

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

IN A MATTER OF A COMPLAINT MADE AGAINST UNISON

Date of decision: 4 May 2000

Date reasons published: 16 June 2000

DECISION

1. I have to decide whether I have jurisdiction to hear an application made to me by Mr S Hill relating to an alleged breach by his union, UNISON, of the rules of the union relating to one of the matters mentioned in section 108A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”). The application concerns, specifically, disciplinary proceedings brought by the union against the applicant in relation to an election address submitted by the applicant in an election in which he was a candidate. In order to decide whether or not I have jurisdiction to hear the complaint I held a hearing on that issue on 3 May 2000. The applicant represented himself, and the Union were represented by Mr Brian Langstaff QC.

2. My jurisdiction, if any, to hear the application is contained in section 108A of the 1992 Act. This is the first hearing concerning an application under sections 108A to 108C of the Act, which were inserted by section 29 of and Schedule 6 to the Employment Relations Act 1999. The relevant parts of section 108A read:

“108A.-(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

- (a) the appointment or election of a person to, or the removal of a person from, any office;*
- (b) disciplinary proceedings by the union (including expulsion);*
- (c) the balloting of members on any issue other than industrial action;*
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;*
- (e) such other matters as may be specified in an order made by the Secretary of State.*

(3)

(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).*

(10) *For the purposes of subsection (2)(d) a committee is an executive committee if -*

(a) *it is a committee of the union concerned and has power to make executive decisions on behalf of the union or on behalf of a constituent body,*

(b) *it is a committee of a major constituent body and has power to make executive decisions on behalf of that body, or*

(c) *it is a sub-committee of a committee falling within paragraph (a) or (b).*

(11) *For the purposes of subsection (2)(d) a decision-making meeting is -*

(a) *a meeting of members of the union concerned (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union, is final as regards the union or which, under the rules of the union or a constituent body, is final as regards that body, or*

(b) *a meeting of members of a major constituent body (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union or the body, is final as regards that body.*

(12) *For the purposes of subsections (10) and (11), in relation to the trade union concerned -*

(a) *a constituent body is any body which forms part of the union, including a branch, group, section or region;*

(b) *a major constituent body is such a body which has more than 1,000 members.”*

The applicant’s case

3. The applicant’s argument contains a number of steps, and was greatly clarified at the hearing.

He argued as follows:

4. In October 1999, following a decision of the union's National Executive Committee ("the NEC"), taken at a meeting of the NEC on 7 October 1998, the union instituted disciplinary action against the applicant. This action has not yet resulted in a determination by the union, but the applicant argues that any such determination will potentially constitute unjustifiable disciplinary action contrary to sections 64 to 67 of the 1992 Act. The relevant provisions of those sections are as follows:

" 64.-(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.

(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that -

(a) he should be expelled from the union or a branch or section of the union,

(b) he should pay a sum to the union, to a branch or section of the union or to any other person;

(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,

- (d) *he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,*

- (e) *another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or*

- (f) *he should be subjected to some other detriment;*

and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.

(3)

(4) *Subject to that, the remedies for infringement of the right conferred by this section are as provided by sections 66 and 67, and not otherwise.*

(5) *The right not to be unjustifiably disciplined is in addition to (and not in substitution for) any right which exists apart from this section; and subject to section 66(4), nothing in this section or sections 65 to 67 affects any remedy for infringement of any such right.*

65.-(1) *An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is -*

(a) *conduct to which this section applies, or*

(b) *something which is believed by the union to amount to such conduct;*

but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing).

(2) *This section applies to conduct which consists in -*

(a) *failing to participate in or support a strike or other industrial action (whether by members of the union or by others), or indicating opposition to or a lack of support for such action;*

(b) *failing to contravene, for a purpose connected with such a strike or other industrial action, a requirement imposed on him by or under a contract of employment;*

(c) *asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or*

is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law;

(d) encouraging or assisting a person -

(i) to perform an obligation imposed on him by a contract of employment, or

(ii) to make or attempt to vindicate any such assertion as is mentioned in paragraph (c); or

(e) contravening a requirement imposed by or in consequence of a determination which infringes the individual's or another individual's right not to be unjustifiably disciplined.

(3)

(6) An individual is not unjustifiably disciplined if it is shown -

(a) that the reason for disciplining him, or one of them, is that he made such an assertion as is mentioned in subsection (2)(c), or encouraged or assisted another person to make or attempt to vindicate such an assertion,

(b) *that the assertion was false, and*

(c) *that he made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith,*

and that there was no other reason for disciplining him or that the only other reasons were reasons in respect of which he does not fall to be treated as unjustifiably disciplined.

(7)

66.-(1) *An individual who claims that he has been unjustifiably disciplined by a trade union may present a complaint against the union to an industrial tribunal.*

(2)”

5. In the applicant’s view Unison’s rules B4.5, D2.1 and D2.8.13 prohibit the union from acting contrary to those sections.

