

DECISION OF THE CERTIFICATION OFFICER FOR NORTHERN IRELAND
IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 90A OF THE TRADE
UNION AND LABOUR RELATIONS (NORTHERN IRELAND) ORDER 1995 (as
amended)

Mrs Lisa McKee

Applicant

V

Northern Ireland Public Service Alliance (NIPSA)

Respondent

Date of Decision:

21 October 2021

DECISION

Upon Application by Mrs Lisa McKee (the applicant) under Article 90A.(2)(a),(b) and (d) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) a total of 10 complaints were raised:

- 1. Breach of rule in the taking of a decision to discipline a member and to remove a member from the office of Trade Union Representative without invoking any of the procedures set out in the Guidance to instigate the required disciplinary procedure pursuant to paragraph 5 of The Guidance*
- 2. Breach of Rule in the setting out by the Chairman and drafted and circulated by the branch secretary in an email of charges against a member which were wrongfully stated as findings without invoking any of the procedures in The Guidance at paragraph 5 to decide such matters by general meeting and to put charges to the member*
- 3. Breach of rule in the failure to comply at all with the rules in calling a decision making meeting to decide the issues as required by para 5 of The Guidance which states that the guilt of a member of disciplinary offences can only be decided by general meeting to which all members of the branch must be invited*
- 4. Breach of rule in the failure to formulate the charge or charges and put the charge or charges to the member pursuant to paragraph 12 of the Guidance*

- 5. Breach of rule in the failure to allow the member time to respond to the charges pursuant to paragraph 13 of the Guidance*
- 6. Breach of rule in the failure to call and give notice of a disciplinary meeting/hearing pursuant to paragraph 14*
- 7. Breach of rule in the failure of the Branch Committee to call a general meeting of the Branch to decide the precise terms of the disciplinary offence, the penalty considered appropriate, the wording of the proposal to be put to the general meeting which members of the Branch Committee should propose and second pursuant to paragraph 16 of the Guidance*
- 8. Breach of rule in the failure to have due regard to paragraph 17 of the Guidance in the consideration of penalties*
- 9. Breach of rule in deciding the penalty imposed which is required to be taken by a general meeting of the Branch Committee*
- 10. Breach of rule in the failure to observe the notification requirements after the taking of a disciplinary decision as required by paragraphs 21- 23 of The Guidance*

A Hearing of the Complaints was held on 01 October 2021 at The Certification Office, Gordon Street Belfast.

My decision on the complaints is as follows:

Complaint 1	Upheld
Complaint 2	Upheld
Complaint 3	Upheld
Complaint 4	Upheld
Complaint 5	Upheld
Complaint 6	Upheld
Complaint 7	Upheld
Complaint 8	Upheld
Complaint 9	Upheld
Complaint 10	Upheld

DECLARATION

I hereby issue a Declaration that the Union breached its rules on all 10 counts of rule breach as brought by the Applicant.

ENFORCEMENT ORDER

The issuing of an enforcement order is not appropriate, as adequate steps have been taken by the Respondent to remedy all declared breaches of Union rule.

REASONS

The Complaint

1. Mrs Lisa McKee, an employee of Belfast City Council and member of NIPSA branch 526, registered her complaints with my office on 12th September 2019
2. Following my initial assessment as to which complaints would be accepted as coming into the jurisdiction of the Certification Officer of Northern Ireland, Mrs McKee confirmed 10 complaints with my office on the following terms:

- 1. Breach of rule in the taking of a decision to discipline a member and to remove a member from the office of Trade Union Representative without invoking any of the procedures set out in the Guidance to instigate the required disciplinary procedure pursuant to paragraph 5 of The Guidance*
- 2. Breach of Rule in the setting out by the Chairman and drafted and circulated by the branch secretary in an email of charges against a member which were wrongfully stated as findings without invoking any of the procedures in The Guidance at paragraph 5 to decide such matters by general meeting and to put charges to the member*
- 3. Breach of rule in the failure to comply at all with the rules in calling a decision making meeting to decide the issues as required by para 5 of The Guidance which states that the guilt of a member of disciplinary offences can only be decided by general meeting to which all members of the branch must be invited*
- 4. Breach of rule in the failure to formulate the charge or charges and put the charge or charges to the member pursuant to paragraph 12 of the Guidance*
- 5. Breach of rule in the failure to allow the member time to respond to the charges pursuant to paragraph 13 of the Guidance*
- 6. Breach of rule in the failure to call and give notice of a disciplinary meeting/hearing pursuant to paragraph 14*
- 7. Breach of rule in the failure of the Branch Committee to call a general meeting of the Branch to decide the precise terms of the disciplinary offence, the penalty considered appropriate, the wording of the proposal to be put to the general meeting which members of the Branch Committee should propose and second pursuant to paragraph 16 of the Guidance*
- 8. Breach of rule in the failure to have due regard to paragraph 17 of the Guidance in the consideration of penalties*
- 9. Breach of rule in deciding the penalty imposed which is required to be taken by a general meeting of the Branch Committee*
- 10. Breach of rule in the failure to observe the notification requirements after the taking of a disciplinary decision as required by paragraphs 21- 23 of The Guidance*

