Neutral Citation Number: [2021] EWHC 1909 (QB)

Case No: QB-2020-004369

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 8 July 2021

Before :

The Honourable Mr Justice Butcher

- -

Between :

(1) DIANA NESLEN
~~(2) MICHAEL ELLMAN~~
(3) MICHAEL HOWARD
(4) JONATHAN ROSENHEAD
(5) CHRIS WALLIS
(6) JOHN DAVIES
(7) COLIN O'DRISCOLL
(8) ALMA YANIV
(9) SAMEH HABEEB **Claimants**

- and -

DAVID EVANS
(sued as a representative of all members of the Labour Party except the Claimants) **Defendant**

- -
- -

Maya Lester QC and Malcolm Birdling (instructed by **Bindmans LLP**) for the **Claimants**
Rachel Crasnow QC and Tom Gillie (instructed by **Blaser Mills LLP**) for the **Defendant**

Hearing dates: 17 June 2021

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Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. The Claimants have brought Part 8 claims against the Defendant, as a representative of the Labour Party ('the Party'), seeking declarations that in carrying out investigations into allegations of, or related to, anti-Semitism against the Claimants, the Party's conduct has been unfair and in breach of contract.

2. The Claimants make three specific complaints of unfairness:

   i) First, that the Party's investigation and adjudication of complaints of anti-Semitism was in breach of the principles of natural justice and procedural fairness because it applied criteria contained in a Code of Conduct that the Party had not published nor made available to those who were subject to it. For reasons which will appear below, this declaration is now sought only by the First and Seventh Claimants ('Ms Neslen' and 'Mr O'Driscoll' respectively).

   ii) Second, that it is unfair for the Party publicly to accept that the existing system for investigating anti-Semitism was procedurally unfair and that therefore a new independent procedure for investigating complaints of anti-Semitism was being put in place – which the Claimants contend the Party has accepted – and yet proceed with the investigations of the Claimants' conduct under the existing procedure.

   iii) The Party has materially mis-stated the Claimants' obligations of confidentiality in the Notices of Investigation sent to the Claimants.

3. This judgment adjudicates on those complaints and whether the Claimants are entitled to any relief in relation to them. It is no part of this case, or this judgment, to determine whether any of the allegations of anti-Semitism made against the Claimants are or are not well-founded.

4. Before considering the three declarations sought, it is necessary to refer to the factual and legal background to the Claimants' claim.

The Legal Relationship between the Party and the Claimants

5. The Claimants are, or were, members of the Party. The Party is an unincorporated association. The relationship between the Party and its members is governed by the law of contract: Evangelou v McNicol [2016] EWCA Civ 817, [19]. The contract is on the terms set out in the Party's Rules, to which each member adheres when he or she joins the association (ibid). Because the nature of the relationship is governed by the law of contract, the proper approach to the interpretation of the Rules is governed by the ordinary principles as to the interpretation of contracts: Evangelou v McNicol, [20]-[23].

6. The current iteration of those Rules is contained in the Labour Party Rule Book 2020 ('the Rule Book').

7. Of particular relevance to the present claims are the terms of Chapter 2, Clauses I, 8 and 9 of the Rule Book. They provide:

> "8. No member of the Party shall engage in conduct which in the opinion of the NEC [viz the National Executive Committee] is prejudicial, or in any act which in the opinion of the NEC is grossly detrimental to the Party. The NEC and NCC [viz the National

Constitutional Committee] shall take account of any codes of conduct currently in force and shall regard any incident which in their view might reasonably be seen to demonstrate hostility or prejudice based on age; disability; gender reassignment or identity; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation as conduct prejudicial to the Party: these shall include but not be limited to incidents involving racism, antisemitism, Islamophobia or otherwise racist language, sentiments, stereotypes or actions, sexual harassment, bullying or any form of intimidation towards another person on the basis of a protected characteristic as determined by the NEC, wherever it occurs, as conduct prejudicial to the Party. The disclosure of confidential information relating to the Party or to any other member, unless the disclosure is duly authorised or made pursuant to a legal obligation, shall also be considered conduct prejudicial to the Party.

9. Any dispute as to whether a member is in breach of the provisions of sub-clause 8 shall be determined by the NEC in accordance with Chapter 1 Clause VIII above and the disciplinary rules and guidelines in Chapter 6 below, or by the NCC in accordance with Chapter 1 Clause IX above and the disciplinary rules and guidelines in Chapter 6 below. Where appropriate the NCC shall have regard to involvement in financial support for the organisation and/or the activities of any organisation declared ineligible for affiliation to the Party under Chapter 1.II.5 or 3.C above; or to the candidature of the member in opposition to an officially endorsed Labour Party

> candidate or the support for such candidature. The NEC and NCC shall not have regard to the mere holding or expression of beliefs and opinions except in any instance inconsistent with the Party's aims and values, agreed codes of conduct, or involving prejudice towards any protected characteristic."

