

Appeal No. UKEAT/0147/19/DA

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLL BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 07 October 2019
Judgment handed down on 19 December 2019

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MR ALEC McFADDEN

APPELLANT

UNITE THE UNION

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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(of Counsel)
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For the Respondent

MR MICHAEL POTTER
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SUMMARY

TRADE UNION MEMBERSHIP

The Union brought two sets of disciplinary proceeding against the Appellant, a member of the Union, arising out of an allegation that he slapped a woman's bottom. In the first disciplinary proceedings, the disciplinary panel found that the allegation was proved and amounted to misconduct under a particular rule (rule 27.1.7) of the Union's rulebook. The Appellant's appeal was dismissed, but the Assistant Certification Officer held that rule 27.1.7 did not apply and so there was no misconduct.

In the second disciplinary proceedings, the Union advanced the same allegation, contending that it was misconduct under three different rules in the Union's rulebook. The disciplinary panel found that it was misconduct under two of those rules. The Appellant's appeal was dismissed and the Certification Officer held that the Union was not estopped from bringing the second disciplinary proceedings, because the doctrine of res judicata did not apply to the Union's disciplinary process.

Held, allowing the appeal, that the Assistant Certification Officer's order gave rise to an estoppel, such that the Union was estopped from bringing proceedings relying on the same allegation and the same rule as in the first disciplinary proceedings. Moreover, since the Union could and should have relied on all applicable rules in the first disciplinary proceedings, it was estopped from asserting a breach of those rules by way of the second disciplinary proceedings.

A THE HONOURABLE MR JUSTICE LAVENDER

(1) Introduction

B 1. This is an appeal from a decision of the Certification Officer made on 4 April 2019. The Certification Officer decided that it was not outwith the rules of the Respondent, Unite the Union, for the Union to have started and conducted a second disciplinary investigation and/or disciplinary proceedings against the Appellant.

C 2. The Appellant has for many years been an active and well-known trade unionist. He is a member of the Union and was at the relevant time the chair of Unite NW522 branch.

D 3. The Appellant took part in a protest march in early October 2013. On the evening of 3 October 2013 he attended an event in a restaurant. Neither the march nor the event was organised by the Union. It has been alleged that during that event the Appellant slapped or touched the bottom of a female member of the Union, whom I will call the Complainant. He has consistently and strenuously denied this allegation.

E 4. Indeed, the Appellant contends that the charges against him were politically motivated, but that was not an issue before me and I will say nothing about it. Nor will I say anything about certain other, related allegations which were made against the Appellant, and which the Appellant also denied, since they did not result in an adverse finding against the Appellant.

F 5. The first set of disciplinary proceedings against the Appellant ended with the decision of an Assistant Certification Officer dated 3 October 2017. However, shortly thereafter the Union commenced a second set of disciplinary proceedings in respect of the same allegation, but

A alleging breach of different rules in the Union’s rulebook, and suspended the Appellant from holding any office in the Union. The Appellant contends that the Union was estopped from doing so.

B **(1) The Union’s Rulebook**

6. Rule 27 in the Union’s rulebook is entitled “Membership Discipline”. So far as is material, rule 27.1 provides as follows:

C “27.1 A member may be charged with:

27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.

.....

D **27.1.4 Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, religion, age, gender, disability or sexual orientation.**

27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union, including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers.

.....

E **27.1.7 Breach of the Union’s policies on diversity, bullying and harassment in the workplace, which will include cyber bullying and harassment.”**

F 7. The relevant policy for the purposes of the present case is the Union’s Policy on Harassment, Dignity and Respect (“the Policy”). I note the following statement from the Policy, which concerns its scope:

“All members, employees and guests attending conferences, meetings, courses or other events organised by the Union, on Union property, or attending events on behalf of the Union are expected to respect the Union’s policy against harassment and to treat others with dignity and respect....”

G 8. Rule 27.2, which concerns disciplinary hearings, provides as follows:

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

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A 9. The directions issued by the Executive Council under rule 27.2, which were referred to as the “EC Directions”, repeat that the disciplinary process is intended to be fair and conducted in accordance with the principles of natural justice.

B 10. Rule 27.4 concerns suspension, and provides as follows:

C “The Executive Council or the relevant Regional Committee may suspend a member charged under this rule from holding any office or representing the Union in any capacity pending its decision. A member shall be given written notice (or, if the member was informed verbally confirmation in writing) of any such suspension as soon as is reasonably practicable. In cases of a serious nature, as a precautionary measure, a member under investigation prior to disciplinary charges being laid may be suspended from holding office or representing the union in any capacity.”

