

DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION UNDER ARTICLE 90A OF THE TRADE UNION AND LABOUR RELATIONS (NORTHERN IRELAND) ORDER 1995.

Mr S T Boylan

V

University and College Union

(UCU)

Date of Decisions:

8 July 2008

DECISIONS

Upon application by the applicant under Article 90A(1) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) (“the 1995 Order”):

- (i) I refuse to make the declaration sought by the applicant that on or around 22 November 2006, the Branch Executive Committee of the Union alleged that the applicant acted in a way detrimental to the Union, by driving through a picket line on or around 16 November 2006, and consequently it took a decision constituting an act of discipline in breach of Rule 13.1 of the Rules of the Union by sending the applicant a Branch Committee letter requesting his resignation from UCU.
- (ii) I refuse to make the declaration sought that on or around 22 November 2006, the Branch Executive Committee met concerning the applicant’s crossing of a picket line on or around 16 November 2006, and in determining the alleged disciplinary decision then, without informing or inviting the applicant to the meeting, it breached the rules of natural justice by denying him the right to a fair hearing and opportunity to be heard.
- (iii) I refuse to make the declaration sought that on or around 22 November 2006, the Branch Executive Committee breached Rule 21 of the Branch Rules, by acting outside its authority, in conflict with the UCU Rules, through failing to follow Rule 13.1 of the Union, which states that the power to discipline rests

with the National Executive Committee. (By sending all union members in the College a copy of its e-mail request to the applicant stating that the Branch Executive would be requesting him to resign from UCU, the Branch stepped outside its authority in this act of discipline).

- (iv) I refuse to make the declaration sought that in circulating the e-mail to a large number of employees at Limavady College, the Branch further disciplined the applicant in breach of Rule 13.1, leading to an impossible position for him culminating in his resignation from UCU.

REASONS

1. By an application dated 11 May 2007, the applicant, Mr S.T. Boylan, made four complaints against his Union, the UCU. Two complaints related to a breach of the National Rules of the Union, one to a breach of the Limavady Branch Rules (the Union's "Model Local Rules" was adopted by the Branch in this respect), and one to a breach of the rules of natural justice.

Following correspondence with the applicant, the complaints he wished to pursue were confirmed by him in the following terms:-

Complaint 1

That on or around 22 November 2006, the Branch Executive Committee alleged that the applicant acted in a way detrimental to the Union, by driving through a picket line on or around 16 November 2006, and consequently it took a decision constituting an act of discipline in breach of Rule 13.1 of the Rules of the Union by sending the applicant a Branch Committee letter requesting his resignation from UCU.

Complaint 2

That on or around 22 November 2006, the Branch Executive Committee met concerning the applicant's crossing of a picket line on or around 16 November 2006, and in determining the alleged disciplinary decision then, without informing or inviting the applicant to the meeting, it breached the rules of natural justice by denying him the right to a fair hearing and opportunity to be heard.

Complaint 3

That on or around 22 November 2006, the Branch Executive Committee breached Rule 21 of the Branch Rules, by acting outside its authority, in

conflict with the UCU Rules, through failing to follow Rule 13.1 of the Union, which states that the power to discipline rests with the National Executive Committee. (By sending all Union members in the College a copy of its e-mail to the applicant stating that the Branch Executive Committee would be requesting him to resign from UCU, the Branch stepped outside its authority in this act of discipline).

Complaint 4

In circulating the e-mail to a large number of employees at Limavady College, the Branch further disciplined the applicant in breach of Rule 13.1 leading to an impossible position culminating in his resignation from UCU.

2. The complaints are matters potentially within my jurisdiction under Article 90A (2)(b) and (d) of the 1995 Order. They were investigated in correspondence and, as required by Article 90B (2)(b) of the 1995 Order, the parties were offered the opportunity of a hearing, which took place on Monday 9 June 2008. The Union was represented by Mr M. Scott, Director of Legal Services of the UCU. Mr J. McKeown, UCU Regional Official, and Mr J. Pollock, UCU Limavady Branch Secretary, were in attendance for the Union and gave evidence. The applicant acted in person and gave evidence on his own behalf. A 206 page bundle of documents containing relevant correspondence and papers, including five case law decisions for the Union and one for the applicant, was prepared by my office for the hearing. The relevant rules of the Union (National and Branch) were also in evidence, along with relevant statutory extracts. A skeleton argument, dated 2 June 2008, was received by my office from the Union on Friday 6 June 2008. It was provided to the applicant, along with time to study it, on the morning of the hearing.

Findings of Fact

On the written and oral evidence available to me I find the facts to be as follows.

