Neutral Citation Number: [2023] EAT 134

Case No: EA-2021-001156-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 October 2023

Before :

The Honourable Mrs Justice Eady DBE, President

Mrs Gemma Todd

Mr Martin Pilkington

- -

Between :

MR P EMBERY **Appellant**

- and –

FIRE BRIGADES UNION **Respondent**

- -
- -

Mr P Embery the **Appellant**, in person
Mr O Segal KC (instructed by Thompsons Solicitors LLP) for the **Respondent**

Hearing date: 12 October 2023
- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 25 October 2023

SUMMARY

Certification Officer – interpretation of trade union rule

The Certification Officer had not erred in her construction of rule C13 of the rules of the Fire Brigades Union and her decision to strike out the appellant's complaint as having no reasonable prospect of success and/or as misconceived could not be said to be perverse.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This is our unanimous judgment on the appellant's appeal against the decision of the Certification Officer ("CO") dated 17 November 2021. By her decision, pursuant to section 256ZA of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act"), the CO dismissed a complaint made by the appellant that the respondent ("the FBU") had acted in breach of its rules, on the grounds that the complaint had no reasonable prospects of success and/or was otherwise misconceived.

2. Considering the appeal on the papers, His Honour Judge Beard took the view that it raised no reasonably arguable question of law. After a hearing under rule 3(10) **EAT Rules 1993**, on 7 December 2022, however, His Honour Judge Barklem gave permission for the appeal to proceed to a full hearing.

The Factual Background and the Rule in Dispute

3. The appellant is a member of the FBU. He has explained to us that he has served as a firefighter for some 26 years and has been a member of the FBU all that time, previously serving on the FBU's Executive Council ("EC"). In early 2021, however, the appellant was the subject of an internal disciplinary investigation, which he contended was in breach of FBU rules, disagreeing with the construction placed on the relevant rule by the Vice President and President of the FBU.

4. That dispute as to the interpretation of the rules was referred to the EC, pursuant to rule C13, which provides as follows:

> "INTERPRETATION OF RULES
> In the event of a dispute arising on the interpretation of any of the rules which cannot be satisfactorily settled by the Executive Council or any sub-committees thereof, the Standing Orders Committee shall be empowered to adjudicate on the dispute."

5. As allowed under rule C13, the EC decided that the dispute should be referred to one of its

sub-committees and asked that this be addressed by the disciplinary sub-committee at the outset of the appellant's disciplinary meeting on 26 March 2021. At that meeting, it was determined by a majority of the sub-committee that the appellant's interpretation of the relevant rule was wrong and, therefore, that the disciplinary investigation could proceed. The decision of the disciplinary sub-committee was recorded in the following terms:

> "President stated for the records that the Disciplinary Committee had voted 3 to 1 to dismiss Bro Embery's dispute in relation to the interpretation of the rule."

6. Notwithstanding the appellant's disagreement with that decision, the disciplinary sub-committee then proceeded with the disciplinary hearing relating to the appellant. It is the appellant's case that in so doing, and in thus failing to permit the FBU's Standing Orders Committee to be empowered to adjudicate on the dispute, the FBU acted in breach of rule C13.

The decision of the Certification Officer

7. On 28 August 2021, the appellant made an application to the CO pursuant to section 108A of the **1992 Act**, in which he complained (*inter alia*) that the FBU had breached rule C13. Section 108A provides (relevantly):

> Section 108A Right to apply to Certification Officer
> (1) A person who claims that there has been a breach or threatened breach of the Rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, …
> (2) The matters are – … (b) disciplinary proceedings by the union (including expulsion); … (d) the constitution or proceedings of any executive committee or of any decision-making meeting. …

8. Considering the application on the papers, however, the CO reached the conclusion that the appellant's complaint in this regard had no reasonable prospect of success and was misconceived (two other complaints made by the appellant were permitted to proceed). Having given the appellant the opportunity to show cause why a strike out order should not be made in respect of this complaint,

and further opportunity to identify a rule that would enable a member to require the Standing Orders committee to consider unresolved questions about the interpretation of the FBU rules, the CO ultimately struck the complaint out under section 256ZA of the **1992 Act**, which provides:

