

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER
SECTIONS 25(1), 55(1) and 108A(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

Mr J Hicks

v

**Unite the Union
(No 2)**

Date of Decision

24 October 2014

DECISION

Upon application by Mr Hicks (“the claimant”) under sections 25(1), 55(1) and 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

1. I refuse the claimant’s application for a declaration that, in the course of an election held between 18 March 2013 to 12 April 2013, Unite the Union breached section 46(1) of the 1992 Act by allegedly not according equally to all members of the union the entitlement to vote in breach of section 50(1) of the 1992 Act.
2. I refuse the claimant’s application for a declaration that, in the course of an election held between 18 March and 12 April 2013, Unite the Union breached rule 15(1) of its rules by balloting 158,824 individuals who were allegedly not members of the union.
- 3(a). I refuse the claimant’s application for a declaration that Unite the Union breached section 24(1) of the 1992 Act by allegedly removing from its register of members 158,824 members who were in arrears of contributions prior to them being excluded from the union.
- 3(b). I make a declaration that Unite the Union breached section 24(1) of the 1992 Act by having failed to secure, so far as is reasonably practicable, that the entries in its register of members were accurate and kept up-to-date.
4. I refuse the claimant’s application for a declaration that, in the course of an election held between 18 March and 12 April 2013, Unite the Union breached section 51(3)(a) and (b) of the 1992 Act by including a document with some ballot papers which allegedly had the consequence that those members were not allowed to vote without interference from or constraint imposed by the Union and without incurring any direct cost to themselves.

5. I refuse the claimant's application for a declaration that, in the course of an election held between 18 March and 12 April 2013, Unite the Union breached section 51A(3) and 51A(6)(b) of the 1992 Act by allegedly instructing its independent scrutineer to include an additional insert with some but not all the ballot papers to be distributed to members in that election.

6. I make a declaration that on or around 27 March 2013 Unite the Union breached paragraph 2.3 of Appendix 5 of its rules by not submitting a complaint for consideration by the Executive Council, which complaint was made by the claimant against Mr Steve Turner in the claimant's email to the General Secretary of 22 March 2013 and his email to Mr Murray of 26 March 2013.

7. I refuse the claimant's application for a declaration that between 1 January and 15 April 2013 Unite the Union breached paragraph 2.7(a) of the 'General Secretary Election 2013 Ballot Rules and Guidelines for the Conduct of the Ballot' by allegedly using the union's resources to support a particular candidate in the election

8. I refuse the claimant's application for a declaration that between January 2013 and 15 April 2013 Unite the Union held an election that failed to comply with its rules by Mr Turner having allegedly breached rules 5.1, 5.2, 27.1.3 and 27.1.5 when campaigning for Mr McCluskey.

Enforcement Orders

9. In respect of the declaration I have made under paragraph 3(b) above, I am required by section 25(5A) of the 1992 Act to make an enforcement order unless I consider that to do so would be inappropriate. For the reasons I give below I do not consider it appropriate to make an enforcement order in this matter.

10. In respect of the declaration I have made under paragraph 6 above, 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. I consider that it is appropriate to make an enforcement order. The order I make is as follows.

11. On or before 19 December 2014, Unite the Union is to submit for consideration by the Executive Council, or a sub-committee thereof, the complaint made by the claimant against Mr Turner under rule 27 of the rules of the Union in his email to the General Secretary of 22 March 2013 and his email to Mr Murray of 26 March 2013 for it to determine whether an investigation of that complaint should be initiated.

REASONS

1. Mr Jeremy Hicks (known as Jerry Hicks) brought this application as a member of Unite the Union ("Unite" or "the Union"). He did so initially by a registration of complaint form which was received at my office on 6 September 2013.
2. Following correspondence with my office, Mr Hicks confirmed his complaints in the following terms:

Complaint 1:

'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached section 46(1) of the 1992 Act in that Mr McCluskey was declared elected as General Secretary following an election which did not comply with section 50(1) of the 1992 Act. This section states that "entitlement to vote shall be accorded equally to all members of the trade union". In the election for General Secretary the Union balloted 158,824 members who were not members of the union, and/or otherwise balloted persons who were not members of the union, and/or failed to ballot all of the members of the Union.'

Complaint 2:

'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached rule 15.1 of its rules in that the rule provides that 'all elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union' but in the election which ended on that date the Union balloted 158,824 individuals outside the 'whole membership of the Union', and/or otherwise balloted persons who were outside the 'whole membership of the Union', and/or failed to ballot the 'whole membership of the Union'. Alternatively there is an implied rule that only members will be balloted in an election for General Secretary.'

Complaint 3

'In breach of section 24(1) of the 1992 Act Unite the Union failed to secure, so far as is reasonably practicable, that the entries in its register of members are accurate and have been kept up to date, in that:

- a) Members who were in arrears of contributions were removed from the register prior to the Union having excluded them from membership in accordance with its rules. In particular 158,824 members in arrears with their subscriptions who were not excluded from the Union were removed from the register for the purposes of the annual return for the year end 31 December 2012 and yet balloted in the General Secretary election for which the electorate was established by reference to the membership on 31 January 2013.
- b) The Union failed to have, or if it had one failed to properly operate it, a system for ensuring that its membership register was up to date, in that members who had been in arrears of contributions for substantial periods of time were not excluded from membership within a reasonable time period.'

Complaint 4

'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached section 51(3)(a) and (b) of the 1992 Act in that members were not allowed to vote without constraint imposed by the Union and without incurring any direct cost to themselves in that the Union included documents with some of the voting papers that might have caused members to believe that their right to vote was contingent upon them starting or continuing to pay contributions or clearing any arrears of contributions.'

Complaint 5

"In the course of an election held between 18 March and 12 April 2013 Unite the Union breached sections 51A(3) and 51A(6)(b) of the 1992 Act with regard to the independent person it had appointed for the purposes of that election, namely Election Reform Services Limited, in that Unite:

- a) failed to require that ERS Ltd carried out its functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice, and
- b) failed to ensure that ERS Ltd carried out its functions and that there was no interference with its carrying out of those functions which would make it reasonable for any person to call into question the independence of ERS Ltd in relation to the Union.

It is alleged that these breaches occurred by Unite having instructed ERS Ltd to include with some but not all the ballot papers distributed an insert that might have caused members to believe that their right to vote was contingent upon them starting or continuing to pay contributions or clearing any arrears of contributions."

Complaint 6

'On or around 27 March 2013 the Union interfered with the proceedings of the Executive Council by preventing Jerry Hicks's complaint that Steve Turner had acted in a matter that could lead to a disciplinary charge from being considered by the Executive Council. In breach of the directions given under rule 27.2, in particular paragraph 2.3 of Appendix 5 to the rules, the Executive Council were thereby prevented from exercising the discretion vested in them under the rules to decide whether or not to order a disciplinary investigation.'

Complaint 7

'Between 1 January 2013 and 15 April 2013 Unite the Union breached paragraph 2.7(a) of the directions given for the conduct of the 2013 General Secretary Election by the Executive Council under rule 16.1 in that the Union's resources were used to support a particular candidate by Steve Turner, a full time employee of the Union, campaigning for Len McCluskey in the course of his employment, for example by campaigning online in support of Mr McCluskey and criticizing Mr Hicks.'

Complaint 8

'Between January 2013 and 15 April 2013 the Union failed to hold an election that complied with the Union rules, as, during that election, supporters of one candidate breached union rules in relation to the election of the General Secretary and the balloting of members to that end. In particular Steve Turner broke rules 5.1, 5.2, 27.1.3. and 27.1.5, when campaigning for Len McCluskey, in that he provided false and misleading information about a member of the Union and candidate in the election, by, during the election, publishing online to other members of the Union, and to the Union at large, a public statement that Mr Hicks condoned sex crimes against women.'

3. I investigated the alleged breaches in correspondence and a hearing took place on 1 October 2014.
4. At the hearing Mr Hicks was represented by Jody Atkinson of counsel. Mr Hicks gave oral evidence, having previously produced a written witness statement. The Union was represented by Michael Ford QC, instructed by Richard Arthur of Thompsons Solicitors. Oral evidence for the Union was given by six witnesses. They were: Dominic Hook, National Officer for the Finance and Legal Sector of Unite; Simon Hearn of Electoral Reform Services Limited; Peter Irwin, Head of Membership for Unite; Irene Dykes, Head of Constitutional Administration for Unite; Howard Beckett, Executive Director for Legal, Membership and Affiliated Services for Unite and Andrew Murray, Chief of Staff of Unite, who all also submitted written witness statements. In addition the Union provided a written witness statement from John Hendy QC, the claimant having indicated that he did not seek to cross-examine Mr Hendy. Mr Atkinson and Mr Ford QC each provided skeleton arguments. There was in evidence a 325 page bundle of documents consisting of correspondence and other documentation supplied by the parties, together with the rules of the Union. Before the hearing I accepted the applications of both parties for the late admission of an additional seven documents in total. At the hearing I accepted the Union's application for the late admission of a further document, by consent. I was also referred to 17 legal authorities by the parties which were available at the hearing in a separate bundle.
5. The authorities submitted by the parties were:-
 - Amalgamated Society of Carpenters v Braithwaite [1922] 2 AC 440
 - Blackall v National Union of Foundry Workers (1923) 39 TLR 431
 - Bonsor v Musicians' Union [1954] Ch483(CA)

Jacques v Amalgamated Union of Engineering Workers [1986] ICR 683
Paul v NALGO [1987] IRLR 43
Manufacturing Science and Finance Union (MSF) (CO Decision D/1-5/98)
Public and Commercial Services Union (PCS) (CO Decision D/4-5/99)
Taylor v Musicians' Union (D/26-28/02)
Lynch v UNIFI (CO/1964/18)
Scobie v TGWU (No 1) (CO Decision D/6-14/05)
Higginbottom v URTU (D/42-43/06)
Rawlins v BMA (D1-5/07)
Rolls Royce plc v Unite [2009] IRLR 576
Dawes v RCN (D/42-43/10-11)
Dooley v UCATT (CO Decision D/44-49/10-11)
Citrine's Trade Union Law, 3rd Ed., pages 266-267, 299, 369-371
Harvey on Industrial Relations and Employment Law at M1507-1513

6. At the outset of the hearing Mr Atkinson made an application for an adjournment of the hearing in respect of complaints one, two and three. He sought the adjournment in order for Mr Hicks or a third party to have an opportunity of inspecting the membership register of the Union and so enable Mr Hicks to be able to challenge the Union's evidence in this regard, if appropriate. He referred to section 24A(4)(b) of the 1992 Act. Whilst noting that I had no power to require the production of the membership register, Mr Atkinson submitted that I should request it and make adverse inferences if the register was withheld. Mr Ford QC, for the Union, opposed this application. He commented that he had had no notice that it was to be made. He observed that Mr Hicks had made a similar request in correspondence with my office which I had rejected having regard to my lack of powers to order an inspection and my judgment that his complaints could be fairly adjudicated on the evidence adduced by the parties with appropriate cross-examination. He noted that my procedural guidance stressed proportionality and the avoidance of delay. He submitted that this application should have been made earlier as the Union had given the gist of its evidence on complaints one to three in its written response of 10 January 2014 and that this case had been listed for hearing on 30 April. I questioned with Mr Atkinson the advantage I would obtain by looking at a database of nearly 1.5 million names and received no satisfactory response. I rejected Mr Atkinson's application on the grounds advanced by Mr Ford and on the grounds that I was not persuaded that the adjudication of these complaints would be materially impeded without such an inspection which I considered would be more in the nature of a fishing expedition than an opportunity to test the Union's evidence. I also had regard to my stated objectives to avoid delay and to deal with the issues before me proportionately.

Findings of Fact

7. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
8. Mr Hicks joined the Union in about 1975 when he entered the employment of Rolls Royce in Bristol. He is now unemployed having been dismissed by Rolls Royce in 2005, which dismissal he successfully challenged before an Employment Tribunal on the grounds that it was for his trade union activities. He has held a number of local positions with the Union and served on its Executive Council ("EC"). He came second in the elections for General Secretary held in 2008 and 2010.

9. Unite was formed in April 2007 from the amalgamation of its two predecessor unions, Amicus and the TGWU. At the outset there were separate Amicus and TGWU sections of the new union. The integration of the systems of these sections was a complex matter which took some time to achieve. At the outset, they each retained their own separate membership databases. The TGWU section already had in place a system for removing from its membership database those members more than 26 weeks in arrears with their subscriptions. The relevant part of rule 4.1 of the rules of the Union now provides as follows:

“... a member whose contributions are recorded by the Union as more than 26 weeks in arrears may be excluded from membership by the Union posting notice to that effect to the member ...”