3. In 2006 the UCU entered into a dispute with employers in Northern Ireland over pay (still unresolved at the time of this hearing). A regional postal ballot on industrial action was held in May 2006, as a result of which the Union obtained a mandate from its members to take both strike action and industrial action short of strike in support of the pay claim. Action short of strike began soon after the ballot result was announced. A series of one-day strikes was planned and the first of these took place in October 2006.
4. Mr Boylan is a lecturer at Limavady College and was a member of the Limavady Branch of the UCU at this time. He supported the Union's stance

on the pay dispute and took part in the one-day strike in October. The next one-day strike was set for 16 November 2006. On this occasion, Mr Boylan did not participate, having decided in the interim that he could no longer support strike action. He reported for work as usual, driving into the main College site through the front gate, past UCU pickets who were stationed there in some numbers.

5. Mr Pollock, the Secretary of the Limavady Branch, was organising pickets at both the main College site and a secondary site on the morning of the strike. He was not at the main site when Mr Boylan entered, but when he arrived shortly afterwards he was told what had happened. At some time in the following days, Mr Boylan was approached in the College staff room by a UCU member or members who raised the issue of his crossing the picket line. Then on 22 November Mr Pollock called a meeting of the Branch Executive Committee to consider what should be done about Mr Boylan. Some of those present expressed the view that they should dismiss him from the Union. Mr Pollock told them (relaying advice he had received in an earlier telephone conversation with the UCU Regional Officer, Mr McKeown) that that would be illegal, but that the Committee could, if it wished, send him a letter requesting his resignation. A letter was typed up there and then, signed by Mr Pollock and the Branch Chairman on behalf of the Committee and left in Mr Boylan's mailbox at the College when the meeting ended, around 2pm on 22 November. It read:

"From: UCU Limavady Branch Executive Committee

To: Mr Terry Boylan

Dear Mr Boylan,

It has been brought to our attention that you deliberately drove through the picket line at the gate of the main college building and came to work on the UCU one-day strike on Thursday 16 November 2006. As a consequence of this, and after a meeting of the UCU Executive Committee, we are requesting that you resign from the UCU immediately.

We request a reply to this communication within 5 working days".

6. The next day, 23 November, Mr Pollock sent the following e-mail to some 70 colleagues at Limavady College, including Mr Boylan:

"Hi folks,

As most of you will now be aware, UCU member, Mr Terry Boylan, chose to drive through our picket line and enter the college on our one-day strike last Thursday 16 November. We can assume that Mr Boylan, therefore, received his normal day's pay.

The Branch Executive Committee met yesterday to discuss this and took the decision that we would send a letter to Mr Boylan, requesting his resignation from the UCU. This letter has been sent and I will keep members apprised of the outcome”.

7. Mr Boylan did not respond directly to either of the above but on 25 November he sent an e-mail to Mr McKeown. He said that he (and all the other addressees) had received Mr Pollock's e-mail before he had received any letter and before any personal contact or communication had been made with him. He asked Mr McKeown for his opinion of Mr Pollock's action and whether this procedure was sanctioned by the Union. He added that there were a few matters he wanted to discuss with Mr McKeown in person, though he did not say what these were.
8. Mr McKeown replied by e-mail on 7 December. He strongly supported the UCU members generally who were taking part in the industrial action, and in particular commended the membership and the officers of the Limavady Branch. He said that while the law prevented unions from expelling members who breached democratically agreed industrial action, members in branches were perfectly within their rights to express disapproval of such breaches, and branch officers to inform other members about them. He noted that Mr Boylan did not say that he disputed the case against him, but went on:

“If you do so dispute, I suggest you set out your case to the branch committee for its consideration. As you know your colleagues are fair-minded and reasonable people and I am confident you would be afforded every opportunity to explain your actions to those colleagues”.

Mr Boylan replied by e-mail the same day, saying that he believed the issues he had raised had not been addressed and that he would be in contact with Mr McKeown later. In fact he made no further contact.

9. Also on 7 December. Mr Pollock sent Mr McKeown an e-mail, which he copied to the same list of 70 persons as before (including Mr Boylan). In this he reported that Mr Boylan, as well as breaking the one day strike on 16 November, had now also broken the terms of the industrial action short of strike. The Branch had decided (on advice from Mr McKeown) that members

would not participate in charity fund-raising activities being undertaken by Limavady College, because these were regarded as being at the same time “college-promotional activities”. Mr Boylan, however, had taken part in an indoor football match that was part of these activities.

