Neutral Citation Number: [2024] EWHC 1295 (Ch)

Case No: BL-2024-NCL-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
BUSINESS LIST (ChD)

The Moot Hall, Castle Garth,
Newcastle upon Tyne, NE1 3RG
Date: 31/05/2024

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

MR PARAMJIT BHOGAL (AKA MR PARAMJEET BHOGAL)	**Claimant**
- and -	
NATIONAL EDUCATION UNION	**Defendant**

- -
- -

Mr Adam Chaffer (Solicitor Advocate of Hay & Kilner LLP) for the **Claimant**
Ms Rebecca Tuck KC (instructed by **Head of Legal Strategy, National Education Union**) for the **Defendant**

Hearing dates: 20 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE HIGH COURT)

Judge Davis-White KC :

Introduction

1. This judgment sets out the reasons for my dismissal, on 20 May 2024, of an application by the Claimant for an interim injunction. The injunction sought was a stay of disciplinary proceedings brought against the Claimant, as a member of the Defendant trade union, pending a trial of his claim before this court seeking declaratory relief that he is entitled to legal representation at the appeal stage of those disciplinary proceedings.

2. In terms of evidence, I had a witness statement from Mr Bhogal, the Claimant dated 1 May 2024 and a witness statement from Ms Rachel Baxter, Senior Manager of the GS Support and Democratic Services department of the Defendant, dated 9 May 2024.

The parties

3. The Claimant is an educational psychologist and has worked as such for the last 27 years. He has worked predominantly for the Council of the City of Newcastle but also with a number of other local authorities. Since about April 2023, he has worked as a self-employed private/independent consultant for various local authorities.

4. Before working as an educational psychologist, Mr Bhogal worked variously as a teacher, advisory teacher, Ofsted inspector and Policy Officer.

5. Mr Bhogal was represented before me by Mr Chaffer, Solicitor Advocate of Hay & Kilner LLP.

6. The Defendant, the National Education Union ("NEU" or the "Union") is a trade union that is the product of the amalgamation of the National Union of Teachers ("NUT") and the Association of Teachers and Lecturers, which amalgamation took place from about September 2017 and completed on 1 January 2019. As at 2022, it had a membership of in excess of 445,600.

7. Before me the Defendant was represented by Ms Tuck KC, who inherited the (revised) Skeleton argument of Mr Brittenden KC. Mr Brittenden KC appeared before me on the first occasion that the application came on for hearing. On that occasion I adjourned the application to give Mr Bhogal an opportunity to file evidence in reply (if so advised) and because the listed hearing time was inadequate, not least given the service by the Union shortly before the hearing of a number of authorities, as well as Ms Baxter's evidence, and which I had not had adequate time to pre-read.

8. I am grateful to all the advocates and those instructing them for the assistance they have given to me on this application.

History

9. The Claimant had been a member of the NUT since 1982 and thereafter was and is a member of the NEU.

10. In his own words, taken from his witness statement, Mr Bhogal has explained his position as follows:

> *"10. I passionately believe in the trade union cause and hope to do so for the remainder of my career. I consider myself an activist and have championed Black representation within the education sector and have worked tirelessly to shape the future for Black and all educators. This is something which I am passionate about and has been at the focus and drive of my work within the Union.*
>
> *11. During my time in the Defendant union, I have held various roles including National Executive seat and on committees including Member Defence and Equalities. I have been heavily and proactively involved in the Black Organising Forum and various positions at District and Regional levels including President, and positions involving equality, international solidarity, planning and delivering training. I have previously spoken on the national media on behalf of the Union as well and a representative at International events."*

11. He feels that the NEU is going through a period of change which started from the amalgamation in 2017/19 but which has *"intensified*" in recent years, He accepts that he does "*challenge*" the NEU but he considers that the NEU now is:

> "*more focused on younger members and does not like internal debate and discussion which does not mirror its new image and leadership. My experience appears to be part of an agenda to manage out older more vocal members*."

12. Further, he considers that:

> "*there is…a culture in the Defendant union which is now against challenge in the traditional sense. The rough and tumble of debate, lobbying and canvasing support is now labelled as inappropriate; or worse by the leadership of the Defendant*."

13. The reference to his "experience" is as to the experience of the disciplinary process that I have referred to.

14. Before I turn to the facts of the disciplinary process, I briefly explain the framework of the NEU disciplinary process as a matter of its rules.

The NEU Disciplinary process

15. The Rule book of the NEU, effective from 6 April 2023, provides by Rule 22 (so far as relevant):

> "***22. Professional conduct and discipline***
> *22.1 There shall be a code of Professional Conduct established by the Joint Executive Council and included as Appendix I to these rules.*
> *22.2 Any questions as to the professional conduct of any member whether it arises on the personal application of any member or otherwise shall stand referred to the National Disciplinary Committee and be dealt with in*

accordance with the procedure produced by the Executive in accordance with Appendix A of these rules.

.....

22.5 All questions relating to the discipline of members and any appeals on the question of eligibility for membership shall be dealt with in accordance with the provisions of Appendix A of these rules."

16. Appendix A to the Rule book provides as follows (so far as relevant):

"*Appendix A*
National Disciplinary Committee and National Appeals Committee

1. Disciplinary Offences

1.1 A member of the Union commits a disciplinary offence if that member:
(a) acts contrary ta the Code of Professional Conduct of the Union;
(b) acts contrary to the Rules of the Union;
(c) refuses to comply with a lawful instruction of the Union;
(d) is knowingly involved in any fraud on the Union or misappropriation of Union funds or property;
(e) misuses protected data contrary to the Data Protection Act Licence of the Union;
(f) frustrates any decision or penalty of the National Disciplinary Committee or National Appeals Committee; or
(g) in any other way engages in conduct which brings injury or discredit to the Union.

2. Elections for National Disciplinary Committee and National Appeals Committee

2.1 The members of the Union in each of the seventeen Executive Districts of the Union shall elect a member to form the Panel of seventeen members who shall be eligible to serve on either a National Disciplinary Committee or a National Appeals Committee.

2.2 Elections to the Panel for the National Disciplinary Committee and National Appeals Committee shall be for a term which shall not exceed four years.

2.3 Candidates for election to the Panel must have been in standard membership of the Union within the last 10 years and in membership of the Union for at least five years continuously prior to the date the election opens. A member wishing to stand must be nominated by their local district. Officers of the Union and members of the Executive at the date the election opens are ineligible to stand for the Panel for the National Disciplinary Committee and the National Appeals Committee.

3. National Disciplinary Committee

3.1(a) .....

3.1(b) A complaint may be formulated by the Officers of the Union under1.1 (b), [c), (d). (e). (f). to be pursued by an employee of the Union. In such case. the procedure to be followed shall be as set out in paragraph 3.3(a).

3.2 A National Disciplinary Committee shall choose its own chairperson.

3.3 A complaint under these proceedings may be made by a member of the Union or by an Officer of the Union acting on behalf of the Officers of the Union. If the complaint is formulated by an Officer of the Union then the Officers of the Union may suspend that member or members from membership of the Union pending the hearing of the disciplinary proceedings. The General Secretary of the Union shall notify the relevant Local District and Branch of any such suspension.

3.3(a)….

3.4 The conduct of National Disciplinary Committee proceeding shall be in accordance with the rules of natural justice. The member making the complaint and the member being complained about have the right to a fair hearing. without bias. conducted with reasonable promptness consistent with fair opportunity to present their respective cases. Before a National Disciplinary Committee, the parties may call witnesses of relevance to the matters in dispute.

3.5 The decisions of a National Disciplinary Committee or a National Disciplinary Committee Chairperson acting on behalf of the Committee are final subject only to the right of appeal to the National Appeals Committee.

3.6 A complaint made by a member of the Union calling for a matter to be considered by a National Disciplinary Committee must be made in writing to the General Secretary specifying matters which come within one or more of the disciplinary offences referred to above at (a) to (g). The complaint will not be considered unless made within six months of the circumstances giving rise to the complaint unless the National Disciplinary Committee find exceptional reasons for doing so. The complaint will be dealt with in accordance with
the written procedures made under these Rules.

3.7 Following consideration of the complaint a National Disciplinary Committee may either dismiss the complaint or find the complaint justified. If the National Disciplinary Committee find the complaint justified they may impose one or more of the following penalties:
(a) reprimand and warning as to future conduct;
(b) severe reprimand and censure;
(c) suspension from the Union for a fixed period;
(d) removal from office or accreditation held by the member either indefinitely or for a specified period;
(e) disqualification from holding office or role in the Union either indefinitely or for a specified period;
(f) exclusion from the Union.

……

4. National Appeals Committee

4.1 An appeal from a decision of a National Disciplinary Committee will be heard by a National Appeals Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee. The Panel members who form the National Appeals Committee shall not in any way have been involved in the decision made by the National Disciplinary Committee.

4.2 A National Appeals Committee shall choose its own Chairperson.

4.3 *When a National Disciplinary Committee complaint has been found to be justified the member complained about now called the appellant. has a right of appeal in respect of the finding and the penalty provided that the appeal is submitted to the General Secretary within the time limit and in the manner set out in written procedures. The appeal must be in writing and set out the grounds for the appeal.*

4.4 When a National Disciplinary Committee complaint has been found not to be justified the member who has made the complaint, now called the appellant. has a right of appeal limited to the process or procedures by which the decision was made and not relating to the substance or merit of the decision provided that the appeal is submitted to the General Secretary within the time limit and in the manner set out in written procedures. The appeal must be in writing and set out the grounds for the appeal.