10. In August 2007 the Amicus section acquired a new membership system, known as Siebel, which was capable of categorising members who had stopped paying their contributions. It could be set up in such a way that once members reached a certain level of arrears, it could automatically generate a letter excluding them from the Union. In fact, Siebel was not operated in this way until 2010. In 2010, Mr Hook, the then director of ICT for the Amicus section and subsequently for the whole of Unite, made a statement for the purposes of a previous Employment Tribunal hearing in which he stated that the members in Amicus had not been excluded for being in arrears “since at least 2006, perhaps earlier”. However, by December 2008, the Amicus section had instituted a system of writing to members in arrears with their subscriptions. Two standard letters were devised for this purpose. These were known as an SP1 and SP2. The SP1 was sent when a member first went into arrears. The SP2 was sent when they were in arrears by 13 weeks. Both letters were effectively reminders, intended to prompt the member to resume payment. They had no effect on the person’s membership status.
11. By early 2010, it was known that there was to be a General Secretary election before the end of the year. The amalgamation of the two predecessor unions had been agreed on the basis that for a period there would be joint General Secretaries, one from each section. At this time they were Derek Simpson (Amicus section) and Tony Woodley (TGWU section). By the end of 2010 they were to be replaced by a single General Secretary elected by the whole membership.
12. In January 2010 there was a meeting of the EC of Unite at which Mr Simpson reported that as many 300,000 individuals currently held as members on the Union’s records were more than 26 weeks in arrears with their subscriptions. The EC accepted Mr Simpson’s proposal that a letter should be written to each individual excluding them from the Union at a specified date six weeks hence unless they took steps to retain membership. This letter was known as an SP3.
13. By July 2010 Mr Hook was able to report to the Finance & General Purposes Committee that SP3 letters had been sent to 310,056 members and by the date of his report 293,816 members had been excluded.
14. The General Secretary election proceeded on this basis and Mr McCluskey was elected on 22 November 2010.

15. In June 2011 a common membership system was established for the whole Union and the Siebel system closed down. The practice of sending SP3 letters ceased about six weeks prior to the introduction of the new system, enabling it to commence without any members who were more than 26 weeks in arrears.
16. A decision was taken at this time to discontinue sending SP3 letters and to no longer automatically exclude members more than 26 weeks in arrears. Mr Beckett, now the Union's Director for Legal, Membership & Affiliated Services, explained that the recession and financial crisis were having a negative effect on the Union's membership. He stated that rising unemployment and a tightening of household budgets had led to the Union losing members at a rate of about 10,000 a month and that this continued in 2011 and 2012. From June 2011 the Union instituted measures to cope with that loss of membership. It developed a retention strategy which included enhanced membership benefits and new membership packages, such as 'Retired Members Plus', 'Community' and 'Back to Work'. The Union continued to send SP1 and SP2 letters but when members became more than 26 weeks in arrears, they would be contacted by phone where possible to persuade them to retain membership, rather than being automatically excluded. However, between December 2011 and December 2012 membership of the Union still fell by 85,723.
17. From June 2011, the Union piloted a system of members in arrears being telephoned by a team of about 50 volunteers. This resulted in a retention rate of between 14% and 21% and was regarded as successful but not very efficient. The Union then contracted for the same service to be provided by a call centre. This method of retention is the one that is currently operated, save that from August 2014 the Regional Offices have a short period in which to attempt to speak to such members prior to the involvement of a call centre.
18. By late 2012 Mr McCluskey was considering whether to stand for re-election in 2013, rather than wait until the end of his period of office in 2015. It was suggested that to have a General Secretary election in the same year as a General Election might be a distraction.
19. At the end of November or early December 2012, Irene Dykes, the Union's Head of Constitutional Administration, met with Simon Hearn of Electoral Reform Services Limited ("ERS"). ERS had conducted the ballots of the Union, its predecessors and many other unions since the introduction of statutory ballots and probably before that. Mr Hearn is extremely experienced in such matters. Having previously informed Mr Hearn of the proposed General Secretary election and invited ERS to perform its usual roles, Ms Dykes confirmed that ERS would be the statutory Independent Scrutineer and that Mr Hearn would be the Returning Officer in accordance with rule 16.4 of the rules of the Union. Ms Dykes obtained Mr Hearn's confirmation that the proposed timetable and the draft 'Ballot Rules and Guidelines for the Conduct of the Ballot' were acceptable.
20. The Ballot Rules and Guidelines are prepared for each election in accordance with the requirement in rule 16.1 that *'the election of members of the EC and the General Secretary shall be organised and conducted in accordance with the directions of the EC'*. The Ballot Rules and Guidelines for this election provided for

the appointment of ERS as the Independent Scrutineer and Mr Hearn as the Returning Officer. They also provided in paragraph 6 for the duties of the Scrutineer, reproducing many of the statutory obligations found in section 51A of the 1992 Act. Paragraph 1.4 provides that members who joined the Union after 31 January 2013 would not be eligible to vote; this type of provision being expressly permitted by rule 16.15.

21. I find that the terms of appointment of ERS and Mr Hearn were agreed at this meeting between Ms Dykes and Mr Hearn, the terms being those explained by Ms Dykes and those contained in the Ballot Rules and Guidelines, subject to their acceptance by the EC.
22. The EC of the Union met on 4 and 5 December 2012. It agreed to the holding of the General Secretary election in 2013 and to the Ballot Rules and Guidelines.
23. On 14 December 2012, Andrew Murray, the Union's Chief of Staff, sent a circular to all Branch Secretaries in which he set out the election timetable. Nominations were to be received by 15 February 2013 and election addresses by 1 March. Voting was to take place between 18 March and 12 April, with the result being declared on 15 April.
24. On 20 December 2012, Mr Murray sent a copy of the Ballot Rules and Guidelines to all Branch Secretaries. A further undated circular to all members informed them of the election, of the cut-off date for eligibility to vote of 31 January 2013 and of a contact number to telephone if they had not received a ballot paper by 3 April.
25. Towards the end of December 2012, Mr Ed Sabisky, the Union's Director of Finance and Operations, told Mr Irwin, who was about to become the Union's Head of Membership, that he was concerned about the backlog of members who were more than 26 weeks in arrears that had built up between June 2011 and December 2012. Mr Sabisky said that steps needed to be taken to get these members to reinstate their subscriptions or exclude them from membership. He commented that, with the upcoming General Secretary election, there would be significant savings in postage if these members could either be excluded from membership before the ballot or excluded from entitlement to vote in the ballot. In the weeks that followed, there was much discussion within the Union as to whether those members more than 26 weeks in arrears were entitled to vote in the election. A provisional view was taken to exclude them from entitlement.
26. In the background to these events, there was some publicity given to a controversy involving the Socialist Workers Party ("SWP"), the significance of which controversy emerges in paragraph 34 below. Amongst other publicity, there was an article in The Independent on 11 January 2013. It describes how a disciplinary panel of the SWP had exonerated a Comrade Delta from allegations of sexual assault and rape but that many members had huge concerns over how the case had been handled.
27. The entitlement to vote of those members more than 26 weeks in arrears with their subscriptions was considered by Mr Beckett. He formed the strong view that such individuals remained members with an entitlement to vote until such time as they were excluded in accordance with rule 4.1. However, it would appear that his view

was not immediately accepted. He obtained outside legal advice from Mr Richard Arthur, an experienced trade union solicitor and a partner in Thompsons, and from John Hendy QC. Both confirmed the view that Mr Beckett had already formed.

28. In the meantime, Ms Dykes had instructed Mr Irwin to send ERS the membership database without the names of those more than 26 weeks in arrears and on 25 February 2013 Mr Irwin sent ERS a database of 1,329,126 names, which excluded those members for whom the Union had no valid address.
29. Only a matter of days later, on 4 March 2013, Mr Irwin was instructed to send ERS a further database of those members who were more than 26 weeks in arrears. This was a database of 158,824 names. The fact that two separate databases had been sent to ERS enabled it to separately record the overall vote of those more than 26 weeks in arrears with their subscriptions.
30. At about the same time, Mr Sabisky asked Ms Dykes if it would be possible for the voting pack to include a suitably worded letter to those more than 26 weeks in arrears which would inform them that their membership would terminate with effect from a specified date in the event that they failed to make contact with the Union by then. Ms Dykes considered whether such a letter might cause legal or other difficulties. She concluded that it would not and a draft was prepared by the Constitutional Affairs Department. The draft letter was considered by Mr Beckett, in whose name it would be sent out. He thought that it had no bearing whatever on the way in which a member might vote, nor did it obscure the voting paper or other material included in the voting pack. He saw it as an administrative expediency to take advantage of a mailing to all members, so saving the significant postal cost of a separate mailing. Ms Dykes also submitted a draft of the letter to ERS for the consideration of Mr Hearn. He gave evidence that he did not think for one minute that there was any possibility of a member believing that their entitlement to vote was conditional on their reinstating their subscription. He stated that he thought carefully about the various duties imposed on the Union and the terms upon which ERS had been engaged. He concluded that the inclusion of the draft letter would not cause any problem. Nevertheless, Mr Hearn considered that the formal decision to include the insert should be made by the EC. The EC met in the first week of March 2013 and approved the inclusion of the insert with the ballot pack.
31. The letter to be enclosed with the ballot pack of those members more than 26 weeks in arrears is dated 18 March 2013. It informs each such member that his or her ballot paper for the General Secretary election is enclosed and goes on to state that if the Union does not hear from him or her, membership will automatically terminate on 30 April. The letter is signed by Mr Beckett. As the terms of this letter are important to Mr Hicks' third complaint, I set them out in full.
32. The letter enclosed with the ballot paper provided as follows:

UNITE THE UNION
CENTRAL OFFICE

18th March 2013

Dear Member,

Enclosed is your ballot papers for the General Secretary election, we note that you have fallen behind with your subscriptions and this will mean that you are due to lose your membership.

We would like to help resolve this, so if you wish to retain your membership, please contact your local office to discuss how we can help. We may contact you over the next few weeks about the benefits of continuing membership.

A list of regional membership department contacts is set out below.

If we do not hear from you, then regrettably we will assume that you no longer wish to be a member of Unite and your membership will automatically be terminated on 30 April 2013.

Yours faithfully

Howard Beckett
Director Legal, Affiliated and Membership Services

Beneath this text appeared a list of the Union's 11 regions and relevant contact details.

33. Shortly before the commencement of voting on 18 March 2013, the ballot packs were sent to each member on the two databases that had been provided to ERS. The ballot packs contained a covering letter from the Chair of the EC, Mr Tony Woodhouse, a ballot paper and return envelope, and a booklet containing the election addresses of Mr McCluskey and Mr Hicks together with the names of the branches which had nominated each of them. Mr McCluskey had secured nominations from branches representing 567,501 members and Mr Hicks from branches representing 86,208 members. The ballot packs that were sent to those more than 26 weeks in arrears with their subscriptions also included the letter from Mr Beckett set out above. Although 158,824 members were identified as being in this category, ERS were unable to locate valid addresses for them all and only 156,457 ballot packs were in fact despatched with a copy of Mr Beckett's letter.
34. On 20 March 2013, the Unite Branch Secretary for Plymouth City Council, Ms Diana Beal posted a tweet which reads, "*I have voted for @United4Len for GS. I want a GS who doesn't condone sex crimes against women. @Hicks_Alert@unitedleft*". The evidence before me of this tweet consists of a screen shot of the twitter account of Mr Steve Turner. Mr Turner was then the Union's Director of Executive Policy. He has since become an Assistant General Secretary. He was known to be a supporter of Mr McCluskey in the General Secretary election. Mr Hicks considered him to be a leading supporter, if not Mr McCluskey's campaign manager. The screenshot shows that Ms Beal's tweet had had three re-tweets, one of them being by Mr Turner. On the evidence before me, I find that Mr Turner's re-tweet was posted by him on his personal twitter account between 7am and 8am whilst he was at home and that his account profile included the words "comments my own". I further find that, at that time, Mr Turner had 355 followers on Twitter, none of whom re-tweeted the offending tweet. A letter from Mr Turner to Professor

Ewing, the Election Commission, of 3 April 2013 describes him as having re-tweeted the message “third hand”.