D 11. Rule 27.5 lists the range of disciplinary sanctions, which extends from censure to expulsion. Rule 27.7 concerns appeals.

(2) The Role of the Certification Officer

E 12. The office of Certification Officer was continued by section 254 of the **Trade Union and Labour Relations (Consolidation) Act 1992** (“the 1992 Act”), which also gave the Certification Officer power to appoint Assistant Certification Officers and to delegate to them such functions as she thought appropriate.

F 13. Section 108A of the **1992 Act** provides as follows:

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

(2). The matters are: -

...

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

H 14. Subsection 108B(2) of the **1992 Act** provides as follow:

“If he accepts an application under section 108A the Certification Officer: -

- A**
- (a). shall make such enquiries as he thinks fit;
 - (b). shall give the applicant and the union an opportunity to be heard;
 - (c) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made.
 - (d) may make or refuse the declaration asked for, and
- B**
- (e). shall, whether he makes or refuses the declaration, give reasons for his decision in writing.”

15. In relation to enforcement orders, subsections 108B(3) and (4) of the **1992 Act** provide as follows:

- C**
- “(3). Where the Certification Officer makes a declaration he shall also, unless the considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements: -
- (a). to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;
 - (b). to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.
- D**
- (4). The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify that period within which the union is to comply with the requirement.”

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16. Pursuant to subsections 108B(6) and (8) of the **1992 Act**, a declaration or an enforcement order made by the Certification Officer may be relied on or enforced as if it was a declaration made by, or an order of, the court.

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(2) The First Disciplinary Proceedings

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17. As I have said, the alleged incident took place (if at all) on 3 October 2015. The Complainant made a complaint to the Union and on 13 November 2015 the Union wrote to the Appellant, informing him of the complaint and stating that it was in breach of the Policy.

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18. The Union appointed an investigation panel, which reported that there was a case to answer and that the alleged misconduct was a breach of the Policy. The Union then appointed a disciplinary panel, which reported on 15 April 2016 that in all probability the Appellant had

A committed the misconduct complained of. By way of sanction, the disciplinary panel decided to remove the Appellant from office within the Union, to bar him from holding office within the Union and to require him to attend a Dignity and Respect Training Course.

B 19. The Appellant appealed. His appeal was considered by an Appeal Panel, which on 30 August 2016 upheld the decision of the disciplinary panel.

C 20. The Assistant Certification Officer was to make the following observation about this first set of disciplinary proceedings, in paragraph 11 of the Reasons for his decision of 3 October 2017:

D **“11. Despite the references throughout the decision chain to rule 27, there was no express statement of the particular sub-rule or sub-rules under which AM was charged or was found guilty. However, it was made clear throughout that AM was being subjected to the disciplinary procedures on the grounds that he had acted in breach of the policy.”**

E 21. It was not disputed that the Union could have alleged a breach of rule 27.1.1, 27.1.4 and 27.1.5 in the first disciplinary proceedings and it is plain that it should have done so.

(4) The First Complaint

F 22. On 26 October 2017 the Appellant made a complaint to the Certification Officer, who appointed His Honour Jeffrey Burke QC as Assistant Certification Officer to resolve the Appellant’s complaint. By agreement, the Assistant Certification Officer invited written **G** submissions on the following three preliminary issues:

(i). whether the alleged misconduct occurred at a location or in the circumstances set out in the relevant part of the policy

(ii). whether on the proper construction of rule 27.1.7 of Unite’s rules the words “in the workplace” should be eliminated or treated as having no meaning

H **(iii). whether the applicant was charged with misconduct only under rule 27.1.7 or under rule 27 generally and, if the latter, could he be found guilty of breach of the rules although the alleged misconduct did not occur in the workplace.**

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23. The Assistant Certification Officer gave his decision on these preliminary issues on 3 October 2017. His decision was that the first disciplinary proceedings and the penalties imposed were in breach of the rules of the Union. He subsequently gave reasons for that decision, in which he concluded as follows:

- (a) Since the event in the restaurant was not organised by the Union, it was outside the scope of the Policy.
- (b) As was conceded, the Appellant’s alleged misconduct did not take place “in the workplace” for the purposes of rule 27.1.7. Contrary to the Union’s submission, the rule should not be construed as if those words were not there.
- (c) As set out in paragraph 48 of his Reasons:

“In my Judgment any fair reading of the evidential material placed before me shows that Unite was intending to bring, and brought, the disciplinary proceedings against AM on the grounds set out in rule 27.1.7 and, at the end of that process, subjected him to penalty on the grounds that he had acted in breach of Unite’s policy on diversity, bullying and harassment.....”