4.5 Operation of the penalty of the National Disciplinary Committee shall remain suspended pending the decision of the National Appeals Committee which shall be final.

4.6 The conduct of National Appeals Committee proceedings shall be in accordance with the rules of natural justice. The parties involved in the appeal have the right to a fair hearing, without bias, conducted with reasonable promptness consistent with fair opportunity to present their respective cases.

4.7 The appeal will be dealt with in accordance with the written procedures made under these Rules.

4.8 The National Appeals Committee has full powers to remove any penalty imposed by the National Disciplinary Committee or to replace any penalty imposed by the National Disciplinary Committee with an alternative penalty or penalties as allowed by these Rules save that the National Appeals Committee may not impose a more severe penalty than the penalty imposed by the National Disciplinary Committee.

5. Confidentiality

5.1 The proceedings of the National Disciplinary Committee and of the National Appeals Committee shall be confidential save that the outcomes of each Committee shall be communicated to the Executive and to the parties to the dispute.

6. Procedures

6.1 The Executive, taking into account advice from the National Disciplinary Committee and the National Appeals Committee, shall produce procedures for the election of members to the Panels for the National Disciplinary

Committee and the National Appeals Committee and for the administration of their cases and the conduct of their hearings including all time limits."

17. The written procedures provided for by Paragraph 6 of Appendix A to the Rule book are as follows (with some editing to remove unnecessary detail). I refer to these provision as the "Disciplinary Procedures" or "DP"):

> " ***NEU DISCIPLINARY PROCEDURE***
>
> *Introduction*
>
> *Under Appendix A of the Rules (paragraph 3.6), complaints will be dealt with in accordance with the written procedures made under these Rules.*
>
> ***COMPLAINTS PROCESS***
>
> ***A. Procedure for initial complaint***
>
> *1. A complaint or submission calling for a matter to be considered by a National Disciplinary Committee (NDC) shall be made in writing specifying the charge or issue within the jurisdiction of the NDC to the General Secretary. The jurisdiction of the disciplinary committee is set out in paragraph 1, Appendix A, NEU rules.*
>
> *2. The General Secretary will in most cases refer the complaint to the Regional/Wales Secretary for the Region to which the member complained against belongs. The Regional Secretary for that Region or the Wales Secretary in Wales shall usually act as Secretary to the Committee in the case. The GS shall have the discretion to appoint to a Regional/Wales official outside the member's area. This will usually be the Regional/Wales Secretary or a Senior Regional Officer.*
>
> *3. All complaints are to be acknowledged and the complainant shall be offered the opportunity to resolve the matter through conciliation. Where this is agreed, conciliation shall be facilitated by a member of the union with not less than 10 years standing (in the NEU and legacy unions)….. Conciliation can be requested at any time through the process, by either party but agreement must be secured within five days for conciliation to proceed. A different format of conciliation can be offered to parties at the end of the process with a view to assisting parties in moving forward.*
>
> *4. If conciliation does not take place or is not successful, the complainant will be sent a copy of the complaints procedure and asked to complete the template complaint form. The complainant shall set out the substance of the complaint and must attach all supporting written evidence and witness statements, in A4 format, in the order in which the complainant intends to present the evidence. Only material which is directly relevant to the matters at issue should be included but, in any event, this should be limited to 30 pages other than in exceptional circumstances.*
>
> *5. The date on which the complaint is received is the date on which the completed template and supporting evidence is received at the office.*
>
> *6. Complaints will not be considered unless made within six months of the circumstances giving rise to the complaint unless the NDC finds exceptional reasons for doing so. The question of whether the complaint can proceed as within the jurisdiction of the NDC under the Union rules will be considered by the NDC. Such preliminary matters should be considered at a meeting (Preliminary Review Meeting) which may be held by videoconference, Teams or Zoom. A PRM can be convened before a complaint is sent to the respondent……*

7. In accordance with the Code of Professional Conduct, the Panel will take into account that freedom of speech includes the right to challenge and contest others' views, respecting the right of oppressed groups to identify prejudice and discrimination.
8. The Secretary to the NDC shall provide the respondent with a copy of the complaint, with all supporting written evidence submitted and a copy of the Complaints Procedure. The respondent shall provide a response to the complaint within 15 working days (see paragraph 47 for definition), attaching any supporting evidence including witness statements…..
9. A friend/ companion can be engaged to assist throughout the process (see paragraph 25). A companion is also bound by the confidentiality requirements as a party to the disciplinary process.
10. Once a complaint against a member has been submitted, any complaint by the party complained against will either by treated as a defence to the original complaint made or treated as a separate complaint and stayed until the original disciplinary process is completed. This decision will be taken by the NDC as a preliminary matter at a Preliminary Review Meeting (PRM).
11. Where it is necessary for a PRM to be held, this will take place as soon as practicable after submission of the respondent's response (see para 12 below). At the PRM, the NDC shall consider such preliminary matters as referred to in paragraphs 6 and 8 above. The PRM may decide to admit late papers, grant or refuse a request for postponement, consider a request from a party to call more than 3 witnesses, hold a meeting outside the school week or deal with other procedural matters as necessary, where it believes that there are good reasons to vary the provisions set out in this procedure. The PRM may establish a timetable for steps to be taken by the parties up to the date of hearing and may set limitations on the length of the hearing.

B. Preliminary Review Stage

12. The complaint will be heard by a National Disciplinary Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee. A diverse Panel will be sought with this being particularly important in cases alleging discrimination.
13. The NDC NAC Panel comprises 17 members (one per electoral district).
14. A Committee Chair may be elected….
15. A Preliminary Review Meeting (PRM) where necessary will be held as soon as practicable…..
16. At the Review stage, the NDC can agree that

(a) the case does not fall within the jurisdiction of the NOC (including time limits, membership and other reasons); or
(b) the case does not fall under any of the disciplinary headings in Appendix A of the Rules;
or
(c) There is no case to answer
(d) There is no case to answer and the case is vexatious
(e) The case should proceed to a full hearing.

17. Reasons for the decision will be given but there is no appeal from a decision of the PRM that the case cannot proceed.
18. Following the PRM, if such takes place, and in any event at least 10 working days (see paragraph 47) before the full hearing date, the Secretary shall combine the papers submitted by the parties into a single hearing bundle.

C. Full Hearing

19. A hearing will normally be held as soon as is practicably possible from the date that the complaint is received…..

20. At least ten working days' notice of the hearing date will be provided to both parties.

21. The hearing will be held at a venue near the Regional/Wales Office, or virtually, and the venue costs will be met centrally.

22. Parties can each call up to three witnesses in person, unless they have been granted permission by the Committee to call more for exceptional reasons. Character witnesses will submit a statement only and shall not attend in person.

23. Witness statements should be submitted with the initial complaint or response to the complaint. Witness statements to include:

a) A brief Union/career resume from the witness in order to establish their credentials and make clear the relevance of the witness' evidence to the proceedings.

b) A statement of the relevant facts as perceived by the witness, chronologically or otherwise rationally ordered.

c) A signed and dated statement that the record is a true and correct record to the best of the witness' knowledge and belief.

24. Parties to an NDC/NAC will not call Union staff as witnesses, unless the staff member(s) were previously local officers at the time of the incident before the NDC/NAC.

25. Each party shall be entitled to attend the hearing by the Committee accompanied by a friend who shall be a member of the Union with the right to call and examine witnesses. No persons other than the parties, their friends, and their witnesses when required shall be present at the hearing.

26. The NDC panel may consider any additional procedural questions arising between the date of PRM and full hearing, including any questions relating to postponement of the hearing. In exceptional circumstances where every reasonable effort has been made to hold the hearing and should it appear to the NDC panel that a party is seeking to frustrate the process, the Panel should review the case and can decide to proceed with the hearing with the party's companion presenting or defending the case, or if necessary, in the absence of a party, taking into account the need for fair process.

27. The national Union will meet travel costs ….

28. All parties shall abide by the Code of Professional Conduct throughout the process …..

D. Relaying the decision

29. Following consideration of the complaint a National Disciplinary Committee may either dismiss the complaint or find the complaint justified. If the National Disciplinary Committee find the complaint justified, they may impose one or more of the following penalties:

(a) reprimand and warning as to future conduct;

(b) severe reprimand and censure;

(c) suspension from the Union for a fixed period;

(d) removal from office or accreditation held by the member either indefinitely or for a specified period;

(e) disqualification from holding office or role in the Union either indefinitely or for a specified period;

(f) exclusion from the Union.

30. The complainant and respondent will be informed in writing by the Secretary of the NDC of the outcome of the hearing as soon as is practicably possible….

31. In the event of sanctions (a) or (b) being imposed, the letter from the NOC Secretary relaying the full report and sanction to the party shall set out the warning as to future conduct or a detailed censure with details of who will be informed of the sanction (the Executive, the parties and, in certain circumstances, district or branch committee members), and information as to the length of time the sanction will remain on record.