10. On 19 December 2006 Mr Boylan asked Mr Pollock where he could obtain a copy of the UCU’s rule book. He was referred to Mr McKeown, but then obtained the rules for himself from the UCU website. This was Mr Boylan’s last communication with the Union before he resigned on 29 January 2007. In the interval the Branch took no action against Mr Boylan in respect of his breaches of the strike and the action short of strike, and he continued to receive information on Union affairs in the same way as other Branch members.
11. In March 2007 Mr Boylan made a complaint of unjustifiable discipline by a trade union to the Industrial Tribunals under Article 33 of the 1995 Order. His application under Article 90A of the 1995 Order was received in the Certification Office on 14 May 2007. In October 2007 an Industrial Tribunal, in a decision made on a pre-hearing review, dismissed Mr Boylan’s complaint as having been lodged outside the statutory time-limit of three months.

The Relevant Statutory provisions

12. The provisions of the 1995 Order that are relevant to this application are:

Right to apply to Certification Officer

90A. –

(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 paragraph (2) may apply to the Certification Officer for a declaration to that effect, subject to paragraphs (3) to (7).

(2) The matters are –

(b) disciplinary proceedings by the union (including expulsion);

(d) the constitution or proceedings of any executive committee or of any decision-making meeting.

(10) For the purposes of paragraph (2) (d) a committee is an executive committee if –

- (a) it is a committee of the union concerned and has power to make executive decisions on behalf of the union or on behalf of a constituent body,
- (b) it is a committee of a major constituent body and has power to make executive decisions on behalf of that body, or
- (c) it is a sub-committee of a committee falling within sub-paragraph (a) or (b).

(12) For the purposes of paragraphs (10), in relation to the trade union concerned –

- (a) a constituent body is any body which forms part of the union, including a branch, group, section or region;
- (b) a major constituent body is such a body which has more than 1,000 members.

Declarations and orders

90B. –

(2) If he accepts an application under Article 90A the Certification Officer –

- (a) shall make such enquires as he thinks fit
- (b) shall give the applicant and the union an opportunity to be heard,
- (d) may make or refuse the declaration asked for, and
- (e) shall, whether he makes or refuses the declaration, give the reasons for his decision in writing.

(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 requirements as mentioned in paragraph (3)(a) specify the period within which the union is to comply with the requirement.

Right not to be unjustifiably disciplined

31. –

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

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

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

Complaint of infringement of right

33. –

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

(2) The tribunal shall not entertain such a complaint unless it is presented –

- (a) before the end of the period of three months beginning with the date of the making of the determination claimed to infringe the right, or*
- (b) where the tribunal is satisfied –*
 - (i) that it was not reasonably practicable for the complaint to be presented before the end of that period, or*

(ii) that any delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal against the determination or to have it reconsidered or reviewed,

within such further period as the tribunal considers reasonable.

The Relevant Union Rules

13. The Union rules that are relevant to this application are:

UCU Rules 2006/2007

Rule 13 The Conduct of Members

13.1 *The national executive committee shall (by the same procedure as it establishes its own standing orders) establish a procedure to censure or bar a member from holding any office for a specified period not exceeding three years or suspend from membership for a period not exceeding one year or expel a member from membership if it finds their conduct to be in breach of the Rules or detrimental to the interests of the union. The procedure, inter alia, shall include an appeals process.*

UCU Model local rules

Rule 21 RULES

No rule or rules of the Branch/LA [Local Association] will at any time be in conflict with a rule or rules of the UCU currently in force. Changes in the rules of the UCU will, where applicable, automatically constitute changes in these rules of the Branch/LA.

Summary of Submissions

The Applicant's submission

14. Mr Boylan said that the first he knew about the Branch Committee's decision to ask him to resign from the UCU was when he received Mr Pollock's e-mail of 23 November 2006. About 70 others got this e-mail at the same time as he did. It had caused him great concern that the issue should be "aired and shared" in this way without any prior contact or communication with him. He

was shocked also by the terms of the Committee's letter dated 22 November, which he received after the e-mail. It was a measure of the distress these caused him that he e-mailed the Regional Officer for advice at 11:30pm on 25 November. The Regional Officer's reply, however, which took two weeks, showed that he was not impartial, but was taking the side of the Branch Committee. Then Mr Pollock had circulated the e-mail about the charity football match, which he (Mr Boylan) had taken part in for personal reasons to do with the particular charity that was to benefit; this caused him still more embarrassment and distress. Moreover, around the same time other UCU members had taken part in promotional activities connected with another charitable project, but the Branch Committee had taken no such action against them.

