was represented by a colleague, Mr Maltby. Case 88 was dealt with in the morning and cases 89 and 90 were dealt with together in the afternoon. The Claimant put his case and answered questions. There were no other witnesses present for him to cross-examine.
20. On 16 February 2007, the Claimant's witness Mr Chapple was interviewed by the Disciplinary Sub-Committee in the Claimant's absence. There are also witness statements dated 16 February from three members of the NEC.
21. On or about 22 February 2007, the Disciplinary Sub-Committee interviewed Mr Moses in person, Mr Caton and Mr Gillen by video link and Mr Gough by telephone. The Claimant was not present at any of these interviews.
22. Arising out of these meetings, the Disciplinary Sub-Committee submitted an undated report to the Disciplinary Committee. It stated that its terms of reference were to carry "*out an investigation into the complaint and to make recommendations to the full Committee*". It concluded that whilst some "*unparliamentary language*" had been used by all parties at the NEC meeting of 12 July 2006 it had been reported that this was nothing out of the ordinary. It was the firm belief of the Sub-Committee that the actions of the Claimant opened the door for the employer to investigate the internal processes and mechanisms of the Union and was highly damaging of it. The Sub-Committee found that the complaints against the Claimant in cases 89 and 90 under Rule 25.1(a) and (b) were

“upheld”. It went on to recommend that “*Mr Darken attend the full disciplinary committee for determination as to the nature of any award*”. The Disciplinary Sub-Committee further recommended that guidance be given to all NEC members about the expected conduct and choice of language within meetings.

23. On 14 March 2007, Mr Freeman invited the Claimant to attend a meeting of the Disciplinary Committee on 10 April. He stated that the meeting would consider the report of the Disciplinary Sub-Committee, any final statement by the Claimant and all aspects of the case. It would then “*decide on a verdict plus any sanctions, should that be necessary*”.
24. On 29 March 2007 the Claimant wrote to Mr Freeman to protest that he had not been allowed to cross-examine the witnesses who gave evidence to the Disciplinary Sub-Committee, in breach of Rule 28.3(c). He further stated that the Disciplinary Sub-Committee had informed him that the reason why witnesses had not been called was that they were carrying out their investigation more in line with the investigative stage of the Prison Service disciplinary process than the rules of the Union. The Claimant states that he was told he would be able to cross-examine witnesses at the Disciplinary Committee if the Sub-Committee decided that there should be a hearing.
25. On 29 March and 2 April 2007, the Claimant was sent copies of the transcripts of all the meetings that the Disciplinary Committee had held with witnesses and copies of the three written witness statements.
26. On 3 April 2007, the Claimant wrote to Mr Freeman requesting the presence of 16 witnesses at the hearing on 10 April. Mr Freeman responded on 4 April informing the Claimant that he had written to all 16 witnesses requesting their attendance. In those letters Mr Freeman stated that the Claimant wished to question them but they were under no obligation to attend.
27. The Disciplinary Committee met on 10 April 2007 to hear disciplinary cases 88, 89 and 90. Mr Oxby and one other member of the Disciplinary Sub-Committee participated. The Claimant was again represented by Mr Maltby. He cross-examined Mr Moses, Mr Caton and Mr Gillen at length. At the conclusion of the hearing, the Disciplinary Committee found against the Claimant. In its subsequent written report it accepted the findings of the Disciplinary Sub-Committee in respect of Case 88 and decided to bar the Claimant from holding local or national office for a period of 5 years for the breach of Rule 25.1(a) and expel him from the Union for the breach of Rule 25.1(b). In relation to cases 89 and 90, the Disciplinary Committee agreed that these two complaints should be merged and that only case 89 should continue. In that case it also accepted the findings of the Disciplinary Sub-Committee and decided to ban the Claimant from holding any local or national office for 5 years for the breach of Rule 25.1(a) and to impose a similar sanction for the breach of Rule 25.1(b). The Disciplinary Committee repeated the recommendation that all NEC members be given guidance as to their expected conduct and choice of language at meetings.