32. The decision will inform the parties of the rights of appeal to the National Appeals Committee.

E. Appeal Process

33. An appeal from a decision of a National Disciplinary Committee will be heard by a National Appeals Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee. The Panel members who form the National Appeals Committee shall not in any way have been involved in the decision made by the National Disciplinary Committee. The form of the appeal will, in accordance with the rules, be as set out in paragraphs 27 to 30 or 31 to 34.

34. Operation of the penalty of the National Disciplinary Committee shall remain suspended pending the decision of the National Appeals Committee which shall be final.

Appeal by respondent

35. When a National Disciplinary Committee complaint has been found to be justified the member complained about, now called the appellant, has a right of appeal in respect of the finding and the penalty provided that the appeal is submitted to the General Secretary within the time limit and in the manner set out in these written procedures….. The appeal must be in writing and set out the grounds for the appeal and must be received within 10 working days of receipt of full decision. The appellant must set out the grounds of appeal, including any findings of fact which the appellant wishes to challenge, along with page numbers of supporting evidence from the NDC bundle, including page numbers of witness statements of witnesses the appellant wishes to call, or relevant paragraphs of the NOC decision.

36. The secretary shall provide the defendant to the appeal (complainant before the NDC) with a copy of the appeal setting out the full grounds and supporting evidence.

37. The defendant to the appeal shall, within 10 working days of receipt of the appellants case, respond setting out the grounds on which the appeal will be resisted, including page numbers of supporting evidence including any witness statements, from the NDC bundle.

38. The full bundle of papers shall be sent to the parties and the Committee at least ten days in advance of the hearing. The onus shall be on the parties to ensure all paperwork is submitted in time. The bundle of papers for the hearing shall contain the papers for the NDC.

39. The appeal will be heard by the National Appeals Committee. The chair of the NAC may decide to hold a preliminary review meeting in order to consider any preliminary matters . It is not necessary for the appeal to take the form of a full re-hearing, as not all matters may be in dispute. The NAC hearing must, however, allow an opportunity for the appellant to challenge any findings of fact made by

the NDC and to make representations as to why the NAC should overturn the decision of the NDC.
40. The secretary will inform the parties of the date of hearing of the appeal….
41. The National Appeals Committee has full powers to remove any penalty imposed by the National Disciplinary Committee or to replace any penalty imposed by the National Disciplinary Committee with an alternative penalty or penalties as allowed by these Rules save that the National Appeals Committee may not impose a more severe penalty than the penalty imposed by the National Disciplinary Committee.
42. Complainant and respondent will be informed in writing by the secretary of the outcome of the hearing as soon as practically possible….

Appeal by complainant

43. ….

…

50…….

F. Appeal Stage
51. The complaint will be heard by a National Appeal Committee consisting of five members drawn from the Panel for the National Disciplinary Committee and the National Appeals Committee. A diverse Panel will be sought with this being particularly important in cases alleging discrimination.
52. The NDC NAC Panel comprises 17 members (one per electoral district).
53. A committee chair may be elected…
54. A Preliminary Review Meeting (PRM), where necessary, will be held as soon as practicable after the receipt of the respondents' paperwork.…
55. At the Review Stage, the NAC can agree that:
i) The appeal has not been presented in accordance with the requirements of the Procedure (including time limits, explanation of ground(s) of appeal)
ii) The appeal shows no arguable case
I ii) The appeal shows no arguable case and is vexatious
iv) The case should proceed to a full hearing.
56. Reasons for the decision will be given but there is no appeal from a decision of the PRM .
57. Following the PRM, if such takes place, and in any event at least 10 working days before the full hearing date, the Secretary shall combine the papers submitted by the parties into a single hearing bundle.
G. Confidentiality
58. All proceedings shall be confidential save that:
(a) If the matter proceeds to an NDC or NAC, the outcome will be communicated to the Executive and to the complainants and may be published in such manner as the Executive may decide;
(b) The Secretary to the NAC reserves the right to inform any relevant party of the referral to, and any decisions of, the Preliminary Review Panel, the NDC or the NAC where this is considered appropriate and necessary.
59. The format of the outcome reported to the Executive will be limited to the decision of the NDC/NAC and the sanction applied. The sanction takes effect

from the completion of the disciplinary procedures and not when it is reported to the Executive.
H. Time Limits
60…..
H: Suspension pending outcome of the disciplinary case
67. If a party is suspended pending hearing and incurs any expenses during their suspension, they should normally claim these from their district…..
I: ***Application of GDPR***
68. When submitting a complaint or responding to a complaint, members must ensure that they do not include any sensitive, personal information about a third party, for example their email or home address….
J: Officers' investigation into breach of Union Rule or Procedure
69. Appendix A paragraph 3.l(b) allows the Officers of the Union to initiate an investigation where it appears that the good functioning or standards of behaviour of the Union may have been undermined. Under this paragraph the Officers shall consider whether the matter requires further investigation, and if so, shall request the General Secretary to appoint an investigating officer….."

The disciplinary proceedings against Mr Bhogal

18. On 15 December and 20 December 2023, Mr Bhogal was written to by the NDC secretary and the National President explaining and re-iterating that a complaint was being brought against him by Officers under Appendix A rule 3.3 of the Rule book.

(a) The Preliminary Review Meeting

19. The Preliminary Review Meeting (the "PRM") took place on 15 January 2024. The report of the NDC full hearing, on 8 February 2024, also records points dealt with at or before the PRM.

20. Some of the main points that had arisen and which are recorded include the following.

21. The role of National Officers in bringing the complaint was set out. Five witnesses were said to have reported concerns about Mr Bhogal's behaviour but they had been reluctant to take an individual complaint. The Officers had agreed to bring a complaint with the five members in question acting as witnesses. Mr Bhogal had questioned the Officers' jurisdiction to act in this way but the NDC was satisfied that there was such power under Appendix A paragraph 3.3.

22. Time limits were considered, some incidents complained of took place more than 6 months previously but it was agreed that the complaint fell within the jurisdiction of the NDC/NAC as the incidents could be joined as an alleged pattern of behaviour over time. On this basis the exceptions to the time limits should apply and the witnesses should be asked to clarify timings of complaints at the hearing.

23. Three witnesses had asked to attend remotely but attendance in person was considered important but that position would be reconsidered if good reasons for remote attendance were put forward.

24. A further two allegations (or incidents) in respect of Mr Bhogal were allowed to be relied upon. They concerned (1) Mr Bhogal having contacted the headteacher of one of the witnesses, making a complaint about that person and purporting to do so on behalf of the NEU and (2) Mr Bhogal copying a letter about the NDC complaint to the two District 2 Executive members. Following these two incidents the Officers are recorded as having agreed to suspend Mr Bhogal pending the completion of the disciplinary process to protect the disciplinary process and the parties to it.

25. On 17 January Mr Bhogal had emailed the NDC secretary with a request the hearing be held in London and an implied request to submit late statements. On 19 January Mr Bhogal had emailed the NDC secretary requesting he be allowed to call more than 3 witnesses on the basis that there were 5 witnesses for the Officers (there being one joint statement from two members). It was decided that (a) the hearing would be in London to facilitate attendance by Mr Bhogal's witnesses, as he had requested; (b) he would be permitted to submit up to four witness statements and up to three witnesses could be called in accordance with the arrangements for the Officers' witnesses; (c) a timetable for evidence was set; (d) two witnesses would be requested to attend in person and (d) the timetable for the hearing would be revised to reduce the time for the Officers' case and allow equivalent time allocation for Mr Bhogal's presentation of his case.

26. In advance of the hearing, a point arose regarding the companion of the President on which the NDC made a ruling. Further Mr Bhogal requested that one of his witnesses should attend remotely due to childcare responsibilities and her just having started in a new post. This was refused on the basis that attendance of witnesses should be in person unless there was ill health and the hearing had been moved to London at Mr Bhogal's request to assist attendance by his witnesses. However, the witness statement of the witness in question would be considered by the NDC in its deliberations.

(b) the Hearing

27. The relevant hearing before the NGC took place on 8 February 2024. Mr Bhogal did not ask to bring a legal representative. He did however take a friend or companion, a Mr Roger King.

28. The Report sets out a summary of the representations made by Ms Rose, who presented the case on behalf of the Officers, and of the evidence. The three heads of complaint were those under Appendix A, paragraph 1, sub-paragraph (a) acts contrary to the Code of Professional Conduct; (b) acts contrary to the rule so the Union and (g) in any other way engages in conduct which brings injury or discredit to the Union.

29. The Report goes on to summarise the course of the oral evidence of witnesses and then the presentation of the case of Mr Bhogal and of his witnesses.

30. The NDC found (among other things) that (a) Mr Bhogal's contact with the headmaster was an extremely serious breach of professional and union conduct for which Mr Bhogal had not given a credible explanation or excuse; (b) that Mr Bhogal had breached the confidentiality provisions if the Procedure/Appendix A in his letter to the General Secretary and the D2 Executive members dated 12 December; (c) that the tone of Mr Bhogal's comments on a WhatsApp group were intimidating and that this was how witnesses perceived them; (d) that the panel was unable to come to a conclusion about an alleged incident between Mr Bhogal and a Mr Sam Makinde at Conference. In

answer to a question from me Ms Tuck confirmed to me that the three matters that I have identified in (a)-(c) above were the sole incidents relied upon and found to have taken place by the NDC and that no findings were made against Mr Bhogal regarding alleged personal confrontations or events taking place on a face to face basis at conferences.