15. Turning to the individual complaints, Mr Boylan said that Complaint 1 was that the Union had breached rule 13.1 of its rules. That rule reserved disciplinary action against members exclusively to the National Executive Committee. But the Branch Committee's letter of 22 November 2006 was a disciplinary act. In it he was not merely *invited* to resign, but was *told* to do so *immediately*. Mr Boylan referred also to the decision of the Industrial Tribunal in his case (Case Ref: 395/07), which stated that the union had conceded at the hearing that the sending of the letter to him "was a 'determination' for the purposes of the 1995 Order" (Article 31(2)); this, Mr Boylan said, showed that it was an act by which he had been disciplined. The Branch Committee was not entitled to discipline him; it had usurped the role of the NEC and therefore breached rule 13.1.
16. On Complaint 2, Mr Boylan said that the Branch Committee had not consulted with him or given him an opportunity to be heard before it took its decision about his resignation. It had not invited him to the meeting at which the decision was taken or even informed him that it was taking place. It had simply presented him with a *fait accompli* and told him to resign. This denial of the right to a fair hearing contravened the rules of natural justice.
17. Complaint 3 was that rule 21 of the Branch Rules had been breached. The UCU's "Model Local Rules" served as the Branch Rules of the Limavady Branch. Mr Boylan observed that, under rule 21, no Branch rule may be in conflict with a rule of the UCU. However, rule 13.1 of the UCU Rules states that the power to discipline lies with the NEC. The Branch Committee ignored, and therefore breached, rule 21 of its own rules when it took disciplinary action that conflicted with UCU rule 13.1. In this complaint Mr Boylan also claimed that by sending the e-mail about the request for his resignation to all the UCU members in the College, the Branch Committee had caused him great embarrassment and subjected him to a detriment. He referred to the Employment Appeal Tribunal (EAT) decision in *NALGO v Killorn and Simm* (1990 IRLR 464), in which it was held that circulating the

names of members as strike-breakers with the intention of causing them embarrassment could reasonably be described as subjecting them to detriment. He referred also to comments made in the Industrial Tribunal's decision in his own case that, in the opinion of the Tribunal, the contents of the e-mails were clearly designed to publicly humiliate him.

18. On Complaint 4 (that, by sending the two e-mails to a large number of employees of Limavady College, the Branch Committee further disciplined him), Mr Boylan said that some of those who received the e-mails (he named four individuals) were not members of the UCU. Publicising his actions to outsiders was a source of additional embarrassment to him. It was a further deliberate act of discipline by the Branch in breach of rule 13.1, which allowed only the NEC to discipline members.

The Union's submission

19. For the Union, Mr Scott said that these complaints were made under Article 90A of the 1995 Order, which is concerned with alleged breaches of union rules, not under Article 33, which is concerned with unjustifiable discipline and comes within the jurisdiction of the Industrial Tribunals.
20. He said that Complaints 1, 2 and 4 alleged breaches of union rule or natural justice in relation to disciplinary proceedings, under Article 90A(2)(b), but the claim was not that a disciplinary process had been wrongly applied: rather, it was that the Union had disciplined Mr Boylan without applying any process at all. He referred to a number of decisions of the Great Britain Certification Officer: *Ryan v Unison (D/45-48/01)*, *Dennison v Unison (D/12/03)*, and *Corrigan v GMB (No.2) (D/35-36/07)*; and to a judgment of the Employment Appeal Tribunal on an appeal against a decision of the Certification Officer: *Unison v Gallagher (UKEAT/0280/05)*.
21. Mr Scott acknowledged that *Ryan* and *Dennison* showed that the Certification Officer's jurisdiction under section 108A(2)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 [the Great Britain equivalent of Article 90A(2)(b) of the 1995 Order] was not restricted to allegations that disciplinary procedures had been wrongly applied, but extended also to allegations that a disciplinary penalty had been imposed without reference to the disciplinary rules at all. However, in *Dennison* the Certification Officer had gone on to recognise that in cases not involving an allegation of a breach of a union rule that deals expressly with discipline, it was necessary to examine with particular care whether he had jurisdiction under section 108A(2)(b). Mr Scott said that clearly it was exceptional for such cases to come within the jurisdiction and submitted that I should examine the present case very

carefully in light of that. He added that in *Dennison* the Certification Officer had indicated (i) that it was necessary to establish that there had been a disciplinary purpose behind the act complained of, and (ii) that there could be no assumption that any action by a union which resulted in disadvantage to a member necessarily related to discipline.