3. All of the above complaints at paragraph 2 **were conceded entirely** by the Union.
4. The parties, however, took conflicting positions on the appropriateness of an enforcement order and so the hearing was limited to submissions on this issue.
5. At the hearing Mrs McKee appeared in person and was represented by Mr J McGuigan, a former NIPSA union representative. A written statement of argument was submitted by Mrs McKee in advance of the hearing. Mrs McKee made submissions at the hearing.
6. The Union was represented by Mr Richards BL, instructed by Mr John McShane, Solicitor of McCartan Turkington Breen Solicitors. Oral submissions were made by Mr Richards at the Hearing. A statement of evidence given on behalf of the Union was provided by Ms Alison Millar, former General Secretary of NIPSA. This statement clarified that all 10 complaints made by Mrs McKee were fully conceded by the Union and it also contained a reiteration of an unqualified apology to the applicant. Documentary evidence bundles were submitted by both parties and a booklet of legal authorities was submitted on behalf of the Union.

The Issues

7. The focus of the unresolved issues arising from the complaints was the procedural delay and ultimate outcome of an internal complaint process brought by Mrs McKee in response to the action of removing her from office (and other related matters which are outside the remit of Article 90A of the 1995 Order and therefore not matters for the Certification Officer).

8. Mrs McKee lodged further complaints with my office on 18 February 2020 in terms of the continuing delay in the internal process. However, it must be noted that delay in a complaint investigation is not of itself a breach of Union rule. In any event, the parties, ultimately, had no difference in position on the 10 counts of rule breach and the complaint about delay by the time the complaint came to a Hearing before me. The internal appeal process eventually concluded in March 2020. The decision to remove Mrs McKee was quashed and the Panel found that certain individuals had breached union rule and failed to observe stated NIPSA policy and procedure. It was acknowledged that there had been an unsatisfactory delay in the process. An apology was issued in the letter of findings. Despite the findings in her favour in terms of her removal from office, Mrs McKee remained unsatisfied and did not wish to withdraw her complaint to the Certification Officer and expressed a desire for a full hearing of her case.

9. Unfortunately, the listing of the case at the Certification Office was impeded by the COVID-19 Pandemic and the public health restrictions first introduced in April 2020. The case was eventually listed for an in person hearing on 12 August 2021, but required an adjournment. The case was finally heard on 01 October 2021.

10. Prior to the Hearing before the Certification Officer, a Witness Statement by Alison Millar was submitted on behalf of the Union. In this statement Ms Millar made a full concession of all of 10 complaints brought to me by Mrs McKee and outlined the final findings of the internal investigation:

...the 'standing down' of Ms McKee was "incompatible with the rules of the union", as no due process was followed, Ms McKee was given no opportunity to defend herself, the principles of natural justice were ignored and there was no consultation with Ms McKee or the branch committee. The Panel recommended disciplinary action in relation to the individuals responsible for Ms McKee's removal and that Ms McKee be reinstated' (Para 5 of Ms Millar's witness statement)

11. This full admission by Ms Millar had the impact of entirely conceding Mrs McKee's complaint of 10 counts of rule breach and the declaration upholding Mrs McKee's complaints is therefore automatic.