28. On 18 April 2007, the Claimant appealed against the decisions of the Disciplinary Committee in cases 88, 89 and 90. Such appeals are heard by Annual Conference. The next Annual Conference was to take place between 22 and 25 May 2007. The Rules provide for the delegates at Conference to be provided with the written representations of any member whose appeal is to be heard. The Claimant provided a lengthy written representation which he began with the words “*Firstly let me say that I fully accept that what I am accused of I did.*”
29. Rule 28.7 sets out quite briefly the manner in which Conference is to determine any such appeal. It provides:
- (b) the Conference will decide, by a simple majority based on a specific motion put by the General Secretary, whether or not to ratify the decision of the Disciplinary Committee.*
30. The Claimant’s appeal came before the Annual Conference on the 22 May 2007 as emergency motions 1(a) and 1(b). However, before these motions were reached, Mr Maltby raised a point of order about whether the Claimant should be allowed to address Conference. Mr Moses, as the Chairman of Conference, pointed out that the Rules do not allow the appellant to speak and ruled accordingly. Mr Maltby challenged that ruling, which is done by a motion to remove the Chair. The motion to remove the Chair was lost and the Chairman’s ruling stood.
31. The debate on the Claimant’s appeal took about 15 or 20 minutes, as is usual for such appeals. The General Secretary introduced the motions and Mr Maltby spoke on them both. On the motion relating to case 89 there was a very short intervention by Mr Midgley, asking Conference to support the motion. Mr Midgley had sat on the Claimant’s Disciplinary Sub-Committee but not the Disciplinary Committee which heard his case. Unusually, Conference called for a card vote on both motions. Emergency motion 1(a), which related to case 88, was defeated. This meant that the case against the Claimant in relation to that matter was effectively dismissed. On the other hand, emergency motion 1(b), which related to case 89 (and with it case 90) was carried. This meant that the decision of the Disciplinary Committee to debar the Claimant from holding local or national office for 5 years was upheld.
32. The Claimant commenced this complaint by a registration of complaint form dated 11 June 1007.

The Relevant Statutory Provisions

33. 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) ...
- (d) ...
- (e) ...

Section 108B Declarations and orders

(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

- (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;
 - (b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.
- (4) The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.

The Relevant Union Rules

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

Rule 12 CONFERENCE

12.10 A ruling by the Conference chairman may only be challenged by a motion supported by at least 10 Branches, that “the chairman vacate the chair”. Such a motion requires a two-thirds majority of those voting to be passed, in which event the Chairman’s ruling will be reversed, however the chairman will continue to preside.

12.11 Unless the Conference chairman agrees otherwise:

- (a) will read the mover of a motion may speak for not more than 5 minutes
- (b) no other delegate may speak for more than 3 minutes;
- (c) the mover may reply to the debate for not more than 5 minutes;
- (d) no other delegate may speak more than once on any motion.

Rule 25 DISCIPLINE

Rule 25.1 Subject to any statutory restrictions in force at the time, any member may be disciplined who:

- (a) acts against the interests of the Association’s membership locally or nationally;
- (b) behaves in a manner which can be construed as unacceptable – by word, act or omission;...

Report by General Secretary

Rule 25.5 If the General Secretary (or, in the General Secretary’s absence, his or her Deputy) becomes aware of an alleged breach of Rule 25.1 he/she will seek through the Association’s Mediation Policy a satisfactory resolution of any complaint. Where this proves to be unachievable or where all parties do not agree, then he/she will report it in writing to the Disciplinary Committee.

Rule 28 SANCTIONS BY DISCIPLINARY COMMITTEE

Proceedings

Rule 28.3 The Disciplinary Committee will give at least 21 days written notice to the member by registered or recorded delivery post to the member's last known home address (or work address if the home address is not known), stating:

- (a) briefly why it is alleged that the member is subject to action under Rule 25.1 and any Rule(s) it is alleged that the member has breached (if this has not already been done);*
- (b) the time, date and place of the meeting of the sub-committee of the Disciplinary Committee at the member's Branch at which disciplinary sanctions against the member are to be considered;*
- (c) the member's rights: to present written submissions in advance of the meeting; to make representations to the sub-committee before and during the meeting; to call and cross-examine witnesses; and to be represented throughout by a friend who is a member of the Association.*