22. Mr Scott said that, in *Gallagher and Corrigan (No.2)* also, it had been found that actions with a detrimental impact were not disciplinary if they had not been done with a disciplinary purpose: and in *Gallagher* the EAT had distinguished clearly between the purpose of an action and its consequence or effect, even (or especially) in situations where the effect or consequence of the action was foreseeable.
23. In *Corrigan(No.2)*, Mr Scott said, the Certification Officer had accepted that there were three situations which fell within the scope of section 108A(2)(b) of the 1992 Act (=Article 90A(2)(b) of the 1995 Order):
 - (a) *Where a union purported to discipline a member, but did not observe its rules in terms of procedural safeguards and/or the range of permissible sanctions.*
 - (b) *Where a union in effect disciplined a member – by imposing a disciplinary sanction within its rules – but without purporting to invoke its rules concerning discipline at all.*
 - (c) *Where a union subjected a member to a significant detriment by depriving him/her of a significant entitlement under its rules (albeit not a disciplinary penalty within its rules) for a deliberately disciplinary purpose.*

Mr Scott said that (a) and (b) were not engaged in the present case. The question then was whether Mr Boylan had been deprived of any entitlement. He said that in *Killorn*, on which Mr Boylan relied (see paragraph 17 above), the applicant had been suspended from the union for strike-breaking, and her suspension deprived her of lawful entitlements. As to the circulation of the names of the strike-breakers, a union official had admitted in evidence that this was done with the intention of causing the individuals concerned embarrassment, and it was because of this disciplinary intent that the EAT had found that there was detriment. There was neither deprivation of entitlements nor disciplinary intent in Mr Boylan's case, Mr Scott said.

24. Turning to the individual complaints, Mr Scott said that the question on Complaint 1 was whether the Limavady Branch Committee's action was an

act of discipline. He argued that the answer must be “no”. A request to resign was not a substantive act of discipline; it had no disciplinary force or effect, Mr Boylan was free to ignore it; he had not suffered any sanction or any loss of entitlements; all union communications had continued to be sent to him. The Committee’s letter of 22 November 2006 was at most a “charge sheet”; if anything, it was the beginning, not the end, of a process. It invited Mr Boylan to respond, but he chose not to do so. He may have felt embarrassed as a result of the Committee’s action, but that was not a matter for the Certification Officer, who must be concerned with intentions, not effects or consequences, as shown in *Gallagher*.

25. Complaint 2 wholly mis-characterised what had happened at the Branch Committee meeting, Mr Scott said. There was in fact no disciplinary hearing to which the rules of natural justice ought to have applied but, according to Mr Boylan, did not. The Committee decided to ask him to resign because he clearly did not share the views of UCU members on the predominant issue of the day. This was not discipline. By way of analogy, Mr Scott said that it was not uncommon for persons facing allegations of misconduct to be invited to resign rather than face proceedings and the possibility of adverse findings. That invitation would form no part of the disciplinary proceedings to which the rules of judicial fairness apply. At the time these events were taking place, Mr Boylan had not shown signs of distress or concern, or indicated that he wanted to have his case heard. In fact he did not reply to the Branch Committee, despite being invited to do so. Even if I were to find that the Branch Committee meeting was a hearing, Mr Scott said, there could be no breach of the rules of natural justice, because Mr Boylan had not engaged in the process.
26. As regards Complaint 3, Mr Scott said it was misconceived. It appeared to allege that the Branch Committee had overstepped its authority by taking disciplinary action, when under the rules only the NEC was able to do this. But as already argued, there had been no disciplinary action. Moreover, to the extent that this purported to be a complaint under Article 90A(2)(d), it was outside the jurisdiction of the Certification Officer, since it was not about a breach of rules relating to the constitution or proceedings of the Branch Committee. That Article covered only those two aspects of any meeting; it did not give the Certification Officer jurisdiction to adjudicate on the substance or purpose of a meeting. The complaint also alleged that the Branch Committee had disciplined Mr Boylan (i.e. subjected him to detriment) by sending a copy of its e-mail to all UCU members in the College. But *Killorn* showed, Mr Scott said, that circulation of information *per se* was not a detriment: there also had to be disciplinary intent. Mr Pollock’s evidence, however, had been that the purpose of his e-mail was to inform Branch members of the decision their

Committee had taken; it was not to embarrass Mr Boylan – indeed he could not be embarrassed by it, since his crossing of the picket line was already widely known among UCU members in the College. But even if it were allowed that he had suffered embarrassment, there was no intent to embarrass him, and therefore no discipline. It was natural and proper for the Branch Committee to want to keep the members informed and promote solidarity amongst them during a period of industrial action; that was its only purpose in circulating the e-mail.