31. It concluded that the complaint under the three heads of Appendix A that I have earlier identified were all made out. It imposed sanctions of a reprimand and warning as to future conduct and suspension from the Union for a period of three years.

(c) the Appeal

32. By letter dated 26 March 2024, Hay & Kilner LLP wrote to the NEU in respect of Mr Bhogal's appeal against the decision of the NDC and enclosing, among other things, a six-and-a-half-page document setting out and called "Grounds of Appeal". The letter went on to suggest a short directions hearing once the Union had filed its response.

33. The Grounds of Appeal were five:

(1) Ground 1: the procedural aspects of the process were improper and fundamentally contravened natural justice;

(2) Ground 2: alternatively, they breached Mr Bhogal's legitimate expectation;

(3) Ground 3: and breached Mr Bhogal's right to a fair hearing;

(4) Ground 4: the decision of NDC was irrational, based on flawed reasoning and subject to the information available unreasonable;

(5) Ground 5: the sanction decision was disproportionate to the issues raised from the perspective of proportionality.

34. In slightly more detail, the particulars under each Ground were as follows (in summarised form).

35. Ground 1:

(1) The complaints were based upon information that was "vague and insufficient";

(2) The scope of the complaint was amended without sufficient notice being given to Mr Bhogal;

(3) The complaint was unclear regarding time frames and some allegations were outside the 6-month limitation;

(4) The Union was estopped from making a complaint in April 2023 when it had indicated that there was no issue with regard to the behaviour between Mr Makinde and Mr Bhogal prior to May 2023;

(5) There had been a failure to disclose (a) an Officer of the Union was in a relationship with a witness that the Union had called; (b) Mr Bhogal had previously brought a complaint against an Officer of the Union previously;

(6) An officer of the Union had been engaged in the process when the Appellant has raised issues against that individual's behaviour and had made a formal complaint;

(7) Failing to enquire or document conflicts of interest including those of the Secretary of the NDC whose line manager is an Officer of the Union;

(8) Having little regard to the rules of evidence, including relying on joint statements, hearsay evidence and not relying on statements of truth to verify the evidence;

(9) Refusing, without good reason, to call Mr Bhogal's key witness or accommodate her personal needs, such as to be both discriminatory and in breach of the rules of natural justice;

(10) Failing to afford to the Appellant to the full extent an opportunity to put his case or to cross examine witnesses.

36. Ground 2: see paragraphs (1) to (10) under Ground 1 which are repeated as matters frustrating Mr Bhogal's expectations and which are said to amount to an abuse of process. In addition, it is said there was an uneven playing field because procedural issues were considered and documented where raised by the Union but not where raised by Mr Bhogal.

37. Ground 3: relying on the matters under Grounds 1 and 2, asserts that Mr Bhogal's right to a fair trial under Article 6 of the European Convention on Human Rights was undermined such that the decision reached is "unsafe".

38. Ground 4: a failure to give adequate reasons as to the basis of the decision; the decision was irrational, based on flawed reasoning and unreasonable in particular in (1) its ruling regarding the meaning of "continuing act"; (2) only taking into account the evidence of witnesses of the Union and not Mr Bhogal; (3) not referring in the report to a "sustained and angry outburst" from Mr Makinde, which led to a caution being administered to him by the NDC; (4) wrongly and irrationally reaching a view as to the credibility of the Union's witnesses; (5) wrongly refusing to permit Mr Bhogal to include a key witness; (6) flawed reasoning by reason of reliance being placed on hearsay, opinion evidence of Mr Bhogal, witness body language and demeanour to determine credibility; (7) failing to consider why Mr Bhogal declined to enter into conciliation (which is said to demonstrate that the Union had "an agenda"); (8) following an unreasonable route to reach the decision and inadequately reviewing the evidence and failing to consider its weight; (9) giving disproportionate weight to written communications and not giving weight to the use of lobbying at conferences; (10) the report not being a true and accurate record of the hearing and not reflecting a conflict of evidence between two witnesses of the Union regarding the alleged incident concerning Mr Makinde.

39. Ground 5: The penalty was disproportionate given the failure to conduct matters in accordance with the rules of natural justice. Further no opportunity was given to Mr Bhogal to present mitigation.

40. By letter dated 28 March the NAC secretary wrote to Mr Bhogal confirming that future contact would be with him and not his lawyers. There was, it was said, no provision for legal representation within the Disciplinary Procedure, the process being "lay led".

41. Following further correspondence, the secretary to the NAC wrote to Hay & Kilner LLP referring to paragraphs 9 and 25 of the Disciplinary Procedures in support of the conclusion that "*There is… no provision for a member to be accompanied by a "solicitor or counsel" through the NDC/NAC procedures*."

The current proceedings

42. The current proceedings were commenced by Part 8 Claim Form in the County Court. On the first hearing of the application for interim injunctive relief I transferred the proceedings to the High Court. The Claim Form was, wrongly, accompanied by Particulars of Claim. The Part 8 procedure does not provide for statements of case unless the Court orders them. In fact, the Particulars of Claim read more like a skeleton argument than a statement of case setting out facts anticipated to be disputed. I have ordered that no defence need be filed pending the court considering the matter further.

43. In summary, the claim is that natural justice requires, in the circumstances of this case, that Mr Bhogal is allowed to be represented at the hearing of the appeal before the NAC by a lawyer.

44. As regards the merits of the claim being brought, the position of the parties can be summarised as follows:

(1) **The Applicable Rules**: the NEU says that paragraphs 9 and 25 of the DP prevent a member against whom a complaint is being proceeded with from bringing a lawyer to a disciplinary hearing of the NDC/NAC. Mr Bhogal says that these paragraphs do not apply to NAC hearings.

(2) Natural Justice: the parties are agreed that representation by one or more lawyers is not a right which follows automatically from the fact that the principles of natural justice apply to a particular process. It all depends on the facts. Mr Bhogal says that on the facts in this case, natural justice does require him to be given the right to bring lawyers to the NAC hearing. The NEU says that (a) the paragraphs I have referred to deal with the position and exclude any right to legal representation but that (b) even if, on special facts, there is any residual role for natural justice to require legal representation to be afforded, the facts here nowhere near approach the sort of exceptional case where this would apply.

(3) Mr Bhogal says that in any event, the NEU is estopped from preventing him from bringing a lawyer to represent him at the NAC hearing: the estoppel is said to arise from the fact that the NAC accepted grounds of appeal drafted by lawyers.

45. I should also make clear that there is no reliance on article 6 of the European Convention of Human Rights.

46. There are a number of points where the parties disagree on the underlying position. As regards that, unless the position is clear, I am unable to resolve disputed questions of fact and must assume the factual position to be as asserted by the Claimant. I turn to some of those matters.

(a) Concern as to loss of job

47. Mr Bhogal asserts a concern that the findings of the NDC are such that, if upheld by the NAC, he may lose his job. This has been put in various ways: "The Claimant may face detriment, in his working life, up to and including the loss of his job and inability to practise his trade as a self-employed person, including consequent financial hardship" (Particulars of Claim paragraph 40(b)); "it may undermine my ability to get further work as a self-employed person, if I lose my job then I am going to face financial hardship" (witness statement paragraph 36); "I could lose my job as self-employed individual" (witness statement paragraph 47); "there is also a risk..for my career as a self-employed Education Psychologist" (witness statement paragraph 50).

48. As a general matter the Union makes the point that no closed shop operates. S137 of the Trade Union and Labour Relations (Consolidation) Act 1992 makes it unlawful for an employer to require any employee or worker to be a member of any particular trade union.

49. With regard to the job aspect, apart from an unquantified assertion of "risk" to obtain work as a self-employed Educational Psychologist, there is no concrete evidence of how real such risk is. Mere assertion (as, in a different context, assertion of a dispute as to a debt on which a winding up petition is based) is not in my view enough. The particular findings of the NDC do not in my judgment give rise to an inference that there is a real risk to the job prospects of Mr Bhogal if he loses his appeal in whole or part.

(b) publicity

50. In the particulars of claim (paragraph 40(d)), part of the circumstances said to result in a requirement of natural justice that Mr Bhogal be permitted to have legal representation at the NAC hearing is the following:

> *"(d) The publication of the result of the hearing is a derogation from the confidentiality of the proceedings and is at the Executive's sole discretion (Rule 58(a) (Procedure Rules)."*

51. Referring to the DP, Ms Baxter indicated that the disciplinary process is largely confidential (see Section G of the DP). Addressing the discretion to publicise more widely, Ms Baxter explains that:

> *"Where the sanction is suspension, we notify the Regional Office staff and relevant branch and district officers. A note is appended to the suspended member's record on the membership database which is accessible to relevant staff on a 'need to know' basis".*

52. In my judgment there is limited basis for Mr Bhogal complaining about the rules regarding confidentiality. First, he must be treated as having agreed to them. Secondly there is not an unfettered discretion to publish. The discretion is exercised according to principle and in this case is restricted as Ms Baxter has explained. Mr Bhogal relies upon publication as being a matter that will cause him damage and is part of or relevant

to the serious consequences to him of findings and the decision of the NDC. In my judgment these points are overstated by him.