Appeal

Rule 28.6 The member who has been sanctioned the complainant or the National Chairman may appeal in writing to the General Secretary within 14 days of receiving the notice of the decision of the Disciplinary Committee (or such longer period as the Disciplinary Committee determines on proof of special circumstances) in which case:

- (a) any expulsion or suspension (unless continued under Rule 27.1) will not take effect until the appeal has been determined;*
- (b) if the member sanctioned is a National Executive Committee member, the appeal will be determined by Conference;*
- (c) in all other cases, the appeal will be determined by an appeal committee.*

The National Chairman shall only exercise his right of appeal under this Rule and Rule 28.8 if he believes that the decision is contrary to law or a policy ordered to be annexed to the Rules by Conference.

Rule 28.7 On appeals to Conference under Rule 28.6(b):

- (a) the General Secretary will distribute with the final Conference agenda:*
 - (i) the report of the sub-committee of the Disciplinary Committee;*
 - (ii) the findings by the Disciplinary Committee; and*
 - (iii) any relevant written representations of the member or complainant.*
 - (iv) The National Chairman's reasons for believing that the decision is contrary to law or a policy ordered to be annexed to the Rules by Conference.*
- (b) the Conference will decide, by a simple majority based on a specific motion put by the General Secretary, whether or not to ratify the decision of the Disciplinary Committee.*

Complaint One

Summary of Submissions

35. The Claimant submitted that he was charged with “*filing a complaint with the Prison Service without exhausting the POA's internal mechanisms*” but that there is no rule within the Rule Book of the POA to that effect. He argued that the Disciplinary Committee had been given wrong terms of reference and that they were not entitled to take the action against him that they did on those terms of reference.

36. Mr Marriott, for the Union, submitted that Rules 25.1(a) and (b) are expressed in general terms and are wide ranging. He argued that there were ample facts upon which this charge could be put and that it was far from perverse to pursue this disciplinary action. Mr Marriott pointed out that the Claimant made his complaint to the Prison Service on or about 13 August 2006 without ascertaining what further steps might be taken by Mr Moses subsequent to his letter of 20 July and without writing to the General Secretary seeking to raise a disciplinary case against Mr Adams and others.

Conclusion – Complaint One

37. The Claimant complained that:

“that on or around 18 December 2006 the POA breached rule 25.5 of the rules of the POA by charging and taking disciplinary action against Mr Darken for actions alleged to be contrary to subsections (a) and (b) of rule 25.1.”

38. The relevant Rules are as follows:

Rule 25 DISCIPLINE

Breaches of discipline

Rule 25.1 Subject to any statutory restrictions in force at the time, any member may be disciplined who:

- (a) acts against the interests of the Association’s membership locally or nationally;*
- (b) behaves in a manner which can be construed as unacceptable – by word, act or omission;...*

Report by General Secretary

Rule 25.5 If the General Secretary (or, in the General Secretary’s absence, his or her Deputy) becomes aware of an alleged breach of Rule 25.1 he/she will seek through the Association’s Mediation Policy a satisfactory resolution of any complaint. Where this proves to be unachievable or where all parties do not agree, then he/she will report it in writing to the Disciplinary Committee.

39. The charge that was notified to the Claimant by Mr Freeman’s letter of 15 December 2006 was in the following terms:

“Under Rule 25.5(a). ‘Filing a complaint with the Prison Service without exhausting the POAs internal mechanisms’. Contrary to 25.1(a) and (b).”

In my judgment, there is no doubt that this form of words effectively communicated the Union’s intention to charge the Claimant with acting against the interests of the Association under Rule 25.1(a) and behaving in a manner which can be construed as unacceptable under Rule 25.1(b). The words of the charge also gave particulars of the alleged breaches; namely, *“Filing a complaint with the Prison Service without exhausting the POAs internal mechanisms”*. Indeed, in his closing submissions, Mr Darken conceded that he would not have brought this complaint if the charges against him had been worded along the lines, *“By filing a complaint with the Prison Service without exhausting the POA’s internal mechanism the Claimant breached Rule 25.1(a) by committing an act against the interests of the Association’s membership ... and Rule 25.1(b) by behaving in a manner which can be construed as unacceptable...”*. I find that the Claimant’s criticism of the charge that was put to him by the Union is without foundation and did not constitute a breach of Rule 25.5.