27. On Complaint 4 (that the Union had further disciplined Mr Boylan by sending the e-mail to a large number of employees of Limavady College) Mr Scott said that Mr Boylan had not been able to show that there was anyone on the circulation list who was not a member of the UCU. The Union asserted that the four individuals he had named as non-members were indeed members of UCU and Mr Pollock and Mr McKeown had given evidence that membership lists were frequently updated. Even if someone on the circulation list was not a member at the time, which was not admitted, this would only have been a mistake, not a deliberate action to embarrass Mr Boylan. As to Mr Boylan's claim that the Branch Committee had taken no action against other members who had breached the action short of strike by participating in charity events, Mr Pollock has said he was not aware of any other member having done so.
28. Finally, Mr Scott said that nothing in the present case turned on the Union's concession, made at the pre-hearing review of Mr Boylan's application to the Industrial Tribunal, that the letter of 22 November 2006 was a "determination" for the purposes of the 1995 Order. The question before the Tribunal was whether the application had been made within the statutory time-limit or not, and the concession was made solely for the purpose of providing a starting point for the calculation. It was not an acceptance that there had been a disciplinary determination.

Conclusions

29. Complaint 1: It is clear, and not contested by the Union, that a UCU Branch Committee is not entitled under the rules of the Union to discipline a member. Rule 13.1 gives the power to discipline to the National Executive Committee alone. If the letter sent to Mr Boylan on 22 November 2006 was an act of discipline against him by Limavady Branch Executive Committee, then there was a breach of rule 13.1 and this complaint will succeed: if not, it will fail. Two questions therefore need to be answered: (i) what counts as an act of discipline for the purposes of Article 90A(2)(b) of the 1995 Order?, and (ii) was the sending of the letter an act of discipline in those terms?

30. What counts as discipline under Article 90A(2)(b) – the scope of the Article – was effectively addressed in the decisions of the Great Britain Certification Officer in *Ryan* and *Dennison* [section 108A(2)(b) of the 1992 Act, there considered, is the word-for-word equivalent of Article 90A(2)(b)]. The effect of those decisions was summarised in the EAT judgment in *Gallagher* and in the Certification Officer’s decision in *Corrigan (No.2)* where three situations falling within the scope were identified, as set out in paragraph 23 above. I will consider the facts of the present case against each of these situations in turn. The decisions make clear, in addition, that an action that has a detrimental impact on a union member is not a disciplinary act unless there is disciplinary intent.
31. The first situation [(a) in paragraph 23 above] is where a union sets its formal disciplinary procedures in motion but fails to apply them correctly. Formal union disciplinary procedures would usually comprise a number of elements, including a statement of the allegations against the member concerned (e.g. breach of rules or conduct harmful to the union); an invitation to him/her to admit or deny those allegations; if they are denied, a hearing before a properly appointed panel; a written decision, which may impose one or more of a range of set penalties; and a mechanism for appeal. Rule 13.1 of the UCU rules envisages a process conforming broadly to this pattern.
32. It might be argued that the Branch Committee’s letter of 22 November 2006 states the allegation against Mr Boylan (crossing the picket line) and that the request for a reply constitutes an invitation to admit or deny it. However, in my judgment, this would be a strained and unsustainable interpretation. The letter does not use the disciplinary terminology of Rule 13.1; it mentions neither breach of rule nor conduct “detrimental to the interests of the union”, which are the only two grounds for discipline under that rule. Nor does it seem to me to be asking Mr Boylan to admit or deny anything; rather it takes it as a matter of established fact that Mr Boylan crossed the picket line. From the evidence available to me, I do not believe that the Committee thought of itself as initiating a formal disciplinary process. It knew, after consultation with Mr McKeown if not before, that it had no power to do so and that a member cannot legally be expelled from a union for failing to support industrial action. Moreover, after sending its letter, the Branch Committee made no attempt to enforce Mr Boylan’s resignation. Mr Pollock said in evidence that the Committee knew that there was nothing it could do if Mr Boylan ignored its request to resign. I conclude that what the Branch Committee did cannot be construed as being either actually or in intent the initiation of a formal disciplinary process. The present case is therefore not an example of situation (a).