(c) equality of arms and financial and legal resources of Officers bringing case

53. In the particulars of claim (paragraph 40(j)), part of the circumstances said to result in a requirement of natural justice that Mr Bhogal be permitted to have legal representation at the NAC hearing is a reference to "*all the resources and machinery of the Defendant, including its finances and access to legal advice*" and it concludes with:

> "*There is no restriction on the Defendant itself being represented by a lawyer on appeal in its capacity as respondent."*

54. As regards this, Ms Baxter in her witness statement explains that:

> "*The Officers of the Union have no legal representation or indeed advice from the legal staff of the Union in relation to complaints they bring against members."*

55. The significant point however is that the Officers were not represented by lawyers at the NDC hearing nor would they be able to at the NAC hearing.

56. This appears to be part of, or allied to, an argument by Mr Bhogal that the NEU disciplinary process is not "lay-led" as the NEU has asserted in correspondence. It seems to me clear from the evidence that there is no arguable case to the contrary of the NEU's position. The Panel comprises lay persons, not lawyers and the NEU as "prosecutor" does not rely on lawyers nor does the relevant committee taken from the lay panel.

(d) the scope of the appeal

57. It seems to me relevant also to take into account the real scope of any appeal and the extent to which arguments might arise with a view to considering how difficult the legal points are that arise.

58. Mr Bhogal makes various complaints about the way in which the case was brought against him with regard to the allegation of the incident concerning Mr Makinde and as regards events said to have taken place at one or more conferences. As regards this however, first the NDC were unable to come to a conclusion regarding the Makinde incident. There is therefore no relevant appeal by Mr Bhogal in relation to this matter. Furthermore, it was confirmed to me that the only allegations made against Mr Bhogal by the NDC were (a) the allegation regarding his contact with the Headmaster of the school where a witness was employed; (b) the circulation of information about the NDC complaint to District Executive members to others and (c) the WhatsApp messages. Any allegations about what happened at conferences (annual conference 2023 and the Black Educator's Conference) are not matters of appeal as no findings were made against Mr Bhogal in this respect.

59. As regards the WhatsApp messages, the Report records Mr King acknowledging (on Mr Bhogal's behalf) that there were posts that should not have been made; Mr Bhogal is recorded as accepting that the posts could be seen as "intimidating" and it was accepted that it was "foolish" to have put the messages on the WhatsApp forum. This record has not been challenged.

60. As regards the contact with the headteacher of the school at which the witness was employed, the Report records Mr Bhogal expressing regret to the NDC about the incident on more than one occasion and again, the Report is not challenged on this point.

Interim injunctions: the principles

61. I did not detect any disagreement between the parties as to the principles the court should apply in deciding whether or not to make an interim injunction. The principles are those set out in the well-known *American Cyanamid* case ([1975] AC 396). First, the person seeking the injunction must demonstrate that (1) there is a serious issue to be tried, that is that they have a real prospect of succeeding in their case for a permanent injunction (or equivalent relief) at trial. If that hurdle is overcome then the court must consider whether granting or withholding the injunction is most likely to produce a just result by reference to the further questions of: (2) whether the Claimant would be adequately compensated in damages were they to win at trial but not be granted an interim injunction in the meantime. If damages would be adequate compensation then normally no interim injunction should be granted; (3) if an interim injunction were to be granted but the claimant loses at trial, would the Defendant be adequately compensated in damages (if so, normally the interim injunction would be granted); (4) if such damages would not be an adequate remedy for either side, or there is a doubt about that, then where does the balance of convenience or the balance of justice lie? The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other (see e.g. *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16; [2009] 1 WLR 1405).

A serious issue to be tried, a real prospect of success?

62. The first questions are one of construction: do paragraphs 9 and 25 of the DP apply to NAC appeals and, if so, what do those paragraphs provide for? Tied into that is the third question, which is whether the court should imply a term as propounded for by the claimant.

63. Again, the principles of law were agreed. As a general matter Trade Union rules are to be construed applying the same principles as apply to, for example, commercial contracts, wills or pension schemes. The particular circumstances in which Trade Union rules came to be made and applied means that there are special factors relevant to that context which have to be taken into account when applying the general principles.

64. For present purposes, the general principles of construction can be shortly stated by reference to the summary given by Carr LJ (as she then was) in in *Network Rail*

Infrastructure Ltd v ABC Electrification Ltd [2020] EWCA Civ 1645 ("Network Rail") at [18] and [19], which I gratefully adopt:

> "*[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:*
>
> *(1) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;*
>
> *(2) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;*
>
> *(3) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;*
>
> *(4) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;*

> *(5) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;*
>
> *(6) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.*
>
> *[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated*."

65. In the Trade Union rule context there are two particular matters to bear in mind: first that rules are to be construed with reference to their intended audience and secondly, that the rules may not exhaustively state the position: matters of custom and practice may supplement the rules and/or their construction. In short, they are not be construed literally or like a statute but so as to give them a reasonable interpretation bearing in mind their authority, their purpose and the readership to which they are addressed. In other words, as regards the last point, the focus is on what the reasonable trade union member would understand the words to mean.

66. In the specific Trade Union rule book context, in *Kelly v Musician's Union* [2020] EWCA Civ 736; [2020] IRLR 809, Singh LJ provided guidance as to how the general principles are to be applied in the Trade Union context:

> **"*RELEVANT LEGAL PRINCIPLES***
> *[34] There is no dispute between the parties as to the relevant legal principles, which can be derived from well-established authority. It is common ground that those principles were helpfully summarised by HHJ Jeffrey Burke QC (acting as a Certification Officer) in Coyne v Unite the Union (D/2/18–19), a decision of 4 May 2018, at paras 24–30:*
>
> > *'[24] The starting point of any examination of authority in this area is to be found in the speech of Lord Wilberforce, giving the joint opinion of the House of Lords in Heatons Transport (St Helens) Limited v Transport*

General Workers Union [[1972] IRLR 25,] [1972] ICR 308. As is common ground between the present parties, each person who becomes a member of a trade union enters into an agreement with the union the basic terms of which are to be found in the union's rules. At [[1972] ICR 308,] pages 393G to 394C of his speech [[1972] IRLR 25, p 28], Lord Wilberforce said:-

> *"The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the TUC Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:*
>
> > *'Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union.'"*

[25] In Taylor v NUM (Derbyshire Area) [1985] IRLR 99, Vinelott J, when considering a question of construction of the rules of the respondent union, described that passage as containing the "correct approach to construction of the rules as a union"; see paragraph 33 of his judgment in the Chancery Division. He referred to the principle there set out as having been applied by Lord Diplock in Porter v NUJ [1980] IRLR 404 and by Lord Dilhorne in British Actors' Equity Association v Goring [1978] ICR 791. Lord Diplock, in Porter, said:-

> *"I turn then to the interpretation of the relevant rules, bearing in mind that their purpose is to inform the members of the NUJ of what rights they acquire and obligations they assume vis-à-vis the union and their fellow members, by becoming and remaining members of it. The readership to which the rules are addressed consists of ordinary working journalists, not judges or lawyers versed in the semantic technicalities of statutory draftsmanship."*

[26] In Jacques v AUEW [1986] ICR 683,Warner J had to resolve an issue as to the meaning of the rules of the defendant union. ...

[27]... The judge, at page 692A to B said:-

"There are, of course, in those dicta differences of emphasis and of formulation, but not, I think, differences of principle. It is to be observed that Lord Pearson and Lord Salmon agreed both with what was said by Lord Wilberforce in the Heatons Transport case and with what was said by Viscount Dilhorne in British Actors' Equity Association v Goring [1978] ICR 791. The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authority, their purpose, and the readership to which they are addressed."

...

[30] In argument both Mr Millar and Mr Segal agreed, by way of summary of the authorities, that the principle can be expressed as "what would the reasonable trade union member understand the words to mean".'

[35] Our attention was drawn to the decision of this Court in Evangelou and others v McNicol (sued as a representative of all members of the Labour Party except the claimants) [2016] EWCA Civ 817, [2016] All ER (D) 50 (Aug). Although that case did not concern a trade union, as it concerned the Labour Party, the judgment of Beatson LJ helpfully summarised the relevant principles at paras [19]–[23]:

[19] The nature of the relationship between an unincorporated association and its individual members is governed by the law of contract:-

(a) The contract is found in the rules to which each member adheres when he or she joins the association: see Choudhry v Tresiman [2003] EWHC 1203 (Comm)[, [2003] 22 LS Gaz R 29] at [38] per Stanley Burnton J.

(b) A person who joins an unincorporated association thus does so on the basis that he or she will be bound by its constitution and rules, if accessible, whether or not he or she has seen them and irrespective of whether he or she is actually aware of particular provisions: John v Rees [1970] 1 Ch 345 at 388D–E; Raggett v Musgrave (1827) 2 C & P 556 at 557.