24. The Assistant Certification Officer concluded his Reasons as follows:

“50. My conclusions on the second and third preliminary points necessarily lead to the conclusion that the disciplinary proceedings could not have succeeded and were not brought within the rules because, for the reasons explained above, the incident complained of did not (if it occurred at all) happen “in the workplace”

51. However, if I am wrong about that, it is not suggested that Unite proceeded against AM other than on the basis that he had acted in breach of the policy; and my decision on the first preliminary point is that the alleged misconduct did not fall and could not fall within the words of the policy. For that reason, too, the proceedings were outwith the rules.

52. In the formal decision by which the parties were notified of my conclusions but not of the reasons for those conclusions, I invited the parties to make submissions to me as to remedy. It seems clear to me that AM is entitled to a declaration to the effect that Unite acted in breach of its rules in pursuing the disciplinary process as it did; and AM’s complaint therefore succeeds. I am not sure what other remedy, if any, might be appropriate. If the parties agree that only such a declaration should be made, they need simply notify the Certification Officer’s office to that effect. The parties have been invited to suggest other remedies as per the decision given on 3 October 2017 (...).”

A 25. The Assistant Certification Officer made his decision as to remedies on 20 November 2017. In his decision, he noted as follows:

“3. The Claimant asks that the declaration which I make should state that the disciplinary meetings and penalties imposed therein were void and of no effect. In my view, for the avoidance of doubt, words to that effect should be added to the declaration which I originally proposed; it will, therefore, be in the terms set out below.”

B 26. The remedies which he granted were as follows:

- C
1. A declaration that Unite acted in breach of its rules in pursuing the disciplinary proceedings against the Claimant and in imposing on him the penalties imposed in those proceedings and that those proceedings were null and void and of no effect.
 2. An order that Unite shall take all reasonable steps to ensure that the Claimant is, within 14 days of this order, restored, for the remainder of the respective terms of each office, to each of the posts and positions within Unite from which he was removed by reason of the penalties imposed in those disciplinary proceedings.
 3. An order that Unite shall forthwith communicate to each of its branches in its North-West region or area my decision in this case.
- D

E 27. Pursuant to paragraph 3 of this order, on 23 November 2017 the Union wrote to its North-West branch secretaries to inform them of the Assistant Certification Officer’s decision. By a letter of the same date, the Union stated to the Appellant that he was able to hold office within his branch and to be restored to any delegation of which he was a member. However, the Union did not take any other steps to restore the Appellant to his post as chair of Unite NW522 branch, and he was not reinstated to that office.

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G 28. The first disciplinary proceedings having concluded in this way, the dispute between the parties is whether the Union was estopped from bringing fresh disciplinary proceedings against the Appellant in respect of the same allegation, but alleging breaches of different rules in the Union’s rulebook. In summary, the Appellant’s argument is that the doctrine of res judicata applies to decisions made in the Union’s disciplinary proceedings and that the Union, having pursued the first set of disciplinary proceedings to a conclusion, was estopped from H pursuing the first set of disciplinary proceedings to a conclusion, was estopped from commencing a second set of proceedings which raised either the same issues or, following the

A **Henderson v Henderson** line of authorities, related issues (i.e. allegations that the Appellant's alleged conduct constituted a breach of rules other than rule 27.1.7) which could and should have been made in the first disciplinary proceedings.

B 29. A number of authorities were cited to me, but it is sufficient to note that in paragraph 22 of his judgment in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2014] AC 160 Lord Sumption stated that **Arnold v National Westminster Bank Plc** [1991] 2 AC 93 is authority
C for the following propositions:

“22.

(1). Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

D (2). Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

E (3). Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

(5) The Second Disciplinary Proceedings

F 30. On 27 November 2017 the Finance and General Purposes Committee of the North-West Region of the Union decided:

(a) that the complaint against the Appellant remained outstanding and required to be dealt with;

G (b) to appoint an investigating officer to undertake an investigation into the events which precipitated the complaint; and

H (c) to suspend the Appellant from holding any office within the Union pending the outcome of that investigation.

A 31. These decisions were communicated to the Appellant by letter dated 28 November
2017. The Appellant's solicitors protested in a letter dated 29 November 2016 addressed to the
B General Secretary of the Union that this was a breach of the Assistant Certification Officer's
order. This position was maintained in subsequent correspondence.