33. Situation (b) is where a union does not apply its disciplinary process at all, but nevertheless imposes a disciplinary penalty mentioned in its rulebook. I have just concluded that no disciplinary process was applied here, so the first of these conditions is satisfied. As to the second, the disciplinary penalties mentioned in the UCU rulebook are censure, disbarment from office for up to three years, suspension from membership for up to one year, and expulsion from membership. None of these was imposed in this case. Mr Boylan seemed to argue, however, that the Committee's request that he "resign immediately" was in fact in the nature of an order rather than a request or invitation, and he may have been suggesting (though this was not entirely clear) that an order to resign is for practical purposes the same as expulsion. Even if I were to accept that proposition, I consider that the argument would still fail, because in my judgment what the Committee did was not the giving of an order. I accept that adding the word "immediately" did lend a peremptory tone to the request, but in my view this gave it, at most, the character of a demand, not an order. To describe something as an order presupposes that there is an authority to which the recipient of the order is subject and by which he/she may be sanctioned for refusal to carry the order out. For over two months Mr Boylan refused to do what the Committee asked, but the Committee made no attempt to impose any sanction on him. It knew it had no authority to order a member to resign. When Mr Boylan did resign, in January 2007, that was because he did not agree with the UCU's strike action and did not wish to cross his union's picket line a second time, not because the Committee had told him to resign. No penalty mentioned in the UCU rule book was imposed on Mr Boylan and therefore situation (b) does not apply.
34. Situation (c) is where a union inflicts a significant detriment on a member by depriving him/her of a significant entitlement of membership, the loss of this entitlement not being a penalty mentioned in the union's rules. On the evidence before me, Mr Boylan was not deprived of any significant entitlement of membership, or indeed of any entitlement at all. He did not claim that he had suffered any detriment in that sense, and the Union said that he had not, affirming that he had been treated in the same way as all other members in the period between the issue of the Branch Committee's letter and his eventual resignation. Another sense of "detriment" was identified in the case of *Killorn*, which Mr Boylan cited as a parallel to his own case (see paragraph 17 above). As Mr Scott pointed out, however, the EAT found that Mrs Killorn had suffered detriment when the union circulated her name as a strike-breaker *with the deliberate intention of causing her embarrassment*. An official gave explicit evidence that that was the union's intention. Mr Boylan said that the Branch Committee's e-mail had caused him embarrassment, but he gave me no reason to believe that it was its intention to do so. Mr Pollock said in evidence that feeling was running high at the time and Branch

members were asking what the Committee was going to do about Mr Boylan's breach of the strike: the purpose of the e-mail was to inform them. In the absence of indications to the contrary I accept this evidence. I find also that there is some force in a point made by Mr Scott, namely that Mr Boylan's crossing of the picket line at the College's main entrance, where by his own account a large number of UCU members was present, was a very public act which he could reasonably have expected would soon become widely known. The e-mail's first words ("*As most of you will now be aware....*") suggest that it was in fact common knowledge, and Mr Pollock gave evidence that it was "the talk of the staff-room". I find that Mr Boylan did not suffer detriment either by being deprived of an entitlement or by being deliberately embarrassed by the circulation of the Branch Committee's e-mail.

35. In light of the above I refuse to make the declaration sought in Complaint 1, that the Branch Committee breached Rule 13.1 of the rules of the Union by sending him a letter requesting his resignation, which constituted an act of discipline.
36. Complaint 2: The burden of this complaint is that the Branch Committee took what was a disciplinary decision to seek Mr Boylan's resignation, but infringed the rules of natural justice by doing so without giving him a fair hearing. The rules of natural justice are implied into the rules of trade unions, a fact which Mr Scott acknowledged on behalf of the UCU.
37. I have concluded above that the Branch Committee did not commit an act of discipline by deciding to request or demand Mr Boylan's resignation. It had, and knew it had, no power to undertake disciplinary proceedings or make a disciplinary decision, and no means of giving effect to such a decision. Nothing actually happened after it conveyed its decision to Mr Boylan. But before the rules of natural justice can be called into play at all, some formal process must have been under way, or some decision, which is in principle enforceable, must have been taken. In my view, the Branch Committee meeting of 22 November was not of this character and there is nothing in it on which the rules of natural justice can gain a purchase. Moreover, Mr Scott made the point, with which I agree, that, if anything, the Branch Committee's decision would have to be regarded as the start of a process, not the end, since Mr Boylan was invited to respond. Mr Boylan did not respond, and any process there might have been – and in which he might have had the opportunity to be heard - did not get off the ground. In the circumstances I do not see how Mr Boylan can sustain his claim that he was denied a fair hearing.