35. Mr Hicks was very upset by Ms Beal’s tweet and its wider dissemination, particularly by Mr Turner. Mr Hicks published a denial on 22 March 2013 which he sought to distribute as widely as possible. He asked his followers to forward his message to all their contacts by “facebook/tweet/blog and all that ...”. Mr Hicks repeated the text of Ms Beal’s tweet in his message and described it as being libellous. He stated that he had never condoned sex crimes against women nor did he condone how the Central Committee of the SWP had dealt with the allegations in question. He also stated that he was not a member of the SWP although, before becoming aware of the recent allegations, he had received and accepted support from them.
36. On 22 March 2013, Mr Hicks emailed Mr McCluskey to complain about Mr Turner having posted the offending slogan on his Twitter account. He formally asked the General Secretary to begin a disciplinary process against Mr Turner as a Union employee. He also asked the EC to consider charges against those Union members who had published the slogan. In addition, he formally requested that the Returning Officer consider whether the publication of the tweet constituted an improper attempt to influence an election by spreading lies about one of the candidates. He added that, as Mr Turner’s statement was defamatory, he was considering whether to take legal action against Mr Turner personally.
37. On 25 March 2013 Mr Murray responded to Mr Hicks. He informed Mr Hicks that any allegation of a breach of electoral procedure was a matter for the Returning Officer. Further, if Mr Hicks believed that either the Union rules or the Ballot Rules and Guidelines had been breached, he had the right to complain to the Election Commissioner. As to Mr Hicks’ wish to have Mr Turner disciplined as an employee of the Union, Mr Murray confirmed that such action can only be initiated by Union management in line with procedure but that Mr Hicks could complain about an officer’s conduct under the Membership Complaints Procedure which could result in a decision to recommend disciplinary action.
38. On 26 March 2013, Mr Hicks emailed Mr Hearn at ERS. He asked Mr Hearn to forward his complaint to the Election Commissioner. Mr Hicks noted that there was no rule which forbade the spreading of lies about candidates but considered the conduct of Mr Turner and others was covered by rules 27.1.3 and 27.1.5. He further considered that their conduct could amount to ‘interference and constraint’ for the purposes of section 51(3) of the 1992 Act.
39. By rule 16.3, the EC shall appoint an Election Commissioner to adjudicate on any complaint made under rule 16.23 relating to the conduct of an election. By rule 16.23, a complaint may be made within 28 days of the day of the result of an election that there has been a breach of the rules or any other legal requirement relating to the conduct of the ballot or any other interference with the conduct of the election and that the breach or interference may have materially affected the outcome of the election. By rule 16.29, the Election Commissioner may make recommendations to the EC which can include the making void of an election or the disqualification of a candidate. Rule 16.30 provides that the EC shall give effect to any recommendation by the Election Commissioner. The Election Commissioner

appointed in this election, as in a number of previous elections, was Professor Keith Ewing.

40. Also on 26 March 2013, Mr Hicks emailed Mr Murray. He noted that rule 27.8 provides that a member may not be charged with misconduct under the rules of the Union in respect of any alleged act *"in connection with the performance of his/her duties as a full time officer and/or employee of the Union"*. He recognised that this may cause a problem as it was not clear whether Mr Turner was acting as an employee of the Union when he re-tweeted Ms Beal's tweet. He therefore put his complaint in the alternative. He submitted that, if Mr Turner was acting as an employee, management should consider disciplinary action against him. Alternatively, if he was not acting as an employee, Mr Hicks wanted Mr Turner and the other members who posted the slogan to be disciplined for a breach of rules 27.1.3 and 27.1.5. Mr Hicks observed that paragraph 2.3 of Appendix 5 to the rules provides that, if the Union receives notice of a matter which may lead to a disciplinary charge against a member, there should be an investigation which may only be initiated with the authority of the EC. He stated that there should now be an investigation and that it was therefore necessary for the EC to be involved.
41. On 27 March 2013, Mr Murray emailed Mr Hicks. He stated that it was not possible for disciplinary action to be taken against an officer of the Union under rule 27 in his capacity as a member of the Union, no matter whether such an officer is acting as an employee or not, because some of the sanctions available for use against members (e.g. removal from office or expulsion) would have the effect of making it impossible for an officer to continue doing his/her job. Mr Murray stated that, for this reason, all complaints against officers must be dealt with through the officers disciplinary procedure. Mr Murray went on to state that Mr Hicks' complaint against Mr Turner would be investigated. He concluded that he would wait to hear from Mr Hearn and Professor Ewing as to whether they are dealing with the issue and would then ask a senior officer of the Union to investigate. That officer would then be in touch with Mr Hicks.
42. The election results were announced on 15 April 2013. Mr McCluskey received 144,570 votes and Mr Hicks 79,751 votes. Mr McCluskey was declared elected by a majority of 64,751. A total of 1,485,079 ballot papers had been distributed, of which 225,801 were returned, a turnout of 15.2%. The ERS issued a certificate indicating its satisfaction as to each of the matters set out in section 52(2) of the 1992 Act, regarding the election. Mr Hearn included in his statement before me a schedule setting out how the 158,824 members more than 26 weeks in arrears had voted. On a turnout of 3.2%, Mr McCluskey received 2,682 votes and Mr Hicks 2,318.
43. On 27 May 2013, Professor Ewing, as the Election Commissioner, issued an interim report. He adjourned the complaint before him under rule 16 pending the resolution and the complaint made against Mr Turner as a member under rule 27. On 30 May, Professor Ewing issued a supplementary note to that report stating that he regretted not having been told earlier that it was not possible to proceed against Mr Turner under rule 27. However, he noted that the complaint that was initially a rule 27 complaint had not been withdrawn and was still in the system. He understood that it would be transferred to the employee disciplinary procedure. He concluded that

the outcome of that procedure might still be relevant to any decision he might have to make and therefore confirmed that the matter before him would remain adjourned.

44. On 2 July 2013, the Union submitted its annual return to my office on form AR21. This reported that as at 31 December 2012 the Union had 1,424,303 members but, of those, 77,889 had no valid address. The Union therefore reported that it had 1,346,414 members with valid addresses. The Union did not include in these figures the 158,824 members who were more than 26 weeks in arrears. At the hearing before me, the Union accepted that the figures in its AR21 were wrong, on the basis that a member whose subscriptions are in arrears remains a member until he or she resigns or is excluded under rule 4.1.
45. Mr Irwin gave evidence that the register of members is kept on a computerised database. The database has different fields. One such field is "Lapsed Status" and another is "Arrears". Mr Irwin stated that the "Arrears" field is populated when a member falls into arrears with his/her subscriptions but such a person is still regarded as being a member of the Union. On the other hand, when a member resigns or is excluded, having received an SP3 or equivalent letter based on rule 4.1, the "Lapsed Status" field is populated and the person is regarded as no longer being a member of the Union.
46. On 8 July 2013 Mr Hicks, having seen the discrepancy between the figures in the AR21 and in the Scrutineer's report wrote to ERS asking why 1,485,079 ballot papers were distributed in March 2013 when the AR21 revealed that on 31 December 2012 the Union had only 1,346,414 members with valid addresses, which meant that 138,665 more voting papers were distributed than the Union had members, according to the AR21. He repeated his previous request to examine the membership register, failing which he requested that it be re-examined by the Returning Officer.
47. On 17 July 2013, Mr Hearn responded to Mr Hicks. He stated that his duties as Independent Scrutineer and Returning Officer had now concluded and any outstanding issues should be raised with the Union or the Certification Officer. Nevertheless, he explained that the Union had latterly decided to treat members more than 26 weeks in arrears as members of the Union, following a recent decision issued by the Certification Officer in a case involving the trade union, UCATT and that this added a further 158,824 members. He also explained that, upon further examination by ERS, a number of members had addresses insufficient for the purposes of Royal Mail. When these were excluded, the total number of ballot papers despatched had been 1,485,079.
48. On 22 July 2013, having received two further letters from Mr Hicks, Professor Ewing issued his final report. He concluded that he made no finding on Mr Turner's conduct but, even if it was shown to have been wrongful, he did not believe that it could plausibly be argued that any such breach would have materially affected the outcome of the election. Accordingly, having regard to the tests he had to apply in rule 16.29, Professor Ewing dismissed the complaint.

49. Mr Hicks commenced these complaints to me by a Registration of Complaint Form received at my office on the 6 September 2013. In that complaint he raised what are now complaints one, two, six, seven and eight.
50. On 17 October 2013 Mr Beckett responded to Mr Hicks' email to Mr Murray of 19 July. He explained in more detail why the members more than 26 weeks in arrears had been balloted.
51. Mr Hicks added further complaints to me as his application was being progressed. On 23 October 2013 he added what is now complaint three, on 19 November he added what is now complaint four and on 28 January 2014 he added what is now complaint five.
52. This case was originally listed for hearing on 5 June 2014 but Mr Hicks asked for a postponement. It was then listed for two days on 22 and 23 July. The Union then asked for a postponement. It was then listed for 1 and 2 October but was in fact heard on one day on 1 October.
53. On 10 September 2014, Mr Murray emailed Mr Hicks in relation to the disciplinary action that was being considered against Mr Turner as an employee. Mr Murray gave evidence that he had not progressed this earlier as there were still proceedings that involved Mr Turner that were outstanding before me, even if both ERS and Professor Ewing were no longer involved. He explained that Mr Beckett had now advised him that it would be appropriate for the disciplinary proceedings to be processed. Mr Murray informed Mr Hicks that he was now going to determine whether or not to charge Mr Turner with an offence under the officers disciplinary procedure and asked if he had any more material to submit. Mr Hicks submitted further material and I was informed at the hearing that this was still being considered by Mr Murray, who would also consider inviting Mr Hicks to a discussion.

The Relevant Statutory Provisions

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

24 Duty to maintain a register of members' names and addresses

(1) A trade union shall compile and maintain a register of the names and addresses of its members, and shall secure, so far as is reasonably practicable, that the entries in the register are accurate and are kept up-to-date.

(2) The register may be kept by means of a computer.

(5) For the purposes of this section a member's address means either his home address or another address which he has requested the union in writing to treat as his postal address.

(6) The remedy for failure to comply with the requirements of this section is by way of application under section 25 (to the Certification Officer) or section 26 (to the court).

25 Remedy for failure: application to Certification Officer

(1) A member of a trade union who claims that the union has failed to comply with any of the requirements of section 24 or 24A (duties with respect to register of members'

names and addresses) may apply to the Certification Officer for a declaration to that effect.

- (2) On an application being made to him, the Certification Officer shall –
- (a) make such enquiries as he thinks fit, and
 - (b) give the applicant and the trade union an opportunity to be heard,

and may make or refuse the declaration asked for.

(5A) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements –

- (a) to take such steps to remedy the declared failure, within such period, 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 failure of the same or a similar kind does not occur in future

32 Annual return

(1) A trade union shall send to the Certification Officer as respects each calendar year a return relating to its affairs.

(2) The annual return shall be in such form and be signed by such persons as the Certification Officer may require and shall be sent to him before 1st June in the calendar year following that to which it relates.

(3) The annual return shall contain –

(a)..(c)...

(d) in the case of a trade union required to maintain a register by section 24, a statement of the number of names on the register as at the end of the period to which the return relates and the number of those names which were not accompanied by an address which is a member's address for the purposes of that section.

46 Duty to hold elections for certain positions

(1) A trade union shall secure –

(a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and

(b) that no person continues to hold such a position for more than five years without being re-elected at such an election.

50 Entitlement to vote

(1) Subject to the provisions of this section, entitlement to vote shall be accorded equally to all members of the trade union.

(2) The rules of the union may exclude entitlement to vote in the case of all members belonging to one of the following classes, or to a class falling within one of the following

(a) members who are not in employment;

(b) members who are in arrears in respect of any subscription or contribution due to the union;

(c) members who are apprentices, trainees or students or new members of the union.

(3) The rules of the union may restrict entitlement to vote to members who fall within -

(a) a class determined by reference to a trade or occupation,

(b) a class determined by reference to a geographical area, or

(c) a class which is by virtue of the rules of the union treated as a separate section within the union,

or to members who fall within a class determined by reference to any combination of the factors mentioned in paragraphs (a), (b) and (c).

The reference in paragraph (c) to a section of a trade union includes a part of the union which is itself a trade union.

(4) Entitlement may not be restricted in accordance with subsection (3) if the effect is that any member of the union is denied entitlement to vote at all elections held for the purposes of this Chapter otherwise than by virtue of belonging to a class excluded in accordance with subsection (2).

51 Voting

(3) Every person who is entitled to vote at the election must -

- (a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees, and
- (b) so far as is reasonably practicable, be enabled to do so without incurring any direct cost to himself.

51A Counting of votes etc

(3) An appointment under this section shall require the person appointed to carry out his functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice.

(6) The trade union -

(a) shall ensure that nothing in the terms of an appointment under this section is such as to make it reasonable for any person to call into question the independence of the person appointed in relation to the union,

(b) shall ensure that a person appointed under this section duly carries out his functions and that there is no interference with his carrying out of those functions which would make it reasonable for any person to call into question the independence of the person appointed in relation to the union, and

(c) shall comply with all reasonable requests made by a person appointed under this section for the purposes of, or in connection with, the carrying out of his functions.

54 Remedy for failure to comply with requirements: general

(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).

55 Application to Certification Officer

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

(2) On an application being made to him, the Certification Officer shall -

- (a) make such enquiries as he thinks fit, and
- (b) give the applicant and the trade union an opportunity to be heard,

and may make or refuse the declaration asked for.

108A Right to apply to Certification Officer

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

(2) The matters are -

- (a) the appointment or election of a person to, or the removal of a person from, any office;

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

(3)..(4)..

- (5) No application may be made regarding –
 - (a) the dismissal of an employee of the union;
 - (b) disciplinary proceedings against an employee of the union.

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 Rules of the Union

55. The rules of the Union which are relevant for the purposes of this application are:

RULE 4 MEMBERSHIP CONTRIBUTIONS AND BENEFITS

4.1 It shall be the personal responsibility of the member to maintain contributions and avoid arrears in all circumstances. Any period during which a member's contributions are 13 or more weeks in arrears shall break continuity of membership for the purpose of the qualification required to be an officer employed by the Union set out in rule 14 save where a member establishes to the satisfaction of the Executive Council that the arrears arose through no fault of that member. A member whose contributions are recorded by the Union as more than 26 weeks in arrears may be excluded from membership by the Union posting notice to that effect to the member. A member so excluded from membership may apply for reinstatement which may be allowed on such terms as to the payment of outstanding arrears as the Executive Council may consider appropriate.