> Section 256ZA Striking out
> (1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may— (a) order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived, (b) order anything in the application or complaint, or any response, to be amended or struck out on those grounds, …

9. Setting out her decision in this regard, the CO recounted the relevant history (see our summary at paragraphs 3-6 *supra*) and then set out her reasoning as follows:

> "7. The matter of the interpretation of the rules therefore seems to have been resolved by the Disciplinary Sub Committee.
> 8. However, Mr Embery states that "in the event the dispute between me and the president/vice president remained unsettled following the meeting that was being convened under rule C13, I expected the standing orders committee to be empowered to adjudicate on the matter."
> 9. Mr Embery's complaint, therefore, appears to be that when a Union member feels that the interpretation of the rules has not been satisfactorily resolved, they have the right to raise the matter themselves with the Standing Orders Committee. However, Mr Embery has not identified a rule which enables him or any other member of the Union to require the issue to be resolved by the Standard Orders Committee.
> 10. My view is Rule C13 empowers the Standard Orders Committee to adjudicate on disputes on any interpretation of the Union's rule which have not been settled by the Executive Committee or one of the sub-committees. The rules do not appear to set out explicitly how a dispute should be referred to a committee. Instead, they appear to empower the committee to adjudicate on a dispute which has not been settled by the Executive Committee or any sub-committee. The Rules does not explicitly give any individual member of the Union the right to raise an issue with the Standing Orders Committee.
> 11. In Mr Embery's case the Executive Committee delegated the matter to its disciplinary sub-committee who appear to have resolved the issue. I understand Mr Embery does not agree with their decision. However, he has not referred me to a rule which would enable him to engage Rule C13 himself.
> 12. Consequently, I consider that Rule C13 is not capable of being breached the way that Mr Embery has set out. On that basis I consider that Mr Embery's complaint has no prospect of success and is misconceived."

The Appeal and the Appellant's Submissions

10. By his notice of appeal, the appellant complains of what he contends was a misunderstanding

by the CO of the relevant history and the significance of that in terms of the application of C13; he further contends that the CO failed to apply the relevant law, erring in her construction of rule C13 by failing to approach that task in accordance with the guidance provided by the Court of Appeal in **Kelly v The Musicians Union** [2020] EWCA Civ 736, and reaching a perverse result.

11. In submissions, the appellant took issue with the CO's findings, at paragraphs 6 and 7 of her decision, that he had "*raised a question*" about whether the investigation into his conduct was within the FBU's rules, that the EC had "*delegated that question*" to its disciplinary sub-committee, and that the matter of interpretation was subsequently "*resolved*" by that committee. Three fundamental errors arose: (1) he had submitted a complaint, not merely a question, about whether the disciplinary process was within the rules; (2) it was incorrect for the CO to say the EC had delegated that question to the sub-committee because, under C13, the sub-committee was tasked not with considering or resolving the question but with settling a dispute; (iii) the matter was not resolved, rather the dispute remained live after the sub-committee's decision.

12. As for the CO's approach to C13, a dispute over the meaning of a contractual provision necessarily involved at least two parties and the FBU itself, generally acting through its EC, could only ever be one of those parties. For a matter to be "*satisfactorily settled*", therefore, the parties to the dispute had to have accepted the decision; if not, the dispute would remain live and, for the rule to have any meaning, the matter must be referred to the Standing Orders Committee for adjudication. Furthermore, if the sub-committee's decision was taken to have "*settled*" the dispute (as the CO seemed to think), that would allow for no distinction between the use of the terms "*settle*" and "a*djudicate*" within rule C13; the difference, the appellant submits, is akin to that between mediation and arbitration.

13. Moreover, the use of the word "*satisfactorily*" implied that there must be satisfaction with the outcome; that could not simply refer to the EC or sub-committee (which would plainly be satisfied with its own decision). The CO's interpretation of C13 would give no role for the Standing Orders

Committee: the EC and its sub-committees would always have the requisite expertise and as the Chair would have a casting vote, a decision would always be reached which would (on the CO's construction) "*settle*" the matter. The appellant also complains as to the CO's comment that he had not identified a specific rule which allowed him to engage the Standing Orders Committee. Contrary to the approach laid down in **Kelly**, the CO's interpretation of the rule did not accord with common sense, or the reasonable expectation of members, or what the rule was intended to mean.