12. It is recognised by Ms Millar and noted as a matter of record that Mrs McKee had experienced inordinate delay during the internal investigation process within NIPSA. Mrs McKee was stood down on 14 March 2019 and she first complained about her treatment by writing to Ms Millar as General Secretary on 26 March 2019. The lack of progress during the internal investigative process was acknowledged by Ms Millar:

'I was surprised to hear from Ms McKee on 20th June 2019 that she had still not been contacted...Disappointingly I received another email from Ms McKee on 6th August 2019 stating that there had been no further contact. It appeared that the panel were not advancing the complaint...There seemed to be problems with the panel's availability...investigatory meetings eventually took place between December 2019 and February 2020' (Para 4 of Ms Millar's witness statement)

13. At the internal investigation stage, it is therefore conceded that there was an unacceptable delay on the part of the Union in responding to and dealing with Mrs McKee's complaint. This must have been extremely stressful for Mrs McKee given the seriousness of the action that was taken against her in the first instance. However, I note that Ms Millar wrote to Mrs McKee on 10 March 2020 upholding her complaint about removal, giving a confirmation of the ordering of her immediate reinstatement and apologising unequivocally for the length of time taken to complete the internal investigation process. Delay is not a matter for the Certification Officer, particularly as the internal matter was ultimately completed. The remedy for the

applicant in the case of challenging delay of an internal process is to lodge her complaint for hearing before the Certification Officer.

14. The Union made a full and honest admission together with an apology for the breaches of rule in the wrongful removal of Mrs McKee and confirmation of full reinstatement, but this was not until a full year after the initial removal of Mrs McKee from office. In the intervening period Mrs McKee had been forced to seek recourse by bringing a complaint to the Certification Officer which may have been entirely avoidable if the Union had acted to investigate the situation more efficiently.

15. Mrs McKee's position is that the escalation of her complaint to the Certification Officer was unnecessary and avoidable. Mrs McKee stated that she was left with little choice as she had concluded that she was not going to achieve an internal remedy, and she had no other escalation options unless she reported the matter to the Certification Officer. This was something that Mrs McKee said that she felt forced to do and she stated that she brought an external complaint about her Union to the Certification Officer with great reluctance.

16. I note that Mrs McKee was unhappy about other matters dealt with in her internal complaint which were not matters under the remit of the Certification Officer per Article 90A of the Order. She therefore brought an appeal of the panel's decision only in terms of the outcome on those other matters. The issues under my consideration relate only to rule breaches pertaining to the method of the removal of Mrs McKee from holding NIPSA office. All of these matters went in her favour in the internal investigation and are therefore not part of the ongoing internal appeal. However, I note that Mrs McKee feels unable to accept the immediate reinstatement to office until other matters within her appeal have been resolved. These matters include the impact of the panel's delay on Mrs McKee's welfare and wellbeing and the alleged failure of NIPSA to adequately consider and act upon her complaint of bullying and harassment. These issues do not relate to the complaints before me and are outside my statutory remit. However, the outstanding issues may explain why Mrs McKee feels unable to take up the open opportunity of reinstatement to office.

17. I also note that the progress of Mrs McKee's ongoing internal appeal and the related disciplinary proceedings of the individuals who wrongfully removed Mrs McKee from office have both been delayed by the onset of the COVID-19 Pandemic and the related public health restrictions. Mrs McKee and the individuals under discipline have both stated a request for a face to face hearing, and not via an online platform, which has not yet been cleared under the Union's health and safety policy. This has resulted in further delay in bringing those processes to a conclusion.

18. This ongoing delay, whilst understandable, is prolonging the strain of the situation from Mrs McKee's perspective and she feels unable to return to her position until all matters are fully resolved. It is important to state that, notwithstanding the ongoing

related issues under appeal, it has been open to Mrs McKee to return to her position immediately since 10 March 2020 and that her wrongful removal has been openly conceded in writing by NIPSA at the most senior level of the Union. Moreover, the removal of Mrs McKee has now been declared by myself as Certification Officer as being entirely unlawful. Mrs McKee is fully entitled to take up the NIPSA office from which she was wrongfully removed.

19. The only question for determination before me is whether the issuing of an enforcement order is appropriate in the circumstances of this case. In the event of issuing a declaration, I am required to make an enforcement order unless I consider it is inappropriate to do so. Mrs McKee seeks an enforcement order as she has 'no faith' in the Union to take the steps it has committed to.

20. Given that my primary concern under the complaints upheld is the wrongful removal of Mrs McKee and that she has been formally reinstated to her position by NIPSA, an enforcement order requiring the reinstatement of Mrs McKee is not necessary in this case.

21. It is important to note Harvey on Industrial Relations at 4012.01

An enforcement order is an order requiring the union to take specified steps or refrain from specified acts within a specified time in order to 'remedy the breach' or 'withdraw the threat of the breach' or to secure that a similar breach or threat 'does not occur in the future'

Accordingly, it is my interpretation that an enforcement order is not merely a rebuke but must be a specified and measurable requirement to act or desist in order to bring the Union into compliance with rule. By way of example, this could be the requirement to reconsider and re-take a decision, re-run an election or to reinstate a removed person to office.