RULE 5 OBLIGATIONS OF MEMBERS

5.1 A member of the Union must comply with these rules and with any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or as a full time officer.

5.2 A member must not knowingly, recklessly or in bad faith provide the Union with false or misleading information relating to a member or any aspect of the Union's activities.

RULE 15 GENERAL SECRETARY

15.1 All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union.

RULE 16 ELECTION OF EXECUTIVE COUNCIL MEMBERS AND THE GENERAL SECRETARY

16.1 Subject to the provisions of these rules and the powers of the independent scrutineer, the election of members of the Executive Council and the General Secretary shall be organised and conducted in accordance with the directions of the Executive Council.

16.2 The Executive Council shall appoint an independent scrutineer to supervise the production, storage and distribution of voting papers, to receive and count the voting papers, to report on the election, to retain the voting papers for an appropriate period and to perform such other duties as the Executive Council may specify.

16.3 The Executive Council shall appoint a suitable, independent person to act as Election Commissioner to adjudicate on any complaints made under clause (23) of this rule relating to the conduct of the election. In the event that the Electoral Commissioner finds it necessary to carry out an investigation in the conduct of his or her duties under rule all members and employees of the Union are required to afford him or her every assistance in this regard.

16.4 The Executive Council shall appoint a Returning Officer to deal with the conduct of the election between the Executive Council meetings and may delegate to him/her its powers relating to the conduct of that election provided that the Returning Officer shall not act inconsistently with any decision of the Executive Council and shall report to the next meeting of the Executive Council all actions taken and decisions made in respect of that election.

16.15 The Executive Council may decide that members who have joined the Union after a prescribed date shall not be eligible to vote, provided the date shall not be more than 13 weeks before the first day on which voting is due to take place in that election.

16.23 If at any stage during an election or within 28 days of the declaration of the outcome a candidate in an election or the Executive Council considers that there has been a breach of these rules or of any other legal requirement relating to the conduct of the election or any other interference with the conduct of the election and that the breach or interference may materially affect or may have materially affected the outcome of the election, he/she or the Executive Council may submit a complaint to the Election Commissioner.

16.29 If after considering a complaint the Election Commissioner considers; that there has been a material breach of these rules or of any other legal requirement relating to the conduct of the election or any other material interference with the conduct of the election; and that the breach or interference may materially affect or has or may have materially affected the outcome of the election; the Election Commissioner may recommend that the Executive Council should take one or more of the following measures:-

16.29.1 Declare the ballot and, if it has been declared, the outcome of the election void and call for a fresh ballot to be held;

16.29.2 Disqualify a candidate or candidates and permit the remaining candidates to go forward in the ballot or in any fresh ballot that may be ordered;
or

16.29.3 Such other remedial measures as the Election Commissioner considers appropriate.

16.30 Subject always to any decision to the contrary by a court, the Certification Officer or any other lawful authority, the Executive Council shall give effect to any recommendation by the Election Commissioner made in accordance with clause (29) of this rule.

RULE 27 MEMBERSHIP DISCIPLINE

27.1 A Member may be charged with:

.....
27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.

.....
27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union.

27.2 Disciplinary Hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice.

27.8 A member may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union.

APPENDIX 5 RULE 27 – DISCIPLINE OF MEMBERS EC GUIDANCE

2.3 If the union receives notice of a matter which may lead to a disciplinary charge against one more members, then the situation should be investigated to determine if there should be a charge. A disciplinary investigation may only be initiated with the authority of the Executive Council (or a sub-Committee of the Executive Council) or a Regional Committee (or a sub-Committee of a Regional Committee). If a Branch or Branch Committee proposes the commencement of a disciplinary investigation, authority must be obtained in advance from the Executive Council (or a sub-Committee of the Council) or the relevant Regional Committee (or a sub-Committee of the Regional Committee). The means of investigation shall be determined by a body referred to in Rule 27.3 or by the General Secretary. Notice of the fact of an investigation being undertaken shall be sent to the office of the General Secretary.

**GENERAL SECRETARY ELECTION 2013
BALLOT RULES AND GUIDELINES FOR THE CONDUCT OF THE BALLOT**

1. INTRODUCTION

This booklet explains how the Election for General Secretary will be conducted. These instructions are issued by the Executive Council under Rule 16, Clause 1 and must be strictly adhered to. Branch secretaries, workplace representatives and prospective candidates should read these instructions carefully. Where branch secretaries are referred to in this booklet it should be taken that this also means father of chapel or mother of chapel.

1.1 The method of voting will be by fully postal ballot and will be supervised by Electoral Reform Services, who, in accordance with Rule 16, Clause 2 have been appointed to act as Independent Scrutineer for this ballot (see Section 5 for further details).

1.2 In accordance with Rule 16, Clause 3, Keith Ewing has been appointed to act as Election Commissioner and he may be contacted care of the returning officer, see below. In the event that the Electoral Commissioner finds it necessary to carry out an investigation in the conduct of his duties under rule all members and employees of the union are required to afford him every assistance in this regard.

1.3 The conduct of the ballot will be dealt with between Executive Council meetings by the Returning Officer in accordance with Rule 16, clause 4. The Executive Council have appointed Simon Hearn, Electoral Reform Services, as Returning Officer. Correspondence should be addressed to Simon Hearn, Returning Officer, Electoral Reform Services, The Election Centre, 33 Clarendon Road, London NB ONW and sent to retumlngofficer@electoralreform.co.uk.

1.4 Eligibility to vote in accordance with Rule 16, Clause 15 will be determined by a Registration date which for this election will be 31st January 2013. The Eligible Membership will be frozen on that date. Anyone who joins the Union after the Registration date will not be entitled to vote in the Election for General Secretary.

2. NOMINATIONS

2.7 In any campaign activity the following must be adhered to:

(a) The corporate identity and logo of the union and the union's resources, which include the union's membership databases, must not be used to support any particular candidate in this election. (see also (d) below) (Any logo that in the opinion of the Returning Officer is similar enough to the logo of the union to cause confusion for an ordinary member is similarly not allowed)

6. INDEPENDENT SCRUTINEER

6.1 The Independent Scrutineer will be given a copy of the Register of Membership in writing or in the form of computer data, based on the eligible membership at the time of the Registration Date. The Union will also make provision of adequate facilities to ensure the Independent Scrutineer can properly discharge their functions set out below without interference. The Union shall comply with all reasonable requests from the Independent Scrutineer connected with the carrying out of their functions.

6.2 The Independent Scrutineer must satisfy themselves that there are no reasonable grounds for believing that the conduct of the ballot contravened any legislative requirements.

6.3 The Independent Scrutineer shall be responsible for the security arrangements in relation to the production, storage, distribution, return or other handling of the voting papers and for the counting of them were, so far as reasonably practicable, sufficient to minimise the risk of any unfairness or malpractice.

CONSIDERATION AND CONCLUSIONS

Complaint One

56. Mr Hicks' first complaint is as follows:

'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached section 46(1) of the 1992 Act in that Mr McCluskey was declared elected as General Secretary following an election which did not comply with section 50(1) of the 1992 Act. This section states that "entitlement to vote shall be accorded equally to all members of the trade union". In the election for General Secretary the Union balloted 158,824 members who were not members of the union, and/or otherwise balloted persons who were not members of the union, and/or failed to ballot all of the members of the Union.'

57. The relevant sections of the 1992 Act provide as follows:

46(1) A trade union shall secure –

(a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter.

(b)

50(1) Subject to the provisions of this section, entitlement to vote shall be accorded equally to all members of the trade union.

Summary of Submissions

58. Mr Atkinson, for Mr Hicks, observed that Mr Hicks' first two complaints had been submitted at a time when he was unaware of the Union's case regarding the discrepancy between the number of members recorded on the AR21 as at 31 December 2013 and the number of members balloted in March 2013. He commented that he was not in a position to challenge the evidence of the Union as to the steps it had taken as regards the members in arrears and must therefore accept that the Union wrote to them as described in the Union's evidence. On that basis, Mr Atkinson submitted that his remaining argument was that the 158,824 individuals more than 26 weeks in arrears with their subscriptions on 31 January

2013 were no longer members of the Union. He argued that a person's membership may terminate otherwise than by the Union excluding him/her in that a member may resign or may leave by stopping his/her contributions. He relied upon the decision of my predecessor as the Certification Officer in **Re MSF (D/1-5/98)** which concerned a similar situation in which MSF did not remove members in long-term arrears, giving rise to the aphorism "once a member, always a member". In particular, he relied upon the following passage:

"What the rule permits is for the Union to terminate a member's membership when he or she is more than 6 months in arrears. It does not in my view continue membership which has otherwise effectively ceased. For example a member may terminate his membership by stopping his arrangements to pay his subscriptions. This may entail terminating his check-off arrangement or stopping his direct debit or standing order mandate. He may consider that his membership is over. Clearly in many circumstances the stopping of the subscription payment (particularly where the member has terminated a check-off or direct debit/standing order arrangement) without making an alternative arrangement is a clear indication that the member has left the Union. Where this is indeed the case, Rule 15(c) should not be construed as continuing membership when in fact it has already terminated. Whilst it may be open to a Union to agree to keep in membership someone who has failed through oversight or temporary financial difficulty to make his or her subscription, it is not open to treat as a member for the purposes of the Act a person who has left the Union. Unfortunately MSF's system of updating its register makes insufficient allowance for this. If a member sends in a letter of resignation, that member's name will be removed from the register of members. However, if a member signals his or her wish to cease membership by stopping payments, he or she will be treated the same way as anyone who is in arrears. That would be of little or no significance if membership automatically lapsed after a certain period, but the rules and practice of this union leaves such a person on the list for at least one year even though they have no wish to be there. The Union might have avoided some of these difficulties if it applied Rule 15(c) systematically and regularly to clear away dead wood from the register but it did not do so. The obligation to keep the register of members as up to date as reasonably practicable includes an obligation to operate a system for removing the names of those who no longer wished to be members. MSF did not and, as far as I have ascertained, do not operate such a system."

Mr Atkinson submitted that as the Union had stated that less than 10% of the 158,824 who were balloted subsequently continued with their membership, the vast majority were ex-members who had already terminated their membership by having stopped payment of subscriptions.

59. Mr Ford QC, for the Union, submitted that the Union had acted lawfully in balloting the 158,824 as they were members of the Union and entitled to a vote. He observed that the position of members in arrears with their contributions is dealt with expressly in the rules and that rule 4.1 provides that those recorded as being "more than 26 weeks in arrears may be excluded from membership by the Union posting notice to that effect to the member". Mr Ford submitted that a member in arrears who has not been sent such a notice remains a member. He observed that the courts had long required that a stricter test should apply to trade union rules concerning expulsion or exclusion and that rules providing for automatic termination of membership for having fallen into arrears must say so in clear terms. He referred to **Amalgamated Society of Carpenters v Braithwaite (1922)**, **Blackall v National Union of Foundry Workers (1923)** and **Bonsor v Musicians Union (1954)** as well as my decision in **Dooley v UCATT (2011)** and extracts from **Citrine's Trade Union Law**. With regard to the decision of my predecessor in **Re**

MSF, Mr Ford commented that it did not appear that any of the above authorities had been cited to him and that it was, with respect, wrong for him to have concluded that membership of a trade union terminates when a member who stops paying subscriptions considers that his membership is over. He argued that the failure to pay subscriptions is not an unambiguous resignation from membership as it could have arisen in any number of ways. It could, for example, have been a mistake or an error in the check-off system by the employer. He further argued that the application of rule 4.1 produces the necessary certainty which is so important to trade union ballots, enabling both the union and the member to know the precise date when membership ceases. Mr Ford compared this to the uncertainty that would be created by a concept of subjective deemed resignation.

Conclusion – Complaint One

60. Section 50(1) of the 1992 Act provides that “... *entitlement to vote shall be awarded equally to all members of the trade union*” and section 46(1) provides that a trade union shall secure that its General Secretary holds that position “*by virtue of having been elected to it at an election satisfying the requirements of this chapter*”, which includes section 50. As it is now put, this complaint questions whether all members of Unite were accorded equally the entitlement to vote, as it is argued that 158,824 persons who were no longer members were also given the entitlement to vote. I must therefore determine whether these 158,824 individuals were members of the Union on 31 January 2013, the cut off date for eligibility to vote in this election.
61. First, however, on a point of detail, it appears that, of the 158,824 members who were more than 26 weeks in arrears with their subscriptions on 31 January 2013, only 156,457 were given the opportunity to vote as the remainder had no valid address. Be this as it may, I shall refer to the figure of 158,824 in this decision, as that is the number who were given an entitlement to vote.
62. A person who joins a trade union enters into a contract of membership. The terms of that contract are contained principally in the rules of the trade union, including the terms governing how membership may terminate. In most cases, a contract of membership may terminate by resignation, expulsion, exclusion or otherwise in accordance with the terms of the contract or by operation of law. Accordingly, the starting point in determining the membership status of an individual is the rules of the trade union.
63. In this case, the starting point is rule 4.1 of the rules of Unite which deals expressly with the position of members in arrears with their subscriptions. It provides that “... *a member whose contributions are recorded by the Union as more than 26 weeks in arrears may be excluded from membership by the Union posting notice to that effect to the member ...*”. In my judgement, the meaning and effect of this provision is plain. A person with arrears of subscriptions of more than 26 weeks remains a member of the Union until such time as he or she is excluded by the posting of a notice to this effect. This is not only the plain meaning of the words, but it is consistent with the practical difficulties faced by trade unions in dealing with the problem of members in arrears. There may be many reasons for the arrears, including those personal to the member and those caused without his or her knowledge by problems with the direct debit mandate or check-off deductions not being forwarded to the trade union. Whatever the reason for the arrears, there are

advantages to both the member and the trade union in having a definite date of termination should issues arise, for example, concerning benefits, entitlement to legal assistance or the right to participate in the union's democracy.