40. Whilst the Claimant gave considerable evidence as to why he felt justified in taking his disciplinary allegations to his employers first, I find that such evidence is not relevant to the determination of this complaint by me. It is evidence that goes to the merits of the charges against him and it is not for me to determine the merits of the charges. I can only consider a case of this nature if the facts alleged against the member could not, on any reasonable interpretation of the rules, constitute a breach of them. On the facts of this case, I find that the admitted actions of the Claimant were capable of constituting a breach of Rule 25.1(a) and/or Rule 25.1(b).
41. For the above reasons, I refuse to make the declaration sought by the Claimant that on or around 18 December 2006 the POA breached rule 25.5 of its rules by taking disciplinary action against the Claimant for conduct allegedly contrary to subsections (a) and (b) of rule 25.1.

Complaint Two

Summary of Submissions

42. The Claimant described this complaint as being very straightforward and simple. In his submission, Rule 28.3(c) entitled him to cross-examine witnesses at the meeting of the Disciplinary Sub-Committee on 15 February 2007 but no witnesses were called on that day for him to cross-examine. He argued that on a later date the Disciplinary Sub-Committee heard evidence from four other witnesses whom he had not called, but that he was not asked to be present on that occasion and he was therefore unable to cross-examine them.
43. Mr Marriott, for the Union, conceded that there had been a breach of Rule 28.3(c) by not providing the Claimant with the opportunity to cross-examine the witnesses who the Disciplinary Sub-Committee called to give evidence to it. Nevertheless, Mr Marriott submitted that the Claimant had not been disadvantaged by this breach, as he had been given the transcripts of the evidence of the witnesses to the Disciplinary Sub-Committee and he had been able to cross-examine them when they appeared before the full Disciplinary Committee on 10 April 2007. Mr Marriott argued that the Disciplinary Committee had re-heard the entire complaint and had reached its own decision on liability before considering the appropriate sanction.

Complaint Two – Conclusion

44. The Claimant complained that:

“that on or around 15 February 2007 the POA breached rule 28.3(c) of the rules of the POA by failing to call and allow Mr Darken to cross-examine witnesses requested by Mr Darken at a meeting before the POA Disciplinary Sub-Committee”

45. Rule 28.3 provides that:

Rule 28 SANCTIONS BY DISCIPLINARY COMMITTEE

Proceedings

Rule 28.3 The Disciplinary Committee will give at least 21 days written notice to the member by registered or recorded delivery post to the member’s last known home address (or work address if the home address is not known), stating:

- (a) *briefly why it is alleged that the member is subject to action under Rule 25.1 and any Rule(s) it is alleged that the member has breached (if this has not already been done);*
- (b) *the time, date and place of the meeting of the sub-committee of the Disciplinary Committee at the member's Branch at which disciplinary sanctions against the member are to be considered;*
- (c) *the member's rights: to present written submissions in advance of the meeting; to make representations to the sub-committee before and during the meeting; to call and cross-examine witnesses; and to be represented throughout by a friend who is a member of the Association.*