32. In June 2018 the investigating officer produced a report in which she concluded that
there was supporting evidence to substantiate the allegation that the Appellant slapped the
C Complainant's bottom and that there was a case to answer under rules 27.1.1, 27.1.4 and 27.1.5
of the Union's rulebook and recommended that a panel be convened to hear that allegation (and
certain other allegations).

D 33. A disciplinary panel was appointed and, following a hearing on 10 December 2018,
concluded that on balance there was sufficient evidence to find that the Appellant had struck the
E complainant on the bottom and that this was a breach of rules 27.1.4 and 27.1.5. By way of
sanction, the panel decided that the Appellant should be barred indefinitely from holding office
in the Union.

F **(6) The Second Complaint**

34. The Appellant made his second complaint to the Certification Officer on 14 March
2018. There was a hearing on 21 March 2019 to consider as a preliminary issue whether the
G Union was entitled to initiate the second disciplinary process. On 4 April 2019 the Certification
Officer gave her written decision. She decided as follows:

H (a) She held that the doctrine of res judicata does not apply to decisions made pursuant
to the Union's disciplinary procedures. Having referred to the rival submissions

A about the relevance of the decision in Christou v London Borough of Haringey
[2013 IRLR 379], she said as follows in paragraph 35 of her decision:

B “In my view, the relationship between the Union and its members is closer to the
relationship between an employer and employee than to a professional body and a
member or registrant. The Union member freely enters into the contract with the Union
and, by entering into the contract, gives the Union a contractual right to take
disciplinary action in certain circumstances. That disciplinary action is, usually, taken
internally within the Union without any external adjudication. This is very similar to an
employee entering into a contract with an employer.”

C (b) She rejected the Appellant’s submission that the decision of the disciplinary panel in
the first disciplinary proceedings was an extant decision, since it had been declared
to be null and void. Accordingly, even if the doctrine of res judicata did apply to
such decisions, there was no decision in the present case to which it could apply.

D (c) She held that it was not appropriate to determine the Appellant’s alternative
submission that the Union acted in breach of the principles of natural justice in
bringing the second disciplinary proceedings without giving the parties the
opportunity to present evidence.

E
(7) Submissions

F 35. For the Appellant, Mr Beaumont presented a powerful argument that the doctrine of res
judicata applied to the Union’s disciplinary procedures. For the Union, Mr Potter contended
that the Certification Officer was right to hold that the doctrine does not apply. In answer to my
G questions, he acknowledged that the effect of his submissions was that, even if the disciplinary
panel had dismissed the charge against the Appellant under rule 27.1.7 (either on the basis that
that rule did not apply or on the basis that it was not satisfied that the Appellant did slap the
H Complainant’s bottom), then it would have been open to the Union to bring exactly the same
charge before a differently-constituted disciplinary panel in the hope of achieving a different
result.

A 36. I need not go into the rival submissions on this point in any detail, because I do not find
it necessary to decide the point. That is because the first disciplinary proceedings did not
B conclude with the decision of the disciplinary panel or the decision of the appeal panel, but with
the decision of the Assistant Certification Officer. His declaration and enforcement order may
be relied on or enforced as if it was a declaration made by, or an order of, the court. Mr Potter
accepted that the doctrine of res judicata does apply to such decisions and he also accepted that
C the Union would have been estopped by the Assistant Certification Officer's decision from
bringing a second set of disciplinary proceedings against the Appellant relying on the same
allegation and the same rule, i.e. rule 27.1.7.

D 37. Accordingly, during the course of the hearing I invited the parties to focus on the
question of the effect of what the Assistant Certification Officer decided. The provisions of the
1992 Act which I have cited gave the Assistant Certification Officer a wide discretion as to the
declaration and order which he made. It seems to me, and the parties did not seriously dispute
E this, that the Assistant Certification Officer could have made an order which either expressly
permitted, or expressly prohibited, a second set of disciplinary proceedings based on the same
allegation, but alleging breach of different rules in the Unions rulebook.

F 38. Indeed, Mr Potter conceded that an estoppel would have arisen if the Assistant
Certification Officer had directed the Union to dismiss the charge against the Appellant under
G rule 27.1.7. However, he submitted that the Assistant Certification Officer's order that the first
disciplinary proceedings "were null and void and of no effect" had the effect that no estoppel
could arise, since a nullity cannot give rise to an estoppel. He also submitted that:

H (a) The decision of the Assistant Certification Officer was limited to the preliminary
issues. For instance, the Assistant Certification Officer did not decide that there was

A any error in the disciplinary panel's finding that the Appellant did slap the
Complainant's bottom.