64. Mr Atkinson relies upon the decision of my predecessor in **Re MSF**. First, that decision is not binding upon me. Secondly, it deals with a complaint under a different statutory provision and its conclusion relates to the system then used by MSF to keep its register of members up to date. I also observe that my predecessor did not have the benefit of such detailed argument as addressed to me by leading counsel or the authorities to which he referred. Against that background, I would respectfully disagree with the proposition that members may terminate their membership by simply stopping their arrangements to pay subscriptions. The subjective intention of a party to a contract in breach of one of its terms does not dictate the consequence of that breach. This is especially so when the contract itself deals expressly with those consequences. This analysis causes no injustice as the member seeking to terminate membership may do so at any time by resignation. In my judgement there is no scope for the concept of constructive resignation when the rules themselves deal with the position. The member who deliberately ceases payment but who does not resign places himself/herself in breach of the contract of membership, entitling the trade union to accept the repudiatory breach and bring the contract to an end either in accordance with the rules of that union or otherwise in accordance with normal legal principles.
65. Accordingly, I find that the members of the Union who were more than 26 weeks in arrears with their subscriptions on 31 January 2013 were still members of the Union and entitled to vote in the General Secretary election in 2013. There was therefore no breach of either section 46(1) or 50(1) of the 1992 Act.
66. For the above reasons, I refuse Mr Hicks' application for a declaration that in the course of the General Secretary election in 2013 the Union breached section 46(1) of the 1992 Act by allegedly not according equally to all members of the Union the entitlement to vote in breach of section 50(1) of the 1992 Act.

Complaint Two

67. Mr Hicks' second complaint is as follows:

'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached rule 15.1 of its rules in that the rule provides that 'all elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union' but in the election which ended on that date the Union balloted 158,824 individuals outside the 'whole membership of the Union', and/or otherwise balloted persons who were outside the 'whole membership of the Union', and/or failed to ballot the 'whole membership of the Union'. Alternatively there is an implied rule that only members will be balloted in an election for General Secretary.'

68. Rule 15.1 of the rules of the Union provide as follows:

15.1 All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union.

Summary of submissions

69. Both Mr Atkinson and Mr Ford QC dealt with complaints one and two by the same submissions. Both complaints turn on whether the 158,824 members more than 26

weeks in arrears with their subscriptions were members of the Union on 31 January 2013, the cut off date for eligibility to vote in the election. Complaint one is framed as a breach of statute. Complaint two is framed as a breach of the rules of the Union.

70. I have found in complaint one that the 158,824 individuals were members of the Union on 31 January 2013 and accordingly I find that this General Secretary election was conducted on the basis of a ballot of the whole membership of the Union.
71. For the above reasons, I refuse Mr Hicks' application for a declaration that in the General Secretary election in 2013 the Union breached rule 15(1) of its rules by balloting 158,824 individuals who were allegedly not members of the Union.

Complaint Three

72. Mr Hicks' third complaint is as follows:

'In breach of section 24(1) of the 1992 Act Unite the Union failed to secure, so far as is reasonably practicable, that the entries in its register of members are accurate and have been kept up to date, in that:

a) Members who were in arrears of contributions were removed from the register prior to the Union having excluded them from membership in accordance with its rules. In particular 158,824 members in arrears with their subscriptions who were not excluded from the Union were removed from the register for the purposes of the annual return for the year end 31 December 2012 and yet balloted in the General Secretary election for which the electorate was established by reference to the membership on 31 January 2013.

b) The Union failed to have, or if it had one failed to properly operate it, a system for ensuring that its membership register was up to date, in that members who had been in arrears of contributions for substantial periods of time were not excluded from membership within a reasonable time period.'

73. Section 24(1) of the 1992 Act provides as follows:

(1) A trade union shall compile and maintain a register of the names and addresses of its members, and shall secure, so far as is reasonably practicable, that the entries in the register are accurate and are kept up-to-date.

Summary of Submissions

74. Mr Atkinson, for Mr Hicks, submitted that the discrepancy between the annual return or AR21 showing 1,424,303 members as at 31 December 2012 and the Scrutineer's report showing that 1,485,079 ballot papers were distributed to those who were members as at 31 January 2013 demonstrated that the membership register was not being kept up to date. He argued that, if the 158,824 individuals who were more than 26 weeks in arrears with their subscriptions were members on 31 January 2013, they should have been on the register of members on 31 December 2012. In his submission, the AR21 establishes that they were not on the register on 31 December. With regard to the second part of the complaint, Mr Atkinson submitted that it was reasonably practicable for the Union to have included the 158,824 names on the membership register in December 2012 as they were able to supply them to ERS in March 2013, as soon as the Union changed its mind about their membership status. He also relied upon the decision of my predecessor in **Re MSF (1998)** and in particular upon the following passage, "*The obligation to keep the register of members as up to date as reasonably practicable includes an*

obligation to operate a system for removing the names of those who no longer wish to be members". He argued that the Union had conceived such a system using the letters SP1, SP2 and SP3 but then had not operated that system since shortly before June 2011. In his submission, the Union had an obligation to exclude, or to consider exercising its power to exclude members more than 26 weeks in arrears.

75. Mr Ford QC, for the Union, conceded that the Union's AR21 for 2012 misreported the number of members as at 31 December 2012. He accepted that it should have included those who were more than 26 weeks in arrears with their subscriptions but who had not been excluded under rule 4.1. However, he submitted that the AR21 is not the membership register and that the register itself was compliant with section 24(1) of the 1992 Act. He observed that a membership register may be kept by computer and that the Union's computer had on it at all times a field for the arrears of members. He argued that members recorded in the 'Arrears' field of the database as being more than 26 weeks in arrears were still members and on the membership register, contrasting them with those who appeared in the 'Lapsed Status' field. With regard to the second part of the complaint, Mr Ford contended, if necessary, that **Re MSF** was wrong in its approach to section 24 and that the duty under section 24 does not impose a requirement to have a system to remove non-paying members from membership. He commented that if the statute sought to impose a duty to "clear out" ineffective members, it would say so and that, in the absence of such a provision, a trade union could properly wait for inactive members to resign positively or could exercise its discretion not to use its power under rule 4.1 to exclude them. As to the general steps taken by the Union to maintain its membership register up to date, Mr Ford noted the evidence of the considerable resources deployed by the Union to this end, the process for the exclusion of members in 2010/2011 and the notice of exclusion sent to 158,824 members with the ballot papers in March 2013.

Conclusion – Complaint 3(a)

76. I sympathise with the position in which Mr Hicks found himself in July 2013 when he saw the AR21 submitted by the Union on 2 July. This gave the membership of the Union as at 31 December 2012 as being 1,424,303, which is considerably fewer than the 1,485,079 ballot papers that had been distributed in March 2013, according to the Scrutineer's report. Notwithstanding the different view that, on legal advice, the Union had taken about the membership status of the 158,824 members more than 26 weeks in arrears as at March 2013, it had still submitted on 2 July 2013 an AR21 which was inconsistent with that position. To this extent, the Union has only itself to blame for adding to the confusion.
77. That said, however, the first part of Mr Hicks' complaint is premised upon 158,824 members having been removed from the membership register prior to them being excluded from membership in accordance with rule 4.1 on 30 April 2013. He relies upon the membership figures as at 31 December 2012 contained in the Union's AR21 for that year. This requires an examination of what is the membership register and how it is operated.
78. I find that the Union's membership register is its computerised database of members. I note that this database has a number of different fields. One such field is 'Lapsed Status' and I accept the Union's evidence that persons entered in that

field are no longer members. These may be persons who have resigned, been expelled or been excluded by reason of rule 4.1. I note that the reason for not excluding 'Lapsed Status' former members from the database entirely is that issues may arise after the termination of their membership which renders it desirable to retain a record of them. Another field on the database is "Arrears". In that field, the number of weeks a member's subscriptions are in arrears can be recorded. As I have found above, a person remains a member of the Union even if these arrears exceed 26 weeks if that member has not resigned, been excluded or otherwise lost membership. Accordingly, the Union has a membership register which records both membership and former "lapsed" membership. The Union's error in submitting the incorrect membership figures with its AR21 for 2012 does not detract from what was recorded on its membership register. The AR21 is not the membership register. In my judgement, Mr Hicks has failed to establish that the Union's membership register was not kept in accordance with section 24 of the 1992 Act by reason of the manner in which the membership position of the those more than 26 weeks in arrears was recorded.

79. For the above reasons, I refuse Mr Hicks' application for a declaration that the Union breached section 24(1) of the 1992 Act by allegedly removing from its register of members 158,824 members who were more than 26 weeks in arrears of contribution prior to them being excluded from the Union in accordance with rule 4.1 of the rules of the Union.

Conclusion – Complaint 3(b)

80. I note that the second part of this complaint is targeted specifically at the alleged failure by the Union to deal properly with those in arrears of contributions for a substantial period. Before looking at this complaint in detail, however, it is appropriate, that I put it in some context by noting the Union's evidence of the steps that it takes to keep its membership register up to date. I was informed that in the period January to September 2014 the Union has recorded over 1.5 million changes to membership records, which averages 170,000 a month or 8,000 a day and that approximately 9,000 members a month go into arrears by more than 26 weeks. To deal with this, there is a membership department, headed by Mr Irwin who has a staff of five at head office to deal with central membership database issues. There are also about 230 membership clerks in the 71 regional and district offices. I was further told of a substantial team in Newcastle with the task of reconciling subscriptions paid by employers through various check-off arrangements with the Union's membership database. Mr Irwin describes the maintenance of the membership register as a huge and ongoing job which is undertaken continuously. Mr Hicks takes no point against the general procedure and resources used to keep the membership register up to date.
81. The specific point taken by Mr Hicks relates to the position of those members more than 26 weeks in arrears. I have already found that such persons remain members until their membership terminates by resignation, expulsion, exclusion or otherwise in accordance with the rules of the Union or by operational law. On that basis, it is highly arguable that a membership register that maintains a record of their names and addresses is compliant with section 24(1) of the 1992 Act. On the other hand, the existence of a considerable number of members more than 26 weeks in arrears is prima facie evidence that some of them may have died and their membership

ceased by operation of law or that their membership might otherwise have terminated by, for example, in certain Unions, no longer qualifying for membership. The greater the number of members in substantial arrears and the longer the period of those arrears, the greater is the duty on the trade union to ensure that its membership register remains compliant with section 24(1). In Unite, there were 310,000 members in its Amicus section alone who were in substantial arrears in 2010, after no action had been taken in this regard since 2006. There were another 158,824 members in substantial arrears in January 2013, that had built up between June 2011 and January 2013, during which period no members had been excluded under rule 4.1. Mr Hicks points out that 158,824 members represents about 10% of the Union's entire membership and 310,000 members was undoubtedly more than 10% of the membership of the Amicus section in 2010. I find it likely that a small but not insignificant number of these 460,000 individuals would have already ceased to be members at the time of their purported exclusion, unknown to the Union. Accordingly in my judgement, it is necessary for a trade union to have a system for determining whether members in substantial and continuing arrears with their subscriptions are still members in order to secure that the entries on its membership register are accurate and kept up to date so far as reasonably practical, in accordance with section 24(1) of the 1992 Act. Each case will turn on its own facts. However, the more members who are in substantial arrears and the longer the period of those arrears, the stronger will be the prima facie case that the membership register has not been kept up to date so far as is reasonably practical.