6. Rule B.4.5 states as the (final) aim and objective of the union “*to perform such other duties as engage in such other business as a trade union may lawfully undertake*”.

7. Rule D2.1 states:

“ The general management and control of the Union between National Delegate Conference shall be vested in the NEC, which shall comprise representatives elected from the Regions and Service Groups. It shall have full power and authority to act on behalf of the Union in every respect and for every purpose falling within the objects of the Union. It shall not do anything that is inconsistent with these Rules or the policy of the Union as laid down by the National Delegate Conference.”

8. Rule 2.8.13 states that:

“As part of its general power under rule D.2.1 above and without limiting the scope of that power the NEC shall have the following powers...

- *To take all such action as shall seem to them to be necessary to ensure that the income property and funds of the union are safeguarded and the objects and purposes of the union achieved.”*

9. The applicant argues that these rules taken together prohibit the union from acting “unlawfully”. In preparing to take disciplinary action against him, which would if taken be contrary to section 64 of the 1992 Act, the union was preparing to act unlawfully and was thus breaching or threatening to breach its rules in relation either to disciplinary proceedings or to the constitution or proceedings of the NEC.

10. Thus, he argues, I have jurisdiction to hear his application under either section 108A (2)(b) or section 108A(2)(d) of the 1992 Act.

The union's counterargument

11. Mr Langstaff QC for the union argued that I do not have jurisdiction to hear this application under either section 108A(2)(b) or section 108A(2)(d).
12. His argument in relation to section 108(2)(d) was straightforward and was accepted by the applicant: the meeting of the NEC which decided to take disciplinary proceedings against the applicant, allegedly contrary to the union's rules, took place on 7 October 1998. The application to the Certification Officer was made on 25 November 1999, more than six months after the alleged breach of rules took place. Any such application would be out of time by virtue of section 108A(6)(a) of the 1992 Act.
13. In relation to my jurisdiction under section 108A(2)(b), Mr Langstaff put forward the following arguments.
14. Firstly, Mr Langstaff argued that my jurisdiction derives entirely from statute; I have no inherent jurisdiction over trade union activities. Section 108A to 108C confer a jurisdiction over breaches of union rules which is, deliberately, limited to those matters described in section 108A(2); I do not have jurisdiction over the entire rule book and it would be wrong to interpret section 108A as giving me such jurisdiction.

15. In particular, section 108A(2)(b) confers jurisdiction over breaches of rules relating to disciplinary proceedings by the union. It does not purport to alter the effect of sections 64 to 67 so as to give me jurisdiction over the separate right of union members not to be subject to unjustifiable discipline. A wide interpretation of section 108A(2)(b) would imply that I have jurisdiction over such matters and thus cannot be right. It follows that there must be a close connection and relationship between the rule breached and one of the matters listed in section 108A(2); to qualify under S108A(2)(b) the rule allegedly breached must be a *disciplinary rule*: one which *on its face* concerns discipline.

16. In support of his argument that my jurisdiction under section 108A should be construed narrowly, Mr Langstaff drew my attention to my decision (number CO/1964/14) of 25 November 1997, in relation to an application concerning the merger between the Civil and Public Services Association and the Public Services, Tax and Commerce Union. That decision also concerned the question as to whether I had jurisdiction to hear an application. In that case my jurisdiction derived from section 103(1)(b) of the 1992 Act, in that the applicants alleged that the unions involved had each failed to comply with a rule of the union relating to the passing of a resolution approving an instrument of amalgamation. My decision that I did not have jurisdiction was based, broadly, on the premise that section 103(1)(b) should be interpreted narrowly. The decision was upheld on appeal to the Employment Appeal Tribunal (EAT/25/98/SV). Although Mr Langstaff did not argue that the earlier decision was binding on me in this case, he suggested that “relating” should be read in the same sense here, because it was desirable to read the same word with the same scope in analogous provision of the same statute.

17. Mr Langstaff then argued that even if I took a wider view of the scope of S108A(2)(b), the applicant could not succeed because there was no conceivable breach of the rules in his case. The alleged breach consists of the union's failure to comply with section 64 of the 1992 Act. Under section 64(2), that section is breached only where the member is subject to a determination by a trade union. Mr Hill has not yet been subject to any such determination, and until he is it cannot be argued that there is a breach of these provisions.

18. Finally, Mr Langstaff argued that even if the applicant can produce a plausible claim that the union is in breach of section 64 of the 1992 Act, this cannot conceivably be argued to be a breach of the rules of the union. Section 66 of the Act provides the remedy for breaches of section 64: the right to present a complaint to an Employment Tribunal. There is nothing in sections 64 to 67 which suggests that their provisions should be viewed as incorporated into union rule books and although it would be possible for a union rule book to contain terms whose effect was to incorporate those provisions into the rules, the UNISON rule book (in particular the use of the words "lawful" in its general rules) does not do so.