14. Finally, the appellant considered that the CO's decision to strike out his complaint was perverse. He had not had the opportunity to rehearse his arguments (in contrast to the process before the EAT) and it was dismissive to rule that his complaint had no reasonable prospect of success or was misconceived.

The Submissions of the FBU

15. The EAT's jurisdiction was limited to the hearing of appeals on questions of law from decisions of the CO. It could not be sensibly argued that the CO in this case had not applied the correct law and, for the appeal to succeed, the appellant must show that the CO's decision was perverse.

16. It was common ground that a union's rules are not always to be construed literally or like a statute, but so as to give them a reasonable interpretation that accords with what, in the court's view, they must have been intended to mean in the context of the reasonable union members for whom they are written (**Kelly**). It was the FBU's submission that, applying that approach, it was obvious that C13 provide for the EC (or its relevant sub-committee) to refer a question of interpretation of the rules to the Standing Orders Committee in so far as the EC (or sub-committee) was not able to resolve the matter to their own satisfaction. That was the clear meaning of the words used - C13 did not speak of "*settled to the satisfaction of the parties to the dispute"*, but "*satisfactorily settled by the Executive Council or any sub-committees thereof*" – and a reasonable member of the FBU would

understand that the power to settle (that is, determine) the dispute was thus vested in the EC, and it would only be in circumstances where the EC was not able to do so, that the Standing Orders Committee would be empowered to adjudicate. As for the complaint that the EC (or sub-committee) would always be able to reach a decision on a dispute of this nature, even if that was so, it might consider it sensible to refer the matter to the Standing Orders Committee.

17. The respondent pointed out that the two principal definitions of the word "*settle*" are: (1) end (a legal dispute) by mutual agreement; (2) reach a decision about; determine. The appellant's argument depended on "*settle*" meaning "*end by mutual agreement*" but that was an unreasonable interpretation of the rule given the wording and intent: a single person/committee could only "*settle*" an issue in the sense of "*determining*" that issue; it would take all relevant parties to a dispute to "*settle*" it in the sense "*end it by mutual agreement*". The construction for which the appellant argued was, in practice, absurd: a member who had raised a dispute about the interpretation of a rule was unlikely to be satisfied with a different view taken by the EC or sub-committee; which would effectively render C13 of vanishingly small practical relevance.

18. The appellant was seeking to argue for an interpretation of C13 that would give him the right to argue his case to the Standing Orders Committee; but that was not what the rule provided. The rule did not require that the Standing Orders Committee adjudicate on a dispute: its potential power to do so did not entail a duty (see **Kelly** at paragraph 53). The CO had been correct to rule that the complaint was misconceived when the appellant could not identify a rule that enabled him to require that the dispute be resolved by the Standing Orders Committee.

The Relevant Legal Principles

19. Having regard to the relevant case-law (set out more fully by the Court of Appeal in **Kelly v The Musicians' Union** [2020] EWCA Civ 736), we approach our task on this appeal with the following principles in mind:

(1) A trade union's rulebook is in law a contract between all of its members from time to time (**Heatons Transport (St Helens) Ltd v Transport General Workers Union** [1972] IRLR 25, [1972] ICR 308; **Evangelou and ors v McNicol** [2016] EWCA Civ 817, paragraph 19; **Kelly**, paragraph 36(1))

(2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts (**Evangelou**, paragraph 20; **Kelly** paragraph 36(2)).

(3) Nevertheless, context is important. Trade union rule books are not drafted by parliamentary draftsmen and should not be read as if they were. Further, unlike commercial contracts, it is not to be assumed that all the terms of the contract will be found in the rule book alone (particularly as regards 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) and may be informed by custom and practice developed over the years (**Heatons Transport** *per* Lord Wilberforce at pp 393G-394C; **Kelly**, paragraph 36(3)).

(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 (**Evangelou**, paragraph 19; **Kelly**, paragraph 36(4)).