82. On the facts of this case, Unite operated a system between 2010 and June 2011 that removed from membership those more than 26 weeks in arrears. This demonstrates that it is possible to have such a system. However, it is not for me to prescribe any particular system or require that a system based on best practice is adopted. Each union must have regard to its own circumstances. I can see the common sense of the decision taken by Unite in 2011 to discontinue the practice of sending SP3 letters excluding members and substituting a practice of telephoning those members to seek to secure their continued membership. However, its own monitoring of this policy demonstrates a success rate of only about 20% at best, which means that 80% of those in substantial arrears remained in limbo, unable to claim many of the benefits of membership by reason of those arrears, whilst able to participate in statutory ballots. It can reasonably be supposed that the 158,824 members who have been at the centre of much of this case is made up by the 80% or so who were contacted by the Union but were not persuaded to resume payment of subscriptions. In my judgement, the accumulation of members in substantial arrears to as many as 158,824 demonstrates, on the balance of probabilities, that its retention system, whatever its merits, does not achieve the statutory objective of securing, so far as is reasonably practicable, that the entries in the register are accurate and are kept up to date. There is considerable merit in the call centre system but if, having identified the 80% or so of members who are not prepared to resume payment, there is no attempt to identify those who are no longer members or those who, in conversation with the call centre, indicate a wish to resign, the system does not in itself secure that the membership register is kept up to date.
83. For the above reasons, I make a declaration that the Union breached section 24(1) of the 1992 Act by having failed to secure, so far as is reasonably practicable, that the entries in the register of members were accurate and kept up to date.

Enforcement Order

84. Where I make a declaration, I am required by section 25(5A) to make an Enforcement Order unless I consider that to do so would be inappropriate.
85. In this case I find that the Union takes very seriously its obligations to secure that its membership register is accurate and kept up to date, as demonstrated by the considerable resources it devotes to this difficult task. The methods by which a trade union chooses to maintain its membership register is a matter for its discretion. In my judgement, this is a wide discretion. The use of a call centre to make contact with those in substantial arrears may serve the dual purpose of aiding retention and possibly ensuring the membership register is kept up to date. The fact that up to 20% of members in arrears chose to resume paying their subscriptions demonstrates the success of the former but the accumulation of 158,824 persons in substantial arrears over a period of about 19 months is prima facie evidence that the latter is meeting less success. Having now sent SP3 letters to the 158,824 members and excluded those that did not respond by 30 April 2014, the Union has for the time being dealt with the problem and its membership register now appears to be compliant in this regard. However, as to the future, the Union may wish to give thought to a means of ensuring that the number of members with a substantial and continuing arrears of subscriptions does not grow to such a significant number, or proportion of its total membership, that it is prima facie evidence that the membership register is not compliant with section 24(1) of the 1992 Act.
86. For the above reasons I do not consider that it is appropriate to make an Enforcement Order in this matter.

Complaint Four

87. Mr Hicks' fourth complaint is as follows:
'In the course of an election held between 18 March 2013 to 12 April 2013 Unite the Union breached section 51(3)(a) and (b) of the 1992 Act in that members were not allowed to vote without constraint imposed by the Union and without incurring any direct cost to themselves in that the Union included documents with some of the voting papers that might have caused members to believe that their right to vote was contingent upon them starting or continuing to pay contributions or clearing any arrears of contributions.'
88. Section 51(3) of the 1992 Act provides as follows:
51(3) Every person who is entitled to vote at the election must -
(a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees, and
(b) so far as is reasonably practicable, be enabled to do so without incurring any direct cost to himself.

Summary of Submissions

89. Mr Atkinson, for Mr Hicks, submitted that the inclusion by the Union of the letter from Mr Beckett dated 18 March 2013 in the ballot packs of the 158,824 members who were more than 26 weeks in arrears was a breach of section 51(3) of the 1992 Act. He argued that Mr Beckett's letter gave those members the impression that they had to begin paying contributions, or settle their arrears, before they could vote

and that this amounted to a 'constraint' or 'interference' contrary to section 51(3)(a). He maintained that constraint or interference went beyond physical interference or putting a person in fear of voting, as commented upon in **Paul v NALGO (1987)** to include the sort of circumstances commented upon in **Re CPSA (1999)**. He considered that a member, seeing Mr Beckett's letter, may have been confused about the communication and thrown away the contents of the envelope, thereby losing his or her vote. Mr Atkinson further argued that Mr Beckett's letter could have had the unintentional effect of imposing a direct cost on the member who would have been misled into believing he or she had to pay contributions in order to vote, contrary to section 51(3)(b). In respect of both potential breaches, Mr Atkinson submitted that the test I should apply is a subjective one as to how the letter was understood by the member and that I should find in his favour if there was a real possibility that a member receiving Mr Beckett's letter would believe that in order to vote, he had to clear his arrears. In construing Mr Beckett's letter, Mr Atkinson argued that I should not approach it as a statute or contract but consider how it would have been read by an ordinary member. He submitted that the request for payment should have been sent separately and/or Mr Beckett's letter should have had a bold heading to show that the envelope contained ballot material. He also argued that the percentage of the 158,824 members who received Mr Beckett's letter and who voted was only about 3% compared to the about 15% of members who did not receive Mr Beckett's letter and voted. He argued that this supported his submission that Mr Beckett's letter had deterred members from voting.

90. Mr Ford QC, for the Union, observed that there was no prohibition in including additional material with the voting paper in a General Secretary election, unlike the express prohibition in sending additional material with the voting paper in a merger ballot in section 100C(5) of the 1992 Act. In his submission, the complaint that any member would have to incur a cost in order to vote was plainly wrong in fact as well as being not capable of being understood from the terms of Mr Beckett's letter and misconceived. Mr Ford observed that Mr Beckett's letter could not amount to interference or constraint in the way a member voted as it was clear from the terms of the letter that the member had the right to vote and that any exclusion from membership would not take effect until 30 April 2013, 18 days after the close of voting. Indeed, Mr Ford observed that members in arrears may have considered that they had no right to vote before receiving Mr Beckett's letter and his letter may have reassured them that they remained members until after the close of voting. Further, Mr Ford argued that neither the Union nor ERS received a single complaint about a member being confused or worried by the inclusion of Mr Beckett's letter with the voting pack. As to the lower percentage of members voting amongst those who received Mr Beckett's letter, he argued that this was not surprising as they were a group who were more than 26 weeks in arrears and likely to be less active participants in the affairs of the Union than those who kept their subscriptions up to date.

Conclusion – Complaint Four

91. There is no statutory prohibition in including extraneous material with the voting papers sent to members in a General Secretary election. Whether any particular enclosure causes there to be a breach of section 50(3) of the 1992 Act is a matter of fact and degree to be considered on the facts of each case.

92. I find that the enclosure of Mr Beckett's short letter with the ballot packs of 158,824 members falls a long way short of the mischief that was considered by my predecessor in **Re Public & Commercial Services Union (1999)**. In that case there was comment that a huge mass of advertising or other extraneous matter which obscured the balloting material and effectively invited immediate destruction of the entire package might be considered to be an interference with the members voting. Similarly I find the terms of Mr Beckett's letter are incapable of amounting to an unlawful interference or constraint. I observe that the letter begins "*Enclosed is your ballot papers for the General Secretary election*". These words are inimical to the construction that Mr Atkinson would have me put on the letter as a whole. I further find that on no sensible reading could Mr Beckett's letter be construed as requiring a member to pay his or her arrears of subscriptions (thereby incurring a cost) before voting. The only possible meaning of Mr Beckett's letter is that the member is entitled to vote by means of the enclosed voting paper but, if no further action is taken, he or she will be excluded from the Union after the election on 30 April 2013.
93. For the above reasons I refuse Mr Hicks' application for a declaration that in the General Secretary election 2013 the Union breached section 51(3)(a) and (b) of the 1992 Act by including a document with some ballot papers which allegedly had the consequence that those members were not allowed to vote without interference from or constraint imposed by the Union and without incurring any direct cost to themselves.

Complaint Five

94. Mr Hicks' fifth complaint is as follows:

In the course of an election held between 18 March and 12 April 2013 Unite the Union breached sections 51A(3) and 51A(6)(b) of the 1992 Act with regard to the independent person it had appointed for the purposes of that election, namely Election Reform Services Limited, in that Unite:

- a) failed to require that ERS Ltd carried out its functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice, and*
- b) failed to ensure that ERS Ltd carried out its functions and that there was no interference with its carrying out of those functions which would make it reasonable for any person to call into question the independence of ERS Ltd in relation to the Union.*

It is alleged that these breaches occurred by Unite having instructed ERS Ltd to include with some but not all the ballot papers distributed an insert that might have caused members to believe that their right to vote was contingent upon them starting or continuing to pay contributions or clearing any arrears of contributions.'

95. The relevant sections of the 1992 Act are as follows:

Counting of votes etc

51(A)(3) An appointment under this section shall require the person appointed to carry out his functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice.

51A(6) The trade union –

(a)

(b) shall ensure that a person appointed under this section duly carries out his functions and that there is no interference with his carrying out of those functions which

would make it reasonable for any person to call into question the independence of the person appointed in relation to the union, and
(c)

Summary of Submissions

96. Mr Atkinson, for Mr Hicks, combined his submissions on this complaint with his submission on Mr Hicks' fourth complaint, as both relate to Mr Beckett's letter of 18 March 2013 being included in the ballot packs of the 158,824 members who were more than 26 weeks in arrears. He submitted that the requirement of the Union that ERS included Mr Beckett's letter in the ballot pack caused the Union to breach its duty of ensuring that the Scrutineer carried out its functions in accordance with section 51A(3) and (6) and that its desire to save the costs of an additional mailing was not a sufficient reason for the inclusion of Mr Beckett's letter. Mr Atkinson argued that this case fell to be considered in the same way as **Re Public & Commercial Services Union (1999)** in which it was held that there was a breach of section 51A(6) by an additional document being included with the ballot pack of some but not all members.
97. Mr Ford QC, for the Union, submitted that the premise of this complaint was wrong in that the inclusion of Mr Beckett's letter would not have led members to believe that their right to vote was contingent upon paying their arrears of subscription. As to the complaint itself, Mr Ford observed that section 51A(3) looked to the appointment of the Independent Person and argued that the facts do not support Mr Hicks' complaint. Mr Ford outlined the manner in which ERS was appointed and referred to the terms of appointment as contained in paragraphs 6.1 to 6.3 of the 'Ballot Rules & Guidelines' that had been approved by the EC on 5 March 2013. Mr Ford submitted that, read fairly and in context, the terms of appointment of ERS and of Mr Hearn complied fully and in substance with section 51(A)(3). He noted that Mr Hearn has long experience both as a scrutineer and in conducting elections for the Union and that Mr Hearn was clear as to the lawfulness of the appointments, which closely tracked the wording of section 51A(3). As to the alleged breach of section 51A(6)(b), Mr Ford considered the complaint to be hopeless. He argued that not only did Mr Hearn consider the insertion of Mr Beckett's letter to be uncontroversial, but that any sensible reading of that letter would lead to the conclusion that it was not an interference which would make it reasonable for any person to call into question the independence of ERS. Mr Ford distinguished the case of **Re Public & Commercial Services Union (1999)** by reference to the nature of the material enclosed with the ballot pack which in this case did not contain any information which might affect how a member might vote.

Conclusion – Complaint Five

98. The alleged breach of section 51A(3) of the 1992 Act requires me to consider the appointment of the Independent Person, in this case the appointment of ERS, on or about late November or early December 2012. I find that this appointment of ERS incorporated the appropriate paragraphs of the 'Ballot Rules and Guidelines'. I have little doubt that these were well known to Mr Hearn when he accepted the invitation of Ms Dykes to discuss the appointment of ERS as the Scrutineer for this election and that his acceptance of the appointment was on the terms of the draft 'Ballot Rules and Guidelines' that he was shown at that meeting. An examination of paragraphs 6.1 to 6.3 of the 'Ballot Rules and Guidelines' establishes that the

appointment did fulfil the requirements of section 51(A)(3) and that ERS were required to carry out its functions so as to minimise the risk of any contravention of the requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice.

99. The alleged breach of section 51A(6)(b) of the 1992 Act is that the Union's request for Mr Beckett's letter dated 18 March 2013 to be included in the ballot pack was an interference with the carrying out by ERS of its functions which would make it reasonable for any person to call into question ERS's independence in relation to the Union. I find firstly that there is no evidence of pressure being put upon ERS by the Union to include Mr Beckett's letter with the ballot pack. To the contrary, I find it more probable than not that, if Mr Hearn had expressed an opinion against the inclusion of the letter on the grounds that it might be unlawful, the Union would have acted upon Mr Hearn's opinion and withdrawn the letter. Secondly, having regard to the terms of the letter and the reasons for the Union wishing for it to be included in the ballot pack, I find there was no interference by the Union with the carrying out of ERS's functions, let alone an interference that would have made it reasonable for any person to call into question the independence of ERS in relation to the Union.
100. For the above reasons, I refuse Mr Hicks' application for a declaration that in the General Secretary election of 2013 the Union breached sections 51A(3) and section 51A(6)(b) of the 1992 Act by allegedly instructing its Independent Scrutineer to include an additional insert with some but not all of the ballot papers to be distributed to members.

Complaint Six

101. Mr Hicks' sixth complaint is as follows:

'On or around 27 March 2013 the Union interfered with the proceedings of the Executive Council by preventing Jerry Hicks's complaint that Steve Turner had acted in a matter that could lead to a disciplinary charge from being considered by the Executive Council. In breach of the directions given under rule 27.2, in particular paragraph 2.3 of Appendix 5 to the rules, the Executive Council were thereby prevented from exercising the discretion vested in them under the rules to decide whether or not to order a disciplinary investigation.'