46. There was a dispute between the parties as to the meaning of Rule 28 and the respective roles of the Disciplinary Sub-Committee and the Disciplinary Committee in the disciplinary process. The Claimant considered that it was the role of the Disciplinary Sub-Committee to determine liability and that the role of the Disciplinary Committee was restricted to determining only the sanction. On the other hand, Mr Caton considered that the Disciplinary Sub-Committee merely made recommendations and it was for the Disciplinary Committee to decide both liability and any sanction. This disagreement is rooted in the unclear drafting of Rule 28. Mr Caton gave evidence that Rule 28 was amended at the Annual Conference in 2007 to make it clear that the Disciplinary Sub-Committee now has an exclusively investigatory function. In this case, the ways in which the Disciplinary Sub-Committee and the Disciplinary Committee expressed themselves as to their respective roles suggest that neither had a clear view of its relationship with the other. Be this as it may, I find that Rule 28.3(c) requires that a member who is subject to the disciplinary procedure is entitled to ask questions of those witnesses who are heard by the Disciplinary Sub-Committee. The Claimant was not given this opportunity and so the Union has, in my judgment, correctly conceded liability.
47. For the above reasons, I make the declaration sought by the Claimant that on or around 15 February 2007 the POA breached rule 28.3(c) of its rules by failing to allow him to cross-examine the witnesses him who gave evidence to the POA Disciplinary Sub-Committee.
48. When I make a declaration I am required by Section 108B(3) of the 1992 Act to make an enforcement order, unless I consider that to do so would be inappropriate. Mr Marriott urged me not to make an enforcement order on the grounds that the Claimant had not been disadvantaged by not being able to cross-examine the Union's witnesses before the Disciplinary Sub-Committee. He submitted that the Claimant had been able to cross-examine the same witnesses before the Disciplinary Committee and that the Disciplinary Committee had considered the matter totally afresh, reaching its own verdict on liability. There is some weight to Mr Marriott's submission as the Disciplinary Committee did reconsider the entire case against the Claimant. However, in my judgment, it did not do so to the exclusion of the findings reached by the Disciplinary Sub-Committee. The Disciplinary Sub-Committee found in terms that the complaints against the Claimant were "Upheld" and the report of the Disciplinary Committee states in terms that it fully accepted the findings of the Disciplinary Sub-Committee. I further note that two members of the Disciplinary Sub-Committee were on the full Disciplinary Committee and that not all the witnesses who gave evidence to the Disciplinary Sub-Committee gave evidence to the Disciplinary Committee. Mr Gough did not do so. In these circumstances I am unable to state with the requisite degree of confidence that the

findings of the Disciplinary Committee would have been the same if the Claimant had been given the opportunity to cross-examine the witnesses before the Sub-Committee and influence its findings. The Disciplinary Sub-Committee might have come to a different finding and this might have had an effect on the Disciplinary Committee. The chances of this happening were not overwhelming but neither were they negligible. What is certain, however, is that the Union's breach of rule deprived the Claimant of whatever chance he might have had to influence the findings of the Disciplinary Sub-Committee in this way.

49. For the above reasons I consider that it is appropriate that I make an Enforcement Order. The Enforcement Order that I am requested to make by the Claimant is one which permits him to hold local office. He does not seek to overturn the decision of the Disciplinary Committee that he be banned from National Office for 5 years. Having regard to the nature of the Union's breach of rule and all the circumstances of the case, including the Claimant's request, the Enforcement Order I make is that the Union shall treat as void and as of no effect those parts of the decision of its Disciplinary Committee of 10 April 2007 that barred the Claimant from holding local office for five years.

Complaint Three

Summary of Submissions

50. The Claimant submitted that it was an implied term of Rule 28(7)(b) that the Appellant should be allowed to address the Annual Conference on the motion to ratify the decision of the Disciplinary Committee. He argued that Mr Adams had been allowed to do so in 2001 and Mr Spratt had been allowed to do so in 2006 and 2007. He further argued that the Area Chairman (Scotland) had been allowed to address Conference, although not a delegate. In the Claimant's submission he should either have been allowed to address Conference or the motion should have been put and voted upon without any discussion. He considered that the prejudice to him of not allowing him to speak was compounded by the fact that a member of the Disciplinary Sub-Committee, Mr Midgeley, participated in the debate, although briefly. The Claimant accepted that his appeal to Conference was not conducted by way of rehearing. In his submission, the rules of natural justice apply to this situation and that a high standard of fairness was required as he was under threat of expulsion as regards case 88 and under threat of being removed from one of the highest positions of the Union as regards cases 89 and 90.
51. Mr Marriott, for the Union, submitted that the appeal to Conference was not by way of a rehearing but a simple motion calling upon Conference to ratify the decision of the Disciplinary Committee. He argued that the normal rules of Conference as to who may speak on any motion should apply. Rule 12.11 provides that this shall be elected delegates, unless the Conference Chairman agrees otherwise. Mr Marriott pointed out that Mr Maltby had asked the Chairman to exercise his discretion to allow the Claimant to address Conference but he was refused. Mr Marriott distinguished the cases of Mr Adams, Mr Spratt and the Area Chair (Scotland) from that of the Claimant on the basis that none of them were appealing from a decision made against them by the Disciplinary Committee. He also referred to an appeal from a decision of the Disciplinary Committee in 2006 in which the appellants were