My decision and my reasons

19. In my view I do not have jurisdiction to hear this application, either under section 208A(2)(b) or section 208A(2)(d).

Jurisdiction under section 208(2)(d)

20. As set out above, the applicant accepted that I do not have jurisdiction to hear his application under this section because the event about which he complains took place more than six months before he made his application to me. I agree with this analysis. However, there is another reason why I could not have jurisdiction to hear an application in relation to the decision taken at a meeting of the union NEC on 7 October 1998, however promptly the applicant had complained about it. Sections 108A to 108C of the 1992 Act were inserted into the 1992 Act by the Employment Relations Act 1999. The provisions were brought into force by a commencement order (SI 1999/2830) on 25 October 1999. Transitional provisions of the commencement order provide that the provisions come into force only in relation to breaches or threatened breaches of union rules which take place (or are threatened) on or after 27 July 1999 (the date on which the Employment Relations Act received Royal Assent). The meeting to which the application relates took place on 7 October 1998, so sections 108 A to 108C of the Act cannot apply to that event and consequently I have no jurisdiction in relation to it.

Jurisdiction under section 108A(2)(b)

21. I do not consider that the alleged breach, or threatened breach, of rules B4.5, D2.1 and D2.8.13 can correctly be described as a breach or threatened breach of the rules of UNISON relating to disciplinary proceedings by the union.

22. I was grateful to Mr Langstaff for drawing my attention to my earlier decision in relation to the PTC and CPSA. I agree with him that I am not bound to interpret section 108A in the same manner as section 103(1)(b). Despite the fact that the same words “relating to” are used in both provisions, the context is quite different. Section 103 confers jurisdiction in relation to a breach of rule as part of a group of provisions which otherwise entirely concern statutory controls on unions. It is legitimate therefore to regard my jurisdiction in relation to the union’s rules on amalgamations and transfers as very limited. By contrast sections 108A to 108C confer an entirely new jurisdiction which is concerned exclusively with breaches of union rules. The two jurisdictions are perhaps less analogous than Mr Langstaff suggests and different considerations may therefore apply.
23. Nevertheless, I agree that the jurisdiction conferred by sections 108A to 108C is deliberately limited to breaches of union rules relating to those matters described in section 108A(2); I do not have a general jurisdiction over breaches of union rules. While I do not accept Mr Langstaff’s argument that I have jurisdiction only over rules which are on their face concerned with the matters set out in S108A(2) - there may well be rules which are of general application but which in the context in which they are allegedly breached clearly relate to one of those matters - I do not consider that the relationship is close enough in this case. In order to conclude that I have jurisdiction, I would have to take the view that a breach of the union’s rules in the context alleged by the applicant is a breach of rules relating to discipline. For the reasons set out below I consider that such an interpretation would not be legitimate.

24. It is not necessary for me to decide at this stage whether the applicant is correct in his assertion that UNISON rules B4.5, D2.1 and D2.8.13 require compliance with sections 64 to 67 of the 1992 Act; in order to establish that the rules relate to discipline it is enough to show that they can plausibly be argued to have that effect. However, in my view they fail even this lower test. The rules cited are very general rules, clearly designed to confer residual powers on the union and the NEC, rather than specifically to restrict its behaviour, either in relation to discipline or anything else. Although it is conceivable that general rules could attract the requirement to comply with statutory provisions about unfair discipline, there is nothing to suggest that these rules should have such an effect; in the circumstances it seems to me inconceivable that the rules could plausibly be interpreted as doing so.
25. I would add that given section 67 clearly specifies the remedy for breach of the statutory right conferred by section 64 of the Act, it would in my view be wrong to interpret these statutory provisions in themselves as forming part of the union's rules for the purposes of section 108A.
26. For completeness I should add that while it is unnecessary to consider whether the union's action could plausibly be described as contrary to section 64 of the 1992 Act, I have one comment on Mr Langstaff's argument as set out in paragraph 17. If the union's rules did require compliance with section 64, I would have jurisdiction to hear an application in relation to an actual *or threatened* breach of that section; there would be no need for the union to have actually made a determination contrary to the section.

27. In conclusion I consider that:
- (a) the events which allegedly constitute a breach of the union's rules relating to the constitution or proceedings of the unions executive committee took place before 27 July 1999, and therefore before the earliest time in relation to which I could have jurisdiction; and
 - (b) there has been no alleged breach, or threatened breach, of a rule of the union which relates to disciplinary proceedings of the union.
28. In such circumstances and for the reasons given, I found, on the 4 May 2000, that I did not have the jurisdiction to determine the application.
29. The parties were notified of my decision by telephone on 4 May 2000.

E G WHYBREW
Certification Officer