38. Accordingly I refuse to make the declaration sought, that in taking its decision of 22 November 2006 without giving him an opportunity to be heard, the Limavady Branch Committee breached the rules of natural justice.
39. Complaint 3: This complaint has two parts: first, that the Branch Committee breached Branch Rule 21 by sending its letter of 22 November 2006, which was an act of discipline; and second, that the circulation of its e-mail of 23 November 2006 was a further act of discipline.
40. Rule 21 of the Branch rules (for which the UCU's Model Local Rules serve) says that *"No rule or rules of the Branch will at any time be in conflict with a rule or rules of the UCU currently in force"*. In claiming that Rule 21 was breached, Mr Boylan is saying, on the normal construction of the words, that there exists or existed a Branch rule that is or was in conflict with a rule of the UCU. He did not offer any evidence that this was the case, or indeed even address this possibility. The complaint as he conceived it appeared to be that the Committee breached Branch rule 21 by breaching UCU rule 13.1; that is, by taking disciplinary action when UCU rule 13.1 reserves disciplinary action to the NEC alone. If my understanding of this is right, then it seems to me that this part of Complaint 3 simply reduces to a repetition of Complaint 1. Breach of Branch rule 21 is not a new complaint; it is simply an automatic consequence of breaching UCU rule 13.1 and seems to add nothing of substance. However, since I have already found that UCU rule 13.1 was not breached, I find that on this interpretation Branch rule 21 was likewise not breached and I refuse to make the declaration sought.
41. In his correspondence with my office Mr Boylan made reference to Article 90A(2)(d) of the 1995 Order, which concerns breaches of union rules relating to the constitution or proceedings of any executive committee or decision-making meeting. He did not raise or address this matter at the hearing, and so it was not clear in what exactly the breach was alleged to consist. Mr Scott assumed, in his submission, that Mr Boylan was claiming, as part of Complaint 3, that by taking a disciplinary action that was outside its remit, the Branch Committee breached a rule covered by Article 90A(2)(d). I agree with Mr Scott that a claim that a committee has acted beyond its powers is not a claim about the constitution of the committee. Mr Scott asserted that it was not to do with the proceedings of the committee either; and that therefore it was outside the scope of Article 90A(2)(d) and outside my jurisdiction. My view is that it might be possible to mount an argument for regarding a committee that exercised powers specifically withheld from it by the rules as having breached a rule concerned with its proceedings. Be that as it may, I have already decided that the Branch Committee did not take disciplinary action against Mr Boylan and so did not exceed its powers. Therefore, if Mr Boylan was making this complaint, it fails.

42. I have addressed the point in the preceding paragraph because it was argued at the hearing. However, in my view, a complaint that the Limavady Branch Committee breached a rule relating to its constitution or its proceedings does not come within my jurisdiction. Paragraphs (10) and (12) of Article 90A lay down that such complaints may only be made to me where the Branch concerned has more than 1000 members. The evidence I have is that the Limavady Branch of the UCU had some 70 members at the relevant time.
43. On the second part of Complaint 3, I have already found (paragraph 35 above) that the circulation of the e-mail was not an act of discipline. I refuse to make the declaration sought.
44. Complaint 4: As elucidated by Mr Boylan at the hearing, this complaint is that the sending of its e-mail to a number of employees of Limavady College who were not members of UCU was a further act of discipline by the Branch Committee: that “outsiders” knew about the matter was an additional embarrassment to him. In his evidence, Mr Boylan named four persons on the circulation list of the e-mail who he said he had reason to believe were not members of UCU at the time. However, he offered no written evidence and called no witnesses to support his contention. The Union’s witnesses affirmed that, to the best of their knowledge, all those on the circulation list were members of the Limavady Branch of UCU. Mr McKeown said that the membership register had been thoroughly checked and corrected where necessary before the ballot on industrial action in May 2006, and he explained that UCU Headquarters keeps Branches up to date on members’ details on a monthly basis. He said there was no reason whatever to question the accuracy of the Limavady Branch membership list. In my judgment, it was for Mr Boylan to show that it was probable that the persons he identified were not UCU members, but he was not able to do so. Mr Pollock said that, as Branch Secretary, he maintained a circulation list of Branch members on his computer and this was what he used for sending out the e-mail about Mr Boylan. It is always possible that an error or two may creep into such a list, for example, if someone leaves the union or moves to another Branch and the list is not updated promptly, but such unintentional lapses could not constitute disciplinary action for the purposes of Article 90A(2)(b). I refuse to make the declaration sought.
45. Finally, as regards the Union’s concession, before the Industrial Tribunal, that the Branch Committee’s letter of 22 November was a “determination” for the purposes of Article 31(2) of the 1995 Order: Mr Boylan drew the conclusion that by this concession the Union had accepted that the letter was a disciplinary act. Mr Scott said that the concession was made so that the letter could be taken as the starting point for calculating whether or not Mr Boylan’s application to the Tribunal was within time. It seems clear to me that

this was a limited concession for a specific purpose. I do not see it as having a bearing on my decisions on the complaints Mr Boylan brought to me.

Observation

46. Although I have not upheld his complaints, I am convinced by his submissions and his demeanour at the hearing that Mr Boylan sincerely felt that he had suffered a deeply embarrassing, even humiliating, experience at the hands of his Branch Committee, and that his resentment at this was his main motive for bringing the complaints. If that is so, I would suggest that it underlines the importance for union officers of taking a measured and courteous approach towards problems with members, especially where, as in this case, feelings are heightened and there are likely to be issues of principle on both sides. It could save the officers and the union effort and expense in the long run.

R Gamble
Certification Officer for Northern Ireland