not allowed to speak. Accordingly, in Mr Marriott's submission, the rules of the Union were properly applied to the Claimant and the Chairman acted within his discretion in refusing the request to allow the Claimant to address Conference. As to an implied term that Rule 28.7(b) be read as incorporating the right of an appellant to address Conference, Mr Marriott argued that the rules gave the Claimant the right to submit written representations, which he had done, and that on the facts of this case natural justice did not require a term to be implied to the effect that the appellant has the right to be heard by Conference in person. Mr Marriott argued that no new facts emerged at the appeal and the Claimant could not have said anything more than what he had already put forward before the Conference in his written submissions. He further argued that the sanction imposed by the Disciplinary Committee did not affect the Claimant's livelihood and that accordingly no higher implied term would be appropriate.

Complaint Three – Conclusion

52. The Claimant complained that

“that on or around 22 May 2007 the POA breached an implied term in rule 28.7(b) of the rules of the POA by allowing members of the POA Disciplinary Committee and the General Secretary but not Mr Darken to speak at the POA Annual Conference on Emergency Motion (1)(b) relating to Mr Darken's appeal to Conference against the decision of the Disciplinary Committee regarding disciplinary cases 89 and 90”

53. Rule 28.7(b) provides

“The Conference will decide, by a simple majority based on a specific motion put by the General Secretary, whether or not to ratify the decision of the Disciplinary Committee.”

54. It is not suggested by the Claimant that there has been any breach of the express terms of Rule 28.7(b). He argued that a term should be implied into Rule 28.7(b) which requires the Union, on any disciplinary appeal to Conference, to give the appellant the opportunity to address conference in person. He submitted that such a term should be implied on the grounds of natural justice and that, in his case, the Union breached that implied term.

55. The term “natural justice” is one which is often misused as a term of general criticism of a process under which an aggrieved person has suffered a detriment as the result of a process which has failed to measure up to the aggrieved person's sense of best practice. In the context of domestic disciplinary proceedings, this misunderstanding has been compounded by the legal concept of ‘natural justice’ having no clear parameters and the need, in all but the most obvious cases, for each complaint to be determined on its own facts.

56. On the facts of this case, it was not argued that the Claimant was heard by a biased tribunal, or that he was not given notice of the charges against him, or that he was not given the right to be heard in answer to those charges. It was also established that he was allowed to call any witnesses who were prepared to come forward on his behalf and that he was provided with transcripts of the evidence given both for and against him to the Disciplinary Sub-Committee in his absence. Further, he was

allowed to cross-examine the witnesses who gave evidence before the Disciplinary Committee, which re-heard the whole case and had the final say on both liability and sanction. As to the appeal to Conference, it was common ground that this was not a rehearing. Such appeals proceed by way of an ordinary motion to Conference. Over the four days of the 2007 Conference there were 222 motions to be debated in addition to seven emergency motions and contributions from the three main political parties and 11 other guest speakers. The appeal was subject to the rules of debate which restricted the mover to five minutes and any other delegate to three minutes, resulting in the actual appeal lasting between 15 and 20 minutes. In this context the Union circulated to delegates in advance a six page written submission prepared by the Claimant to support his appeal. Furthermore, his representative throughout the disciplinary process, Mr Maltby, addressed Conference on his behalf, with the Claimant present in the hall. Having regard to the disciplinary process as a whole and particular regard to the nature of the appeal procedure and the Claimant's right to have written representations circulated to delegates in advance, I find that there is no term to be implied into Rule 28.7(b), whether by reason of natural justice or otherwise, which gave the Claimant the further right to address Conference personally.

57. For the above reasons I refuse to make the declaration sought by the Claimant that on or around 22 May 2007 the POA breached an implied term of rule 28.7(b) of its rules by not allowing the Claimant to speak at its Annual Conference on the matter of his appeal to Conference against the decision of the Disciplinary Committee on 10 April 2007 to discipline him.

David Cockburn
The Certification Officer