(5) The rules of a trade union should thus be given an interpretation which accords with what the reasonable trade union member would understand the words to mean; a court should be slow to adopt a construction which, on the face of it, is contrary to what both the members and common sense would have expected. (**Jacques v AUEW** [1986] ICR 683 per Warner J, at p 692A-B; **Coyne v Unite the Union** (D/2/18-19) *per* HHJ Jeffrey Burke QC (acting as a CO), paragraph 30; **McVitae and ors v Unison** [1996] IRLR 33 *per* Harrison J, paragraph 57; **Kelly**, paragraph 39).

20. When exercising her power to strike out an application on the basis that it has no reasonable prospects of success or is otherwise misconceived, we consider that the CO's approach should be akin to that of an Employment Tribunal, exercising its power under rule 37(1) schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. It would, thus, not be appropriate to strike out an application involving a crucial core of disputed facts, as may arise (for example) where there is an issue as to custom and practice relevant to the interpretation of a particular rule. That said, the CO would be entitled to move to strike out an application where its prospect of success is "*merely fanciful*" (**Eszias v North Glamorgan NHS Trust** [2007] EWCA Civ 330 *per* Maurice Kay LJ at paragraph 26), or to effectively proceed to summary judgment upon an application where the CO has all the evidence necessary to resolve the issue before her or to determine the particular point of law or construction raised (see in the context of an application for summary judgment under the **Civil Procedure Rules**, **Easyair Ltd v Opal Telecom Ltd** [2009] EWHC 339 (Ch) per Lewison J at para 15 (vii)).

Analysis and Conclusions

21. We have started by considering whether the CO erred in approaching this as a matter that might be summarily determined on the papers. There is no doubt that the CO has the power to strike out an application at any stage of the proceedings on the basis that it has no reasonable prospect of success or is otherwise misconceived (section 256ZA of the **1992 Act**); the question is whether it was an error of law for her to take that course in this instance.

22. The particular complaint raised by the appellant related to the construction of a rule of the FBU. In determining such an application under section 108A of the **1992 Act**, it may be necessary to consider evidence other than simply the trade union rule book in issue (in particular, where reliance might be placed on custom and practice developed over the years; see **Heatons Transport** *supra*), but that was not this case: the question of interpretation raised by the appellant was solely focused on

the FBU rules. The appellant has, nevertheless, told us that he felt it had been unjust to dismiss his complaint as having no reasonable prospect of success and misconceived, without first giving him the opportunity to articulate his arguments, as he has been able to do before us.

23. Accepting the sense of unfairness that can arise when a case is simply dismissed on the papers, we are, however, unable to say that gives rise to any error of law on the CO's part in this instance. The complaint raised a self-contained point of construction relating to a specific rule (C13). The process adopted by the CO afforded the appellant two opportunities to provide further representations, but ultimately the complaint he was making was as articulated in his original application. Whilst we feel that we have benefitted from hearing the appellant develop his submissions on appeal, we do not consider that the CO erred in law in the procedure she adopted below.

24. We then turn to the substantive decision reached by the CO, which essentially requires us to consider whether she erred in her construction of rule C13, either because she failed to properly apply the approach laid down in cases such as **Kelly**, or because the conclusion she reached in this regard can be said to be perverse.

25. It is common ground between the parties that rule C13 makes provision for disputes as to the interpretation of the FBU's rules to be considered by the EC or one of its sub-committees. The difference between the parties arises where, following that process, one or other of the parties to the original dispute remains dissatisfied. On the appellant's case, in such circumstances, the dispute must be placed before the Standing Orders Committee for adjudication. For the FBU, it is said that rule C13 invests the EC (and its sub-committees) with the power to determine the dispute and it is only where the EC (or relevant sub-committee) is unable to do so to its own satisfaction that the Standing Orders Committee would be empowered to adjudicate upon the matter. The issue between the parties in this regard is thus focused on the phrase "*satisfactorily settled by*". The claimant says this must mean settling the dispute by agreement (implying that the EC's (or its sub-committee's) interpretation of the disputed rule is accepted by all sides); the FBU says that "*to settle*" can also mean to reach a

decision or determination, which need not be agreed by all parties to the dispute.