(c) The constitution and rules of an unincorporated association can only be altered in accordance with the constitution and rules themselves: Dawkins v Antrobus (1881) 17 Ch D 615 at 621, Harington v Sendall [1903] 1 Ch 921 at 926 and Re Tobacco Trade Benevolent Society (Sinclair v Finlay) [1958] 3 All ER 353 at 355B–C.

[20] Because the nature of the relationship between an unincorporated association and its individual members is governed by the law of contract

> *the proper approach to the interpretation of the constitution and rules is governed by the legal principles as to the interpretation of contracts, and is a matter of law for the court. The approach is thus that set out in cases such as Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 at [14], Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [15] and [18], and Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2015] 3 WLR 1843. The intentions of the parties to a contract will be ascertained by reference to what a reasonable person having all the background which would have been available to the parties would have understood the language in the contract to mean, and it does so by focusing on the meaning of the words in the contract in their documentary and factual context.*
> *[21] The meaning has to be assessed in the light of the natural and ordinary meaning of the words, any other relevant provisions of the contract, the overall purpose of the clause in the contract and the facts and circumstances known or assumed by the parties. In this context, this means the members of the unincorporated association, the Labour Party. In Foster v McNicol Foskett J, relying on Jacques v AUEW [1986] ICR 683 at 692, stated that the court can take into account "the readership to which" the rules of an unincorporated association are addressed when interpreting them."*

> *[36] It will be apparent therefore that:*
> *(1) A trade union's rulebook is in law a contract between all of its members from time to time.*
> *(2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts.*
> *(3) Nevertheless, the context is important. Recent authorities, which have tended to concern the interpretation of commercial contracts, have not cast doubt on the approach to the interpretation of a trade union's rulebook, which was set out in, for example, Heatons Transport (St Helens) Ltd v Transport General Workers Union [1972] IRLR 25, [1972] ICR 308.*
> *(4) It is also important to recall that what falls to be construed in this context is in substance the constitution of a trade union. Although in law its status is that of a multilateral contract, it is the document which sets out the powers and duties of a trade union."*

67. As regards the implication of terms into contracts, and bearing in mind the specific Trade Union context of the role of custom and practice, the general proposition is that terms will only be implied into a contract where it is necessary for such term to be implied as a matter of business efficacy and/or the term sought to be implied is obvious. Again, I gratefully adopt the summary of Carr LJ (as she then was) this time in the case of *Yoo Design Services Limited -v- Iliv Realty Pte Limited* [2021] EWCA Civ 560 at paragraph [51]:

> *[51] In summary, the relevant principles can be drawn together as follows:*

> *(1) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;*
>
> *(2) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;*
>
> *(3) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;*
>
> *(4) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;*
>
> *(5) A term will not be implied if it is inconsistent with an express term of the contract;*
>
> *(6) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;*
>
> *(7) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred; v*
>
> *(8) The equity of a suggested implied term is an essential but not sufficient precondition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."*

Paragraphs 9 and 25 of the DP

68. Mr Chaffer accepted, at least implicitly, that on a true construction of paragraphs 9 and 25, legal representation as such is not permitted at hearings covered by paragraph 25. It follows that there cannot be any room for an implied term as to a right to representation (subject to what I say below regarding the interplay between Appendix A and the DP).

69. The Claimant's case is that paragraphs 9 and 25 only apply to proceedings before the NDC. They appear in those parts of the DP dealing with the NDC and not the NAC. Further, as a matter of common sense, what is required at an appeal tribunal is different to what would be required at a first instance tribunal.

70. As a matter of construction, it seems to me not only that the submissions on the NEU on this point are to be preferred but that there is no real prospect of success in an argument to the contrary.

71. First, the reference in paragraph 9 is to a "friend/companion can be engaged to assist throughout the process (see paragraph 25)." In my judgment (a) the extent of the ability to engage a friend or companion is delimited or explained by paragraph 25 but (b) that any limitation applies "throughout the process". Paragraph 9 is part of a document called "New Disciplinary Procedure". The overall heading, to which parts A-J (or possibly A-K, as there appear to be two parts "I") are subordinate, is "Disciplinary Process". It seems to me clear that the "process" referred to in paragraph 9 is clearly the whole "Disciplinary Process", including that from the moment of first complaint through to that of determination of any appeal (by complainant or by member disciplined at the NDC stage).

72. Secondly, it is clear that paragraph 25, taken alone and by its terms, has two limbs. First, and permissively, it provides that a member, the subject of the disciplinary proceedings, may be accompanied to a Full NDC hearing by a friend who shall be a member of the Union with the right to call and examine witnesses. Secondly, it limits attendees at Full NDC hearings to the parties, their friends and their witnesses. The reference to "Full" hearings comes from the name given to part C of the DP. In terms, therefore, the permissive and the restrictive limbs apply to a "full hearing" before the NDC. However, paragraph 9, as said, extends paragraph 25 to cover the entire disciplinary process.

73. Thirdly, that there are other provisions within a sub-section of the DP which apply to one or more other sub-sections is clear. For example, paragraph 28 (dealing with all parties abiding by the Code of Professional Conduct "throughout the process") clearly applies not just to Full Hearings before the NDC as dealt with in sub-section C (where paragraph 28 is located) but, as the paragraph says, throughout the "whole process". Similarly, paragraph 7, requiring the Panel (in immediate context those members of the Panel constituting the NDC dealing with a PRM but more generally surely also applying to those members of the Panel comprising an NDC at a full hearing or an NAC), to take account that freedom of speech includes the right to challenge and contest others' views etc. must apply throughout the process where the Panel is involved and thus not just at the initial complaint stage (where paragraph 7 is located). It would also apply at the PRM stage (which is covered in sub-section A and sub-section B) and the full hearing stage before a NDC (as well as at hearings before an NAC).

74. Fourthly, and contrary to the Claimant's submission, there appears little common sense behind a prohibition on legal representation at NDC level (which the Claimant accepts and positively asserts) but an ability to be legally represented at NAC level. At NDC level of fact finding the practicalities can be that legal representation is more valuable than at appellate level, particularly as regards cross-examination of witnesses and the like. In any event, one would have thought it would be no less valuable.

An absolute prohibition against legal representation?

75. If, as I have decided, the prohibition in paragraphs 9 and 25 applies to hearings before the NAC, Mr Chaffer's next submission is that in the disciplinary context there cannot be an absolute prohibition by contract against legal representation if that is what natural justice requires in the particular case. The NEU says on the other hand that the absolute prohibition can admit of no exceptions and is determinative.

76. On this point I consider that the claimant has a case with a real prospect of success. This is on the basis that there is an arguable case with a real prospect of success either that where natural justice requires legal representation to be granted, then that will override any contractual provision preventing legal representation (i.e. as a matter of law), or that in this case the DP are subject to the NEU Rulebook applying the rules of natural justice to disciplinary proceedings and which limit the provision to the contrary that the DP can lay down. On the latter basis, the DP have to be construed with Appendix A of the NEU Rule book such that, where natural justice requires legal representation, it is permitted OR the DP are in effect ultra vires to the extent that they negate such a right conferred by Appendix A.

77. As regards the position in general, the Union relies upon *Pett v Greyhound Racing Association Ltd (No 1)* [1968] 1 QB 125 (Court of Appeal) and *Pett v Greyhound Racing Association Ltd (No 2)* [1970] 1 QB 46. The case concerned disciplinary proceedings where the rules were silent about legal representation. On an appeal against an interim injunction preventing a disciplinary hearing going ahead unless the trainer in question was allowed to be represented by lawyers, the Court of Appeal dismissed the appeal on the basis that there was a right to appoint an agent and no reason why the agent could not be a lawyer. However, at the trial of the claim, Lyell J held that there was no such right. Referring to dicta in *University of Ceylon v Fernando* [1960] 1 WLR 223, he considered that it was difficult to say that legal representation before a tribunal was an elementary feature of the fair dispensation of justice.

78. I am not persuaded that for the purposes of the consideration of "a serious issue to be tried", it clearly follows that there is no case at all that in some circumstances natural justice may require legal representation to be granted to an accused in the context of a disciplinary tribunal. Certainly, in the *University of Ceylon* case, the board said:

> *"Accordingly (apart from a subsidiary question as to the jurisdiction of the courts in Ceylon to grant declaratory relief in such a case), the present appeal resolves itself into the question whether this inquiry was conducted with due regard to the rights accorded by the principles of natural justice to the plaintiff as the person against whom it was directed.*
>
> *These rights have been defined in varying language in a large number of cases covering a wide field. Their Lordships do not propose to review these authorities at length, but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and the circumstances of the case in point. As Tucker L.J. D said in Russell v. Duke of Norfolk [1949] 1 All E.R. 109, 118: ' There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must*

> *depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'"*

79. When I discuss later cases in this judgment, it becomes apparent that more recent cases have recognised that natural justice can, in certain circumstances, require legal representation to be permitted at internal disciplinary hearings.

80. The second question, however, is whether an express prohibition in the relevant disciplinary rule book prevents any right to legal representation in all circumstances. Certainly there are suggestions that this is correct in dicta to this effect in the *Pett* case and others at about that time.