(b) The Union had a responsibility to bring the second disciplinary proceedings.
B (Against this, Mr Beaumont submitted that there was no evidence as to the Union's
reasons for bringing those proceedings, and, as I have said, it is the Appellant's case
that the Union has, in effect, acted for an improper purpose. Nevertheless, it can be
C said that the Union has, in general terms, a role to play in enforcing its rules and, in
a case where a factual allegation has been established against one of its members,
one can readily see that the Union has an interest, if it properly can, in seeking a
finding that its member has contravened the applicable rule).

D 39. Mr Beaumont's primary answer to the submission that no estoppel could arise because
the Assistant Certification Officer declared that the first disciplinary proceedings "were null and
void and of no effect" was that rules 27.1.1, 27.1.4 and 27.1.5 were not raised in the first
E disciplinary proceedings and that declaring those proceedings to be a nullity did not alter that
fact. In addition, he submitted that the second disciplinary proceedings were contrary to
paragraph (ii) of the Assistant Certification Officer's order.

F
(8) Decision

G 40. As I have said, I do not consider it necessary to decide the principal issue raised by the
parties, i.e. whether the doctrine of res judicata applies to decisions made pursuant to the
Union's disciplinary procedure. The doctrine of res judicata requires a decision by a competent
court or tribunal (even if it is only a decision to dismiss a claim on the basis that it has been
H withdrawn). The Appellant could not rely on the decisions made by the disciplinary panel or

A the appeal panel in the first disciplinary proceedings, since those decisions were overturned by the Assistant Certification Officer.

B 41. The decision of the Assistant Certification Officer was capable of giving rise to an estoppel per rem judicatam, but that makes it necessary to consider exactly what he decided. There is an attractive simplicity in Mr Potter's submission (with which the Certification Officer agreed) that no estoppel could arise from the first disciplinary proceedings, since the Assistant
C Certification Officer declared that they "were null and void and of no effect". Moreover, I do not consider that Mr Beaumont's primary submission in response (i.e. that the Union's failure to rely on rules 27.1.1, 27.1.4 or 27.1.5 was a fact which was not rendered null or void) assists
D the Appellant, since the Appellant needs to identify a decision in order to rely on the doctrine of res judicata.

E 42. However, the Assistant Certification Officer's decision itself was neither null nor void nor of no effect. The effect of his decision was that the Appellant was not in breach of rule 27.1.7 and that the Union had not relied on any other rules in its rulebook. In my judgment, and this was conceded, the Union was estopped by that decision from bringing further disciplinary
F proceedings alleging that the Appellant had slapped the complainant's bottom and was thereby in breach of rule 27.1.7.

G 43. It follows, in line with the Henderson v Henderson line of authorities, that the Union was estopped from bringing further disciplinary proceedings alleging that the Appellant had slapped the complainant's bottom and was thereby in breach of rules 27.1.1, 27.1.4 or 27.1.5 (or
H any other rules in the Union's rulebook). The Union could and should have asserted that the Appellant had breached those rules in the first disciplinary proceedings.

A 44. I would not have reached this conclusion if the Assistant Certification Officer had stated in his order that it was open to the Union to bring such proceedings, but he did not do so (and, so far as I am aware, was not invited to do so).

B 45. This conclusion is reinforced, in my judgment, by paragraph (ii) of the Assistant Certification Officer's order, i.e. his order that the Union take all reasonable steps to ensure that the Appellant was restored to each of the posts and positions from which he was removed by
C reason of the penalties imposed in the first disciplinary proceeding. While it was clearly not inconsistent with this order for the Appellant to be suspended or removed from office as a result of disciplinary proceedings arising out of a fresh and separate allegation of misconduct, it
D seems to me that it was a breach of this order for the Union to suspend and then remove the Appellant from his post as a result of proceedings concerning the same underlying factual allegation as the first disciplinary proceedings.

E

(9) Conclusion

F 46. For the reasons which I have given, this appeal is allowed and I declare that the answer to the preliminary issue considered by the Certification Officer is that the Union was not entitled to bring the second disciplinary proceedings.

G 47. The parties were unable to agree on the appropriate form of order to give effect to this judgment, and so I am making the order which seems to me best to suit the justice of the case, drawing on various points of the received drafts. This includes an order that the Union pay a modest amount in respect of the Appellant's costs. This is appropriate in the circumstances
H where the Union acted in breach of the Assistant Certification Officer's order, and, therefore, improperly.