102. The relevant rules of the Union are as follows:

Rule 27.2: Disciplinary Hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice.

Paragraph 2.3 of Appendix 5: If the union receives notice of a matter which may lead to a disciplinary charge against one more members, then the situation should be investigated to determine if there should be a charge. A disciplinary investigation may only be initiated with the authority of the Executive Council (or a sub-Committee of the Executive Council) or a Regional Committee (or a sub-Committee of a Regional Committee). If a Branch or Branch Committee proposes the commencement of a disciplinary investigation, authority must be obtained in advance from the Executive Council (or a sub-Committee of the Council) or the relevant Regional Committee (or a sub-Committee of the Regional Committee). The means of investigation shall be determined by a body referred to in Rule 27.3 or by the General Secretary. Notice of the fact of an investigation being undertaken shall be sent to the office of the General Secretary.

Summary of Submissions

103. Mr Atkinson, for Mr Hicks, submitted that appendix 5 to the rules of the Union contains provisions that are themselves rules of the Union. He observed that rule 27.2 provides that “*disciplinary hearings shall be organised and conducted under directions issued by the EC*” and that appendix 5 is headed “*Rule 27 – Discipline of Members EC Guidance ... this document sets out those directions that must be read in conjunction with Rule 27*”. Mr Atkinson stated that Mr Hicks’ email to the General Secretary of 22 March 2013 gave the Union notice of a matter that may lead to a disciplinary charge and that the rule then states that “*the situation should be investigated to determine if there should be a charge*”. He contended that the EC (or a sub committee of the EC) must determine whether to initiate a disciplinary investigation but that Mr Murray had prevented the matter going to the EC due to his belief that Mr Turner had immunity from proceedings under rule 27.8. In Mr Atkinson’s submission, that was not Mr Murray’s decision to take. He argued that the complaint should have gone before the EC for it to decide the way forward. Mr Atkinson also addressed the issue of my jurisdiction having regard to section 108A(5)(b) of the 1992 Act, which provides that no application may be made to me regarding disciplinary proceedings against an employee of the Union. Recognising that this might exclude my jurisdiction under section 108A(2)(b) (*‘disciplinary proceedings by the union (including expulsion)’*) Mr Atkinson submitted that this complaint was within my jurisdiction by virtue of section 108A(2)(d) (*‘the constitution or proceedings of any executive committee or of any decision making meeting’*), as it concerns whether or not an issue should be placed before the EC for decision. He relied upon **Scobie v TGWU (2005)**. Mr Atkinson stated that he was not asking me to decide whether there should be any disciplinary proceedings, only that the Union should not have prevented Mr Hicks’ complaint against Mr Turner from going before the EC for it to determine if a disciplinary investigation should be initiated.
104. Mr Ford QC, for the Union, submitted that I had no jurisdiction to determine this matter on the basis of section 108A(5)(b) of the 1992 Act. He argued that the words of the sub-section are very wide indeed and not restricted to the activities of an employee in connection with his or her duties. He further argued that there were good practical reasons for excluding my jurisdiction “*regarding disciplinary action against an employee of the Union*”. First, if an employee pursued such legal remedies as breach of contract or unfair dismissal, it would be undesirable if there were parallel proceedings before me. Secondly, sanctions imposed on officers in any disciplinary proceedings taken against them in their capacity as a member may affect their status ‘qua’ employee. Mr Ford suggested that, if the disciplinary penalty imposed in such circumstances was a suspension of that member from representing the Union, the person’s employment as an officer would become untenable and would entitle him/her to claim constructive dismissal. He also referred to the potential penalty that might be imposed under the members disciplinary process of barring a member from holding office, which he argued might be a dismissal from employment in itself. Mr Ford further submitted that the provisions of appendix 5 to the rules are not in themselves rules of the Union but directions of the EC and, as such, are not within my jurisdiction. In the alternative, should I find that I have jurisdiction, Mr Ford submitted that there was no breach of paragraph 2.3 of appendix 5 as the EC was prevented by rule 27.8 from considering any disciplinary matter against a full time officer in respect of any alleged act ‘*in connection with the performance of his duties*’. He argued that it was clearly not the

intention of the rules that the members disciplinary procedure and the employees disciplinary procedure should operate in relation to the same allegation as this could lead to inconsistent decisions. Mr Ford observed that the words “in connection with the performance of his duties” are wide and submitted that they should be construed more broadly than “in the course of employment”. He further observed that the employees disciplinary procedure enables matters outside the work environment to be the subject of a charge if such activities bring the Union into disrepute or impact on the employee’s duty of trust and confidence. Finally, Mr Ford noted that his submission was supported by custom and practice as in no instance have disciplinary proceedings been brought against an employee of Unite in his/her capacity as a member under rule 27.

Conclusion – Complaint Six

105. This complaint gives rise to a number of issues of jurisdiction. Two of them concern my jurisdiction to hear this complaint and a third concerns the jurisdiction of the EC to initiate a members disciplinary investigation against an employee of the Union.
106. It is firstly argued that section 108A(5)(b) of the 1992 Act deprives me of jurisdiction to hear this complaint. Section 108A(5) provides as follows:
- “(5) No application may be made regarding –*
 - (a) the dismissal of an employee of the union;*
 - (b) disciplinary proceedings against an employee of the union.*

Mr Ford argues that this provision not only removes my jurisdiction to hear a complaint under section 108A(2)(b) (‘disciplinary proceedings by the Union (including expulsion)’) but also under any of the heads of jurisdiction in section 108A(2).

107. Since the repeal of the provisions which enabled there to be a closed shop, an officer of a trade union may or may not be a member of the union by which he/she is employed or of any other trade union. In practice, however, it is to be expected that an officer would be a member of the appropriate trade union. Further, it is axiomatic that any trade union member may be subject to disciplinary proceedings being taken against him or her, unless protected from those proceedings by the rules themselves. In this case, Unite argues that its employees are protected from all disciplinary proceedings taken against them as a member by rule 27.8. However, my interpretation of section 108A(5)(b) of the 1992 Act cannot be based exclusively on the rules of Unite. Many trade unions do not have equivalent rules. In the absence of protection under the rules, employees of a trade union can be subject to disciplinary action being taken against them as a member, if indeed they are members of that trade union. If Unite’s argument is correct, a member/employee of any union would have no right to bring a case to the Certification Officer, no matter how blatantly the disciplinary procedure might have been in breach of rules. The only avenue open to such a person would be a challenge in the High Court for breach of rule. I find such an interpretation to be unattractive and unlikely to have been the intention of Parliament. On the other hand, I recognise that the existence of parallel disciplinary procedures is undesirable. I also recognise that trade union officers are particularly vulnerable to spurious complaints of misconduct from disgruntled members or members pursuing a particular political agenda. Whilst I do not suggest that Mr Hicks’ complaint falls into either of these categories, many trade unions deal with this dilemma by having rules aimed at preventing such abuse.

Unite has both rule 27.8 and paragraph 2.3 to appendix 5 to the rules. I am further urged by Mr Ford to have regard to the impossible employment position in which an officer/employee might find himself/herself if certain penalties were imposed against that person as a member. Whilst noting this concern, I am not persuaded that such a person is put in an impossible position. An officer who is subject to a disciplinary penalty as a member may be prevented from taking part in branch activity or otherwise participating as a member but, as membership of the union is not and cannot be a condition of employment, the officer/employee can continue to act in his or her employed capacity in the same way that employees who are not members of the trade union can do their jobs.

108. Having considered the consequences of the alternative interpretations, I examine the words of section 108A(5). I accept Mr Ford's submission that, if this provision applies at all, it excludes my jurisdiction under each of the heads of section 108A(2), not just the head relating to disciplinary procedures. I also observe that sub-section (5)(a) can only apply to a person in his/her capacity as an employee. Sub-section (5)(b) can be read as being restricted to disciplinary proceedings against an employee of the Union, 'qua' employee, or as preventing any disciplinary proceedings at all against such a person, whether as an employee or as a member of the Union. In my judgement, the correct interpretation of sub-section 5(b) is that it must be read consistently with sub-section 5(a) to mean that no application may be made to the Certification Officer regarding disciplinary proceedings taken against an employee of the Union in his/her capacity as an employee. Accordingly, as the disciplinary proceedings that Mr Hicks wished to pursue against Mr Turner were in Mr Turner's capacity as a member of the Union I find that I am not precluded by section 108A(5)(b) from considering this complaint.
109. The second preliminary matter I must consider is whether appendix 5 forms part of the rules of the Union. If it does not, no complaint under section 108A(1) can be brought before me. I take account of a number of factors. First, appendix 5 is physically included in the publication that describes itself as the rule book which is provided to members as being "the rules". Secondly, appendix 5 has its genesis in rule 27.2. This provides that: "*disciplinary hearings shall be organised and conducted under directions issued by the Executive Council. These directions ensure that the process is fair and conducted in accordance with the principles of natural justice*". Thirdly, the rule book contains seven appendices which contain both words of general guidance and specific provisions, precisely expressed – some in mandatory language – which are clearly intended to have a normative effect. In my judgement, appendix 5 is to be read as containing rules of the Union, expressly incorporated by rule 27.2, insofar as those rules are capable of creating rights and duties governing the activities of the Union and Union members. I further find that paragraph 2.3 of Appendix 5 does create such rights and duties and is a rule of the Union, within my jurisdiction under section 108A of the 1992 Act.
110. I turn now to consider whether paragraph 2.3 of appendix 5 was breached by Mr Murray not having submitted Mr Hicks' complaint against Mr Turner to the EC on the grounds that the EC had no jurisdiction to consider his complaint by virtue of rule 27.8. This requires a consideration of rule 27.8, which is as follows:
"27.8 A member may not be charged under this rule in respect of any alleged act or omission in connection with the performance of his/her duties as a full time officer and/or employee of the Union".

111. I have firmly in mind the difficulties that trade unions can experience by officers, who may have to make unpopular decisions, being subject to disciplinary action being taken against them as a member by other members (see paragraph 107 above). Rule 27.8 is drafted to avoid many of these difficulties. However, it falls short of providing that no disciplinary action may be taken against a full-time officer and/or employee of the Union. The words qualifying the protection of such a person must be given meaning and effect. The alleged act or omission must be "*in connection with the performance of his/her duties*" if it is to be protected. In many cases, this will be abundantly clear and I find that in such cases the Union is under no obligation to submit the matter to the EC. In other cases, however, it may be unclear whether or not an officer's conduct was in connection with the performance of his/her duties and in those circumstances it may be appropriate to submit the matter to the EC for a preliminary determination on the application of rule 27.8 before considering its discretion to initiate a disciplinary investigation. I accept Mr Ford's submission that the words "in connection with the performance of his/her duties" give the employee greater protection than would the words "in the course of his employment". Nevertheless there must still be a connection between the act or omission and the performance of his/her duties in order for the protection to apply. On the facts of this case, there was evidence that officers and employees are entitled to hold and express their views in an election but not in their capacity as an officer or employee. Mr Murray gave evidence that Mr Turner was not acting in the course of his employment but in his own capacity and on his own initiative. There was also evidence that the re-tweet by Mr Turner was made between 7am and 8am from his home. On the evidence before me I find that Mr Turner was not only not acting in the course of his employment when he posted the tweet in question but that he was also not acting "in connection with the performance of his duties". I find that the performance of his duties did not include the lending of support or indicating opposition to any candidate in the General Secretary election, either expressed directly or by way of giving wider publicity to the views of another person.
112. Accordingly, I find that Mr Turner's actions were not protected by rule 27.8 and that by virtue of paragraph 2.3 of appendix 5, the situation notified to the General Secretary by Mr Hicks' email of 22 March 2013 and confirmed in his email to Mr Murray of 26 March should have been considered by the EC (or a sub committee thereof) and a decision made as to whether a disciplinary investigation should be initiated.
113. For the above reasons, I make a declaration that the Union breached paragraph 2.3 of appendix 5 of its rules by not submitting a complaint made by Mr Hicks against Mr Turner under rule 27, in Mr Turner's capacity as a member of the Union, to the EC for its consideration.

Enforcement Order

114. Where 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.
115. On the facts of this complaint, I consider that it is appropriate to make an enforcement order. I order that the Union submits for consideration by the Executive Council, or a sub-committee thereof, the complaint made by Mr Hicks

against Mr Turner under rule 27 of the rules of the Union in his email to the General Secretary of 22 March 2013 and his email to Mr Murray of 26 March 2013 for it to determine whether an investigation of that complaint should be initiated.