81. It is clear from *Enderby Town Football Club v Football Association Ltd [*1971] Ch 591, that the requirements of natural justice were not then thought to require, in any circumstances, legal representation in disciplinary proceedings but were restricted to the three matters set out in *Ceylon University v Fernando* [1960] 1 WLR 223 at 232, namely (1) that the person accused should know the nature of the accusation made; (2) that he should be given an opportunity to state his case and (3) that the tribunal should act in good faith. One sees that from the judgment at first instance of Foster J (at 597F-598). In my judgment it is also the basis of the decision of Fenton-Atkinson LJ at paragraphs [7] and [8] of his judgment at 609A-D. It is also a possible interpretation of the judgment of Cairns LJ (i.e. that the focus is that natural justice does not require legal representation at internal tribunal level, which is why there is nothing wrong in disciplinary rules excluding it). So far as Denning MR is concerned, he would clearly have accepted (as was conceded by Counsel, Sir Elwyn Jones (as he then was) for the Football Association) that if such a rule is contrary to natural justice, it would be invalid. Ms Tuck, whilst not formally making a like concession at this stage, recognised the force of such a point. As Lord Denning MR discussed, the position would then be that, in effect, the rules of natural justice would override whatever is in the contract. In my judgment, later cases that I was shown (as I shall explain) do tend to demonstrate that the principles of natural justice are recognised as being capable of giving rise to a right to legal representation in the domestic disciplinary context, albeit only in certain circumstances and not as a blanket right in all circumstances. By way of example, I refer to the passage of Lord Goff's speech in the *Ex P Hone* case (see below) which appears to confirm that natural justice may in certain circumstance require legal representation to the accused to be permitted in disciplinary proceedings and the decision in *AB v The University of XYZ* (also considered below).

82. Furthermore, there is, in my judgment, a real prospect of success in the alternative argument (although perhaps not clearly articulated by Mr Chaffer), that in this particular case, natural justice is a principle that expressly applies to both NDCs and NACs by virtue of paragraphs 3.4 and 4.6 of Appendix A to the Rule book. Whether by reason of the description of natural justice as confirming a "fair opportunity to present" the accused's case or as simply being a component of natural justice in certain circumstances, it seems to me that there is an argument with a real prospect of success that these paragraphs apply and override anything to the contrary in the procedures created by the Executive under paragraph 6.1 of Appendix A to the Rule book (in this case, being the DP). As I have said, it may be that this result is achieved either as matter of construction or as a matter of vires of the DP.

83. Thus, although I consider that the DP expressly cover NAC hearings and that they do not permit legal representation, in my judgment there is an argument with a real prospect of success that if natural justice would otherwise require legal representation, the relevant paragraphs (at least apparently) to the contrary under the DP cannot preclude the same.

84. It follows that I do not need to consider further submissions of Mr Chaffer to the effect that there must remain a "discretion" to permit representation (relying on other reasoning of Lord Denning MR in the *Enderby* case) or that there is a "residual discretion", relying on *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2008] EWHC 1861 at paragraphs [21]-[22] (being the first instance decision, the subject of a successful appeal). In the latter case I note that the suggested discretion arose from an implied term arising from trust and confidence of the relationship between the parties. There is no such relationship of trust and confidence here and in any event I do not consider there is room for an implied term contradicting the express terms of paragraphs 9 and 25 of the DP. As regards discretion generally, again I find difficulty in an argument that there is a discretion given the express terms of the relevant paragraphs of the DP that I have identified. However, and as said, I do not need to consider these points having come to the conclusion that there is a serious issue to be tried on the other points.

85. However, I turn next to the question of whether there is an argument with a real prospect of success that natural justice does require legal representation at the NAC on the facts of this case. If it does not then it does not seem to me that any arguments that a refusal to permit legal representation, as a matter of discretion, would be irrational or unreasonable and in breach of contract can have a real prospect of success.

In this case, does natural justice require legal representation at NAC hearings?

86. As I have indicated, I consider that current case law does support the view, such that there is a serious issue to be tried, that natural justice is capable of requiring an accused to be granted legal representation before disciplinary tribunals in particular fact situations. These situations will however be out of the norm.

87. In *R v Home Secretary ex p Tarrant* [1985] 1 Q.B. 251, the Court was considering judicial review of what was said to be a decision to refuse legal representation where there was said to be a discretion to permit the same. The context was hearings before the boards of visitors as regards alleged breaches of Prison Rules by convicted inmates, two of whom were charged with mutiny. The decision was quashed (requiring the matter to be reconsidered).

88. However, as Webster J pointed out, it was contended that the discretion ought to have been exercised in favour of the grant of legal representation. He therefore set out the considerations that a board of visitors should take into account in deciding whether or not to grant legal representation. Although in terms dealing with a discretion, it seems to me that these factors are, or are at least arguably, relevant in considering whether natural justice requires legal representation in a particular case. The list (expressly prefaced by guidance that the list is not necessarily exhaustive) was:

> (1) The seriousness of the charge and of the potential penalty;

(2) Whether any points of law were likely to arise;

(3) The capacity of a particular prisoner to present his own case;

(4) Procedural difficulties;

(5) The need for reasonable speed in making their adjudication;

(6) The need for fairness as between prisoners and as between prisoners and prison officers.

89. In applying the test to the facts of the case Webster J considered that as regards the charges of mutiny, legal representation should have been permitted but that as regards the other three prisoners, it could not be said that legal representation should have been permitted and he would remit that matter back to the persons exercising the discretion. Kerr LJ spoke in largely similar terms. The discretion to permit legal representation should, he said, always be exercised in favour of the prisoner if rule 49(2) required it. Rule 49(2) provided in effect that a prisoner charged with an offence under the Rules must be given a proper and full opportunity of presenting his case.

90. The matter was addressed again by the House of Lords, in *R v Maze Visitors, ex p Hone* [1988] 1 AC 379. This again was a case about prisoners' rights to legal representation before boards of visitors. Lord Goff, with whom the other Lords agreed, said the following:

> *"In the nature of things, it is difficult to imagine that the rules of natural justice would ever require legal representation before the governor. But though the rules of natural justice may require legal representation before a board of visitors, I can see no basis for Mr. Hill's submission that they should do so in every case as of right. Everything must depend on the circumstances of the particular case, as is amply demonstrated by the circumstances so carefully listed by Webster J. in Reg. v. Secretary of State for the Home Department, Ex parte Tarrant [1985] Q.B. 251 as matters which boards of visitors should take into account. But it is easy to envisage circumstances in which the rules of natural justice do not call for representation, even though the disciplinary charge relates to a matter which constitutes in law a crime, as may well happen in the case of a simple assault where no question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to wholly unnecessary waste of time and money, contrary to the public interest. Indeed, to hold otherwise would not only cause injustice to prisoners; it would also lead to an adventitious distinction being drawn between disciplinary offences which happen also to be crimes and those which happen not to be so, for the punishments liable to be imposed do not depend upon any such distinction."*

91. In *AB v the University of XYZ* [2020] EWHC 2978 (QB), Mr Hugh Southey, then QC now KC, had to consider, after a trial, the issue of legal representation in the context of university disciplinary proceedings. Among other points that he made were the following:

> *"[58] In R v Board of Visitors of HMP The Maze ex p Hone [1988] AC 379 it was held that whether the common law gave rise to a right to legal representation would depend upon the circumstances. There was no right to legal representation in every case (p392D).*
>
> *[59] In ex p Hone the House of Lords cited with approval the judgment of Webster J in R v Secretary of State for the Home Department ex p Tarrant [1985] QB 251. In that judgment Webster J identified factors to be considered when deciding whether to permit legal representation in the context of prison disciplinary proceedings:*
>
> *i) The seriousness of the charge.*
>
> *ii) Whether any points of law are likely to arise.*
>
> *iii) The capacity of the prisoner to understand the case against him.*
>
> *iv) Procedural difficulties.*
>
> *v) The need to avoid delay.*
>
> *vi) The need for fairness between the prisoner and those making allegations.*
>
> *The Court proceeded to find that it would be unreasonable to deny representation in the context of particularly serious charges (p287).*

[60] Consistent with ex p Tarrant, the courts have continued to recognised that legal representation may be required in particular cases. For example, in R (Dr S) v Knowsley NHS Primary Care Trust [2006] EWHC 26 (Admin) Toulson J held that:

> *"It may be that in many cases legal representation would be unnecessary, but the question in each case must be whether the doctor can reasonably be expected to represent himself or whether legal representation is necessary in order to enable him to be able properly to present his case. I do not see that this can be a matter of presumption but must depend on the circumstances, including particularly the complexity of the allegations and the evidence. [101]*
>
> *....*

[84] It appears to me that at times in this case the arguments have failed to distinguish between the issue of whether there was an automatic right to legal representation because of the nature of the proceedings and whether there was a right to legal representation in the specific circumstances of this case.

[85] In general courts have been reluctant to find an entitlement to legal representations in broad classes of cases. So, for example, it has been held that there is no right to representation in all prison disciplinary cases (ex p Hone). As a consequence, I have no doubt that there was no right to representation simply because these were disciplinary proceedings.