26. In favour of the appellant's construction, as the FBU has acknowledged in its submissions, certainly one definition of "*settle*" would suggest resolving by agreement between the parties. That construction might also seem to give meaning to the word "*satisfactorily*": as the appellant asks, why would that term be used if it simply meant that the EC (or its relevant sub-committee) was satisfied with its own decision?

27. In our judgement, however, the construction of rule C13 favoured by the appellant is overly literal and fails to view the provision in context. C13 is a general provision relating to the interpretation of the rules of the FBU. Charged with the management of the FBU (see rule C3), the EC and its sub-committees will have to apply the rules on a day-to-day basis and to seek to satisfactorily settle any disputes as to the interpretation of the rules, with the ability to empower the Standing Orders Committee to adjudicate upon the dispute where unable to do so. That, we consider, is how the reasonable member of the FBU would understand C13 is to be read.

28. We further consider this common sense construction of C13 to be entirely consistent with the language used. Adopting the alternative definition of "*settle*" – to decide or determine – makes better sense of the rule, given that it speaks of a dispute being "*settled by*" (emphasis added) the EC (or sub-committee). As the FBU has observed, if the role of the EC (or sub-committee) had been intended to be that of mediator, it might have been expected that there would be a requirement that the dispute would be "*settled by the parties*" or "*settled to the satisfaction of the parties*". As an individual entity, the EC (or particular sub-committee) would not be able to "*settle*" the dispute in the sense for which the appellant contends.

29. We also take the view that this construction of rule C13 more properly reflects the intention behind the rule when considered in the particular context of the appellant's case. Where the dispute as to the interpretation of a rule arises against the background of (for example) a disciplinary investigation, it is most unlikely that the conclusion reached by the EC (or relevant sub-committee)

will be agreed by all parties to the dispute, which would mean that there was no real-world purpose for the requirement that the matter be "*satisfactorily settled*". Moreover, on the appellant's construction of C13, it would effectively provide an automatic right of appeal against the decision (the "*settlement*" of the issue) by the EC (or sub-committee) to the Standing Orders Committee. We do not consider that any sensible reading of the rule could support that interpretation.

30. We have reflected on whether our reading of C13 is undermined by the different terms used: in relation to the EC (or sub-committee) – "*settled*"; and in respect of the Standing Orders Committee – "*adjudicate*". In our judgement, however, these terms merely reflect the fact that the rule anticipates that most such disputes will be "*satisfactorily settled*" – in the sense of being decided or determined – by the EC, and it will only be when that body is not satisfied that it is able to resolve the issue that it will seek an adjudication from the Standing Orders Committee. The appellant says that is not an eventuality that will ever arise, in the light of the expertise of the EC and its sub-committees and given that a decision can always be arrived at by use of the Chair's casting vote. We do not, however, see that that presents a substantive objection. As we have already indicated, the context of the rule makes clear that this is a general provision, which should enable the EC, and its sub-committees, to fulfil their management functions on a daily basis. Where, however, a dispute arises that the EC, or sub-committee, is unable to settle to its satisfaction, the Standing Orders Committee will be empowered to adjudicate upon the issue.

31. Returning then to the decision of the CO, we do not consider that she can be said to have erred in law, either in her construction of rule C13 or in her conclusion that the appellant's application ultimately had no reasonable prospect of success and/or was misconceived. We understand the appellant's complaints about the CO's characterisation of the history, and we can see that it might have been better if the reasoning had more closely kept to the language of the rule in issue. We do not, however, consider that materially impacted upon the decision reached. The CO set out the point at the heart of the appellant's complaint at paragraph 8 of her decision, and her answer is given in the

paragraphs that follow. Answering the complaint that the FBU had acted in breach of rule by not empowering its Standing Orders Committee to adjudicate on the dispute in this instance, the CO was clear that C13 only empowered the Standing Orders Committee to so act where the EC (or sub-committee) had not satisfactorily settled the matter; she was unable to see that C13 (or any other provision) gave the appellant a right to an adjudication by the Standing Orders Committee and, therefore, was bound to conclude that there had been no breach of rule in this instance. Given the conclusion we have ourselves reached as to the correct construction of rule C13, we do not find that the CO thereby erred in law or reached a perverse decision.

32. For all the reasons we have set out above, we therefore dismiss this appeal.