116. By section 108B(4) of the 1992 Act I must in any enforcement order specify the period within which the Union is to comply with the Order. I specify that the EC or a committee of the EC must consider this matter on or before 19 December 2014.
117. In my judgement, paragraph 2.3 of appendix 5 to the rules does not impose a requirement that the EC must automatically put forward all complaints for investigation. If this were the case, there would be no purpose in the matter being placed before the EC. As I have commented (see paragraphs 107 and 111), the institution of member on member complaints can give rise to difficulties which can tie up the energies of the participants and the administration of the Union. It is consistent with the sound management of a trade union that its rules build in a level of reflection to guard against such difficulties. In my judgement, paragraph 2.3 of appendix 5 is intended to be just such an opportunity. It is significant that this level of reflection is given to the highest committee of the Union, the EC. It is in a position to have regard to all relevant factors and reach a decision which takes into account not only the interests of the conflicting parties, but also the interests of the Union, as well as being itself democratically accountable for its decision. On the facts of this case, the existence of parallel disciplinary proceedings may be a factor which it considers relevant in deciding whether the complaint of Mr Hicks against Mr Turner under the rules relating to member discipline should go further. Mr Hicks has expressed his concern that these disciplinary proceedings against Mr Turner as an employee may be a device timed to coincide with my decision and intended to enable Mr Turner to avoid all disciplinary action. Such concerns have not been alleviated by the proposed disciplinary action against Mr Turner as an employee having lain relatively dormant since March 2013 and having been reactivated just 21 days before this hearing. I am nevertheless confident that these fears will be balanced by the EC alongside all other relevant considerations.

Complaint Seven

118. Mr Hicks' seventh complaint is as follows:

'Between 1 January 2013 and 15 April 2013 Unite the Union breached paragraph 2.7(a) of the directions given for the conduct of the 2013 General Secretary Election by the Executive Council under rule 16.1 in that the Union's resources were used to support a particular candidate by Steve Turner, a full time employee of the Union, campaigning for Len McCluskey in the course of his employment, for example by campaigning online in support of Mr McCluskey and criticizing Mr Hicks.'

119. The relevant rules of the Union are as follows:

The Ballot Rules and Guidelines:

Para 2.7 In any campaign activity the following must be adhered to:

(a) The corporate identity and logo of the union and the union's resources, which include the union's membership databases, must not be used to support any particular candidate in this election. (see also (d) below) (Any logo that in the opinion of the Returning Officer is similar enough to the logo of the union to cause confusion for an ordinary member is similarly not allowed).

(b)

Rule 16.1: Subject to the provisions of these rules and the powers of the independent

scrutineer, the election of members of the Executive Council and the General Secretary shall be organised and conducted in accordance with the directions of the Executive Council.

Summary of Submissions

120. Mr Atkinson, for Mr Hicks, submitted that paragraph 2.7 of the Ballot Rules and Guidelines is a rule of the Union. He observed that rule 16.1 provides that *“the election of members of the Executive Council and General Secretary shall be organised and conducted in accordance with directions of the Executive Council”* and that these directions are contained in a document headed “General Secretary Election 2013 – Ballot Rules and Guidelines for the conduct of the Election”. Mr Atkinson noted in particular that the directions were referred to as ‘Rules’ by the Union itself. He also submitted that if the Ballot Rules were not ‘rules’, the Union would not be able to exclude from eligibility to vote those who joined the Union after 31 January 2013, as section 50(2)(c) of the 1992 Act only permits such exclusions if they are contained in the rules of the union and this particular exclusion is found in paragraph 5 of the Ballot Rules, in accordance with rule 16.15. On the basis that the Ballot Rules and Guidelines are rules of the Union, Mr Atkinson observed that paragraph 2.7(a) provides that *“the union resources, which include the union’s membership databases, must not be used to support any particular candidate in this election”*. He submitted that Mr Turner, a senior employee of the Union, had been campaigning online for Mr McCluskey in the course of his employment and that accordingly a Union resource had been used to support a particular candidate, in breach of paragraph 2.7. Mr Atkinson commented that Mr Murray had not progressed Mr Hicks’ complaint against Mr Turner as a member of the Union on the grounds that the offending conduct was said to be in connection with the performance of Mr Turner’s duties. He argued that this amounted to an admission by the Union that Mr Turner was a Union resource when campaigning online for Mr McCluskey.
121. Mr Ford QC, for the Union, submitted that the Ballot Rules and Guidelines are not ‘rules’ of Unite. He observed that they were issued just for this General Secretary election, a one-off event, and that they contained much material which was not appropriate for the rules of the Union by way of guidance and explanation. As to the merits of the complaint, Mr Ford submitted that there was no use of a union resource by Unite (Mr Ford’s emphasis) to support a particular candidate as (i) the offending tweet did not originate from Mr Turner but Ms Beal, (ii) Mr Turner was not acting with the approval of the Union or on its instructions or as its representative, (iii) Mr Turner did not purport to post the retweet as coming from the Union, (iv) the retweet took only a moment, (v) the Union had no role in the retweet and (vi) Mr Turner did not have the express or implied authority of the Union to post it. Further, Mr Ford stated that the Union was not using Mr Turner ‘qua’ paid employee or his paid time to support Mr McCluskey on its behalf and that unless the act was somehow authorised by the Union it could not be attributed to it. He also argued that Mr Turner was not a resource of the Union as, if so, the expression of any views in an election by an employee over the internet would constitute a breach of paragraph 2.7(a) of the Ballot Rules and Guidelines.

Conclusion – Complaint Seven

122. Rule 16.1 provides that *“Subject to the provisions of these rules and the powers of the independent scrutineer, the election of members of the Executive Council and*

the General Secretary shall be organised and conducted in accordance with the directions of the Executive Council". The directions of the EC for this election are contained in a separate document entitled "General Secretary Election 2013 - Ballot Rules and Guidelines for the Conduct of the Ballot". An examination of that document shows that whilst it contains some provisions which create rights and duties or otherwise govern the activities of the Union, there are others of a more general nature giving, as the name of the document would suggest, guidance. Considering the document as a whole, its genesis in the rules of the Union and the importance of its content to the democratic structures of the Union, I find that those provisions that are capable of constituting rules of the Union are in fact rules. I further find that paragraph 2.7(a) is one such rule.

123. As to the substance of Mr Hicks' complaint, I have already found in Complaint Six that, in re-tweeting the offending message, Mr Turner was not acting in connection with the performance of his duties as a full time officer. I find that the offending message was re-tweeted by him from his personal twitter account between 7am and 8am from home and that his account profile includes the words "comments my own". I further find that Mr Turner did not have the express or implied authority of the Union to post the retweet nor did the Union have any role in it or sanction or approve it. Accordingly, I find that Mr Turner's retweet of the offending message did not constitute the use of a union resource for the purposes of paragraph 2.7(a) of the Ballot Rules and Guidelines.
124. For the above reasons, I refuse Mr Hicks' application for a declaration that during the General Secretary election the Union breached paragraph 2.7(a) of the 'Ballot Rules and Guidelines for the Conduct of the Ballot' at the General Secretary election in 2013 by allegedly using the union's resources to support a particular candidate in the election.

Complaint Eight

125. Mr Hicks' eighth complaint is as follows:

'Between January 2013 and 15 April 2013 the Union failed to hold an election that complied with the Union rules, as, during that election, supporters of one candidate breached union rules in relation to the election of the General Secretary and the balloting of members to that end. In particular Steve Turner broke rules 5.1, 5.2, 27.1.3. and 27.1.5, when campaigning for Len McCluskey, in that he provided false and misleading information about a member of the Union and candidate in the election, by, during the election, publishing online to other members of the Union, and to the Union at large, a public statement that Mr Hicks condoned sex crimes against women.'

126. Rules 5.1, 5.2, 27.1.3 and 27.1.5 of the Union's rules provide as follows:

5.1 A member of the Union must comply with these rules and with any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or as a full time officer.

5.2 A member must not knowingly, recklessly or in bad faith provide the Union with false or misleading information relating to a member or any aspect of the Union's activities.

27.1.3 Knowingly, recklessly or in bad faith providing the Union with false or misleading information relating to a member or any other aspect of the Union's activities.

27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union.

Summary of Submissions

127. Mr Atkinson, for Mr Hicks, submitted that I had jurisdiction to consider this complaint under section 108A(a) of the 1992 Act ('the appointment or election of a person') and/or section 108A(c) ('the balloting of members'). He accepted that the rules allegedly breached did not themselves relate to any of the matters listed in section 108A(2) but argued that, if such misconduct took place during the course of an election, the misconduct was brought within my jurisdiction by the context in which it had taken place. It was Mr Hicks' case that my jurisdiction was founded upon whether the alleged breach was related to any of the matters in section 108A(2) not whether the rules allegedly breached related to any of those matters. As to the merits of the complaint, Mr Hicks was strongly of the opinion that Mr McCluskey's campaign had deliberately set out to smear him for his connections with the SWP and, by extension, the way the SWP had dealt with the charges of sexual assault and rape against one of its members. Mr Hicks has consistently denied that the scandal had anything to do with him or that he condoned how the SWP had dealt with it. In Mr Atkinson's submission, the retweet by Mr Turner was an act of misconduct by him as a member of the Union and a breach of rules 5.1, 5.2, 27.1.3 and 27.1.5.
128. Mr Ford QC, for the Union, submitted that I have no jurisdiction to hear this complaint for two reasons. First, he argued that I have no jurisdiction to determine disciplinary complaints against members for misconduct and that it was not intended that I should duplicate or replace the Union's own disciplinary processes. Mr Ford commented that my jurisdiction is limited to complaints brought against unions themselves and does not encompass complaints against individual members, as is made clear by section 108A. He pointed out that a claim can only be made against a trade union, that only a trade union and the applicant are given an opportunity to be heard and that any declaration or enforcement order must necessarily be enforceable only against the trade union. He went on to argue that section 108A(2)(b), in setting out the limits of my jurisdiction regarding rules which relate to discipline, limits my jurisdiction to disciplinary procedures "by the Union", not a breach of a rule by a member. He relied upon my decision in **Taylor v Musicians' Union (2002)** in which I commented that the common mischief which section 108A(2) seeks to address is the "*potential abuse by a union of the procedures that it is required to administer and are under its control*". Mr Ford further argued that it would be inconsistent with the mischief, as well as the wording and structure of the provisions, if I were to have jurisdiction to make a declaration to the effect that Mr Turner had breached the rules when Mr Turner is not a party and neither present nor represented at the hearing. In this connection he relied upon **Rolls Royce Plc v Unite (2009)**. Secondly, in the alternative, Mr Ford submitted that the connection between the relevant rules and my jurisdiction is not sufficient to give me jurisdiction, relying upon my decision in **Lynch v UNIFI (2004)** (at paragraphs 48 and 49). He argued that even if the alleged misconduct took place during an election, that was not in itself a sufficiently clear and direct connection with any of the prescribed matters to make it an exceptional case which attracted my jurisdiction. In his submission, the connection between the retweet and 'the appointment of a person to office' or 'the balloting of members' was far too oblique to meet the wording of section 108A(2). As to the merits of the complaint, Mr Ford argued that it was inconceivable that the retweet was a breach of rule 5.1, 5.2 or 27.1.3 and that the only conceivable breach was that of 27.1.5 but that could not

fairly be resolved by me because it concerned a dispute between the claimant and a non-party.

Conclusion – Complaint Eight

129. My jurisdiction in relation to alleged breaches of the rules of a trade union is provided for in section 108A(1) and (2) of the 1992 Act. It is limited to breaches or threatened breaches of the rules of a trade union relating to any of the matters set out in section 108A(2). I therefore reject Mr Hicks' argument that it is the breach which must relate to the prescribed matter, not the rule. On their face, none of the rules cited in this complaint relate to any of the matters set out in section 108A(2). There is therefore no prima facie case that this complaint is within my jurisdiction.
130. Mr Atkinson submits that I should adopt a wider view of my jurisdiction under section 108A. However, I remain of the view I expressed in **Lynch v UNIFI** (at paragraph 48) that the legislative history of the jurisdiction of the Certification Officer and the power of the Secretary of State to extend my jurisdiction by regulation, demonstrate an intention by Parliament that my jurisdiction under section 108A should be viewed restrictively. I also remain of the view I expressed in **McDermott v UNISON (D/1-8/10-11)**, in which I observed at paragraph 47, *“Whether a rule does relate to any of the prescribed matters is to be considered firstly on an objective reading of the rule, disregarding the facts of the instant case. If it does not objectively and obviously relate to any of the matters in sub-section (2), I may exceptionally consider whether it is rule which is so closely related with any of the prescribed matters that it can properly be found to “relate” to one or more of them”*
131. In my judgement, this is not such an exceptional case. The alleged breaches of rules involve a potential finding of misconduct by a member of the Union. Such matters were plainly never intended to be within my jurisdiction for the reasons explained in Mr Ford's submissions, which I accept. I understand Mr Hicks' frustration in that he has attempted to have his complaints against Mr Turner raised in the disciplinary charges he has sought to bring against him, both as an employee and a member. He considers that his attempts to do so have been blocked in order to protect a senior officer of the Union who supported the re-election of the General Secretary and the only avenue left open to him was a complaint to me. Whilst this may be the reason the present complaint has been brought, it is no reason to find that the complaint is within my jurisdiction. It plainly is not.
132. For the above reason I refuse Mr Hicks' application for a declaration that in 2013 the Union held an election for the position of General Secretary that failed to comply with its rules by Mr Turner having allegedly breached Union rules 5.1, 5.2, 27.1.3 and 27.1.5 when campaigning for Mr McCluskey.



David Cockburn
The Certification Officer