[86] However, it appears to me to be clear that in principle there can be individual cases where fairness requires legal representation. That was recognised in ex p Hone. The conclusion in ex p Hone appears to me to be consistent with the approach to procedural fairness adopted in Osborn. That demonstrates that procedural fairness is a flexible concept that takes account of matters such as the sense of injustice that a person will feel if an unfair procedure is adopted. None of the authorities relied upon by the Defendant appear to me to undermine that conclusion. In particular, in G the manner in which the case was argued meant that the Supreme Court's finding that article 6 was not engaged was determinative of the claim to be entitled to legal representation. As Laws LJ noted, the courts were not ruling on the common law and Laws LJ left open the possibility that the common law may entitle a person to legal representation. The remarks of Lord Dyson in G when he noted that he would have found a right to legal representation if article 6 applied demonstrates the importance of considering the particular circumstances of a case when a claim is made for legal representation.

[87] In light of the matters above, it appears to me that the Defendant misinterpreted its contractual obligations. Although both the 2018 and 2019 Regulations appear to provide for a student to be accompanied by someone rather than represented by them, those provisions do not exclude the need to ensure "natural justice" and so need to be read in light of the overriding duty to ensure "natural justice". As a consequence legal representation could be required when that was necessary for fairness. However, that does not mean the contract was breached unless the failure to permit legal representation was a breach of natural justice on the facts. That means that I need to consider what natural justice required.

[88] In my opinion ex p Tarrant remains the best guidance as to the factors to be taken into account when deciding whether legal representation is required in a particular case. Indeed, it is of interest the evidence before me shows that a university unconnected with this claim, the University of Salford, has a policy of applying the Tarrant criteria when deciding when whether legal representation should be authorised in the course of disciplinary proceedings. However, it does appear to me that in applying those criteria one needs to take account of the remarks of Lord Hope in G [R(G) v Governors of X School [2011] UKSC 30; [2011] ICR 1033] *about the dangers of allowing legal representation. Those remarks were consistent with the evidence of Professor Van Der Velden who was concerned that disciplinary proceedings should not become too adversarial. Permitting legal representation should not be routine."*

92. In my judgment the test is therefore whether, applying the *Tarrant* criteria (and any other matters which are relevant, including e.g. the remarks of Lord Hope in *G* and see also *Harvey on Industrial Relations Employment Law* at paragraph [3418] referring to the benefits of speed, informality, self-determination and privacy of internal procedures being a factor weighing against permitting legal representation), there is an argument with a real prospect of success that legal representation for Mr Bhogal is required before the NAC. In my judgment, there is not.

93. Using the numbering of the criteria as in *Tarrant*:

(1) The conduct alleged and the penalty imposed is not that severe. Any reputational damage is also not, in my judgment, very great. The sanction involves no financial penalty or deprivation of liberty or (e.g.) of important career making opportunities. The conduct found is not that serious in the scale of things and is not criminal nor attaching the odium of e.g. sexual misconduct. There is no very credible evidence, rather than assertion, of effect on actual employment. There is no closed shop.

(2) The points of law that arise do not seem unduly complicated and in large part can in any event be dealt with by written submissions prepared by lawyers for Mr Bhogal which he can lodge in advance and/or advance at the hearing. He seems to have raised many if not all of the points before the NDC. This is not a case where procedural expertise on e.g. matters of cross examination arises.

(3) Mr Bhogal is an erudite and highly educated person, used to speaking publicly.

(4) There are no sort of procedural issues arising as they did in *Tarrant* or as in the *University of XYZ.*

(5) It does not seem to me that the proceedings would be delayed by any requirements of the Claimant. Legal representation is already in place and has been for some time. However, there would, it seems to be a question as to whether the Union might require legal representation. Even if this did arise, I do not consider that that should delay the hearing from the date currently fixed.

(6) There do not seem to me to be any major issues of fairness between other members of the Union and the Claimant pointing either way. As regards fairness between the Union and the Claimant,

(a) the Union has a freedom under Article 11 of the European Convention on Human Rights as to who its membership should be. There is no obligation on the Union to admit to membership whosoever wishes to join (see generally *ASLEF v UK* [2007] IRLR 361 at paragraph [39], a decision of the European Court of Human Rights):

> *"Similalrly, the right to join a union "for the protection of his interests" cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union: in the exercise of their rights under Article 11(1) unions must be free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union".*

This gives further weight to the general factors in favour of a speedy informal process that I have already referred to.

(b) Further, it is incorrect to suggest that the Union is the complainant as well as the appeal body. As with other bodies, including e.g. the Institute of Chartered Accountants, the internal procedures separate out the prosecution function from the independent panel from which the NDC/NAC are drawn and then separate out that working of the relevant committee.

(c) Resources is not the underlying complaint: it is one of legal representation which the Union also does not have.

(d) Mr Bhogal, through Mr Chaffer, makes a number of points about his perception of "unfairness" of the NDC hearing. His perception of "unfairness" at that hearing is not immediately relevant to unfairness or the requirements of natural justice at the NAC hearing: the NAC being a different body. The real relevance is whether the matters of perceived unfairness can be dealt with adequately by Mr Bhogal without lawyers. In my judgment they can be.

94. Standing back from the detail, the most powerful factor in my judgment is that this is a fairly ordinary disciplinary case. As the cases make clear, a situation where natural justice requires legal representation is far from being the norm in cases of an internal disciplinary dispute procedure. In this respect, and as I have said, the cases are replete with the undesirability of bogging down internal disciplinary procedures with an overly legal complexity (see e.g. Fenton-Atkinson LJ in *Enderby* at [6]-[7], pg.608G-H; dicta of Lord Hope in the *G* case).

95. In conclusion, I do not consider that there is a seriously arguable case with a real prospect of success that natural justice requires Mr Bhogal to be allowed legal representation in this case at the NAC hearing. This is because, although I consider there is (at the least) a serious argument that in certain circumstances natural justice might require an accused member facing disciplinary proceedings to be permitted legal representation, the facts of this case are nowhere near the sort of factual situation where such circumstances might arise. Such circumstances, in the particular context of union membership, are likely to be wholly exceptional.

Has the Union/NAC waived any right to refuse legal representation or agreed to the same?

96. In his oral submissions Mr Chaffer, in my judgment, rightly, did not dwell on this point. The correspondence speaks for itself. There was no waiver of any right to refuse legal representation or of any prohibition of legal representation. Nor was there any agreement that legal representation at a hearing was permitted. The NAC accepted grounds of appeal drafted and sent by lawyers but immediately made clear that they would be communicating directly with Mr Bhogal as regards the NAC process.

Balance of convenience

97. The parties are agreed that damages would not be an adequate remedy for either side were an injunction to be granted/refused.

98. In my judgment the balance of least injustice requires the NAC hearing to be permitted to proceed without requiring legal representation, even if I am wrong about there being no seriously arguable case that legal representation at the NAC should be allowed to Mr Bhogal.

99. I do not accept that allowing legal representation amounts to "micro-managing" the proceedings (contrast cases where what is sought to be regulated is matters such as the evidence to be called or the inquiry/investigation process to be carried out), a matter

that the courts have decried. However, I do consider that the process should, in any event, be allowed to continue.

100. Mr Bhogal's underlying complaint is that the NDC has breached his contractual rights in the manner it conducted itself and/or that it has reached the wrong conclusions which are not open to it. Instead of attacking those conclusions in a court of law, as he is entitled to so, he has instead decided to proceed with the NAC process, but to seek legal representation at that hearing. If, despite legal representation, he loses that appeal in any material respect then he may well seek to challenge the underlying process in the courts. As I have explained, it seems to me that in effect the benefit of legal representation can be achieved by written submissions which he can speak to or lodge in advance.

101. Further, if the NAC continues and reaches a conclusion, any court will have the benefit of the reasoning of the NAC and its views on the points of appeal currently raised and it may well be clearer what issues are in reality issues. As is clear from the grounds of appeal, it is difficult to see how some of them have any merit (for example, a complaint about non-disclosure seems odd when Mr Bhogal himself drew the attention of the NDC to the matter that he says was not disclosed). It will be clearer whether legal representation was an issue causing problems and in relation to which grounds of appeal. Further, the reality is that it is more likely that any court attack on the NAC decision will not be on the procedural question of whether legal representation as permitted but on the underlying legal arguments as to whether the NDC decision was correct or not (see generally comments of Beatson J (as he then was) in *Makhdum v Norfolk and Suffolk NHS Foundation Trust* [2012] EWHC 4015 QB at paragraphs [52]-53]) and *Al Mishlab v Milton Keynes Hospital NHS Foundation Trust* at [19]:

> "[19] *Fourth, there is a public interest in allowing internal processes to run their course and courts should be slow to interfere if disputed issues can be sorted out and resolved within the framework of the internal procedure itself. See for example, Makhdum [2012] EWHC 4015 per Beatson J. at paragraph 51 where the judge indicated that it would in effect require serious irregularities before the court would consider interfering. He also intimated (see paragraph 52) that where the parties have agreed upon a process the court should prima facie respect the contractual intention of the parties and allow the process to occur. Similar observations were made by Mann J. in Hendy v MOJ [2014] EWHC 2539 at paragraph 49 and see also Sarker [2015] EWHC 165 to similar effect."*

Conclusion

102. I do not consider that there is a serious issue to be tried under limb 1 of the *American Cyanamid* test and would also have found that the balance of convenience lay in not enjoining the continuation of the proceedings until trial (or, even, unless legal representation were permitted). Accordingly, I dismissed the application for an interim injunction.