22. Further, as argued by Mr Richards at the hearing, it is not open to the Certification Officer to merely issue an enforcement order which is purely a direction to comply with stated rules or reinforce rules that are already clear and well understood. The matter of '*securing that a similar breach or threat does not occur in the future*' does not automatically mean that it is appropriate for the Certification Officer to issue an order to the Union 'not to do it again'. Such an enforcement order would be unspecific and, moreover, such a requirement is explicit within the general requirement of compliance with Union Rules. However, it could be said that a complaint has exposed low awareness or consistent misapplication of a Union rule or rules and the Certification Officer may require the Union to alert members to something that has been repeatedly breached or has been misunderstood. In such a case, the Certification Officer might wish to issue an enforcement order requiring specific steps to raise awareness within the Union. There is no evidence that such a

situation arises in this case. The rules breached are clear and certain, and the impugned behaviour was an isolated and highly irregular situation which appears to be the result of rogue individuals ignoring stated processes. This is acknowledged by the Union, the wrongful decision has been quashed and steps are being taken to address concerns with the persons involved.

23. Mrs McKee seeks the terms of an enforcement order which would demonstrate that a rule breach has been recognised by the Union and steps have been taken and more specifically this should be by way of direct notice to branch membership to inform them of the breaches which occurred. I note that in addition to an order of full reinstatement of Mrs McKee, the Union has submitted in evidence a formal communication to all Branch Secretaries reinforcing the rules and policy on disciplinary processes and stressing the importance of following all NIPSA procedures and guidance for the required approach to the discipline of members.

24. I do not agree with Mrs McKee that the Union should go further by way of engaging in more specific messaging with branch membership about her reinstatement and that this should be done by way of specific information given to her branch membership colleagues. In my view, the Union has taken sufficient steps in terms of restitution. For example, the Union has gone further than the mere reinstatement of Mrs McKee and has moved to discipline those who removed Mrs McKee and, further, Ms Millar issued the following general notice to all Branches on 24 August 2020 (and which is also published on the NIPSA website):

Reminder to Branches Regarding Rules of the Union and Potential Disciplining of NIPSA Members:

From time to time branches may consider taking disciplinary action against a member of the union. This is a serious step for any branch to initiate and there are certain rules that must be observed by branches in those circumstances.

I would, in particular, wish to draw your attention to the Guidance on Procedures for Disciplining NIPSA Members on Page 43 to 45 of the NIPSA Rule Book and checklist of main steps that must be followed on pages 46 to 47 (see attached).

I would wish to point out it is essential that branches ensure that there is full adherence to the guidance set out in paragraphs 1 to 23 of the Guidance on Procedures for Disciplining NIPSA members. It is vitally important that all NIPSA branches follow the guidance as set out in the NIPSA Rulebook.

If any branch has any specific query they can seek advice on these rules before initiating any action of this nature.

Alison Millar

General Secretary

25. Further, it must be recognised that the members who are subject to disciplinary investigation due to the action taken against Mrs McKee are entitled to the completion of due process in their own disciplinary proceedings. It is my view that specific communications circulated by Union leadership about Mrs McKee's case may compromise the integrity of those live proceedings.

26. I can see that the unresolved issue in this complaint is the barrier perceived by Mrs McKee to the practical reality of taking up her restoration to office. This relates to unresolved matters concerning her grievances relating to her treatment by NIPSA colleagues, which is a matter subject to both her own ongoing internal appeal and the incomplete disciplinary process against the individuals who removed her. I can understand the need to allow those proceedings to complete before the Union can make any statements which have wider circulation across NIPSA in terms of any learning which has arisen from this unfortunate situation. I also fully acknowledge that until outstanding internal processes have completed, Mrs McKee finds herself in a very difficult situation in terms of working relationships with the union colleagues concerned and her concerns about potential damage to her reputation within the branch. However, those are matters outside my remit and I can see no practical need for an enforcement order as the action taken by NIPSA has addressed matters as far as possible in order to remedy the original rule breach.

A handwritten signature in dark ink, appearing to read 'S. Havlin', with a long horizontal flourish extending to the left.

S. Havlin LLB,

Certification Officer of Northern Ireland