8. Chapter 6 of the Rule Book contains, inter alia, the rules applicable to disciplinary investigations by the NEC. Chapter 6, Clause I.1.A provides:

> "In relation to any alleged breach of the constitution, rules or standing orders of the party by an individual member or members of the party, the NEC may, pending the final outcome of any investigation and charges (if any), suspend that individual or individuals from office or representation of the party notwithstanding the fact that the individual concerned has been or may be eligible to be selected as a candidate in any election or by-election. The General Secretary or other national officer shall investigate and report to the NEC on such investigation. Upon such report being submitted, the NEC may instruct the General Secretary or other national officer to formulate charges against the individual or individuals concerned and present such charges to the NCC for determination in accordance with their applicable procedures. …"

9. Following the Party's annual conference in 2019, Chapter 6, Clause I.1.B was amended to include a direct power of exclusion by the NEC in certain circumstances, a power which has been called the 'Fast-Track Procedure'. Chapter 6, Clause I.1.B of the Rule Book provides:

"In relation to any alleged breach of Chapter 2 Clause I.8 above by an individual member or members of the Party which involves any incident which in the NEC's view might reasonably be seen to demonstrate hostility or prejudice based on age; disability; gender reassignment or identity; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation, the NEC may, pending the final outcome of any investigation and charges (if any), suspend that individual or individuals from office or representation of the Party notwithstanding the fact that the individual concerned has been or may be eligible to be selected as a candidate in any election or by-election. The General Secretary or other national officer shall investigate and report to the NEC on such investigation. Upon such report being submitted, the NEC or a subpanel of Disputes Panel may exercise its powers under Chapter 1 Clause VIII.3.A.iii, provided that it is satisfied that the following conditions are met:

i. The proposed charge and all evidence to be relied upon have been put to the individual member or members under investigation;

ii. The individual member or members under investigation have been given a reasonable opportunity to submit any evidence and make any representations in response to the proposed charge;

iii. There is sufficient evidence in documentary or other recorded form to reasonably conclude that the charge is proven and justify the sanction proposed;

> iv. The evidence relied upon is sufficient to conclude that the charge is proven and justify the sanction imposed without the reasonable need for witness evidence;
>
> v. There is no other compelling reason to determine the matter by an oral hearing;
>
> vi. No member of the panel taking the decision has been involved in the conduct of the investigation or making of recommendations as a result of the investigation."

10. By Chapter 2, Clause II.7 of the Rule Book it is provided that:

> "Members have the right to dignity and respect, and are to be treated fairly by the Labour Party. Party officers at every level shall exercise their powers in good faith and use their best endeavours to ensure procedural fairness for members."

11. This express term covers much of the territory of what might otherwise be the subject of an implied term or terms: Williamson v Formby [2019] EWHC 2639 (QB), [24]. Whether an aspect of the express Chapter 2, Clause II.7 duty or as a result of an implied term, where a power or discretion is conferred upon the Party, that power or discretion must be exercised in good faith, and the Party must not act arbitrarily, capriciously or irrationally. This was common ground, and is consistent with Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] 1 WLR 1661; Evangelou v McNicol, [24]; and Williamson v Formby, [23.5].

The Codes of Conduct

12. At Appendix 9, the Rule Book contains certain "NEC Codes of Conduct". Those appearing in Appendix 9 include a Code of Conduct on "Antisemitism and other forms of racism". That Code is in these terms:

> "The Labour Party is an anti-racist party, committed to combating and campaigning against all forms of racism, including antisemitism and Islamophobia. Labour will not tolerate racism in any form inside or outside the party.
>
> The Labour Party will ensure that the party is a welcoming home to members of all communities, with no place for any prejudice or discrimination based on race, ethnicity or religion.
>
> The Labour Party welcomes all who share our aims and values, and encourages political debate and campaigns around the vital issues, policies and injustices of our time.
>
> Any behaviour or use of language which targets or intimidates members of ethnic or religious communities, or incites racism, including antisemitism and Islamophobia, or undermines Labour's ability to campaign against any form of racism, is unacceptable conduct within the Labour Party. "

13. Also within Appendix 9 is a Code of Conduct entitled "Social Media Policy". This provides, in part:

> "Everyone should feel able to take part in discussion about our party, country and world. We want to maximise this debate, including critical discussions, as long as it does not result in the exclusion of others.

…

Harassment, intimidation, hateful language and bullying are never acceptable, nor is any form of discrimination on the basis of gender, race, religion, age, sexual orientation, gender identity or disability."

14. A matter which is central to the issue between the parties as to the first of the declarations sought by the Claimants is what the Claimants refer to as 'the Unpublished Code', and the Party calls 'the 2018 Code'. I will use the term '2018 Code' simply as a convenient shorthand. The origin and status of the 2018 Code was explained by Mr Barros-Curtis, the Party's Executive Director of Legal Affairs, in his first witness statement, which is dated 23 December 2020, as follows:

"[53] Shortly after the 2017 Labour Party Conference, the NEC adopted the short generic Code of Conduct: Antisemitism and Other Forms of Racism, which was added with effect from the 2018 Rule book to the Codes of Conduct reproduced in Appendix 9. …

[54] In 2018, the NEC decided that the Party should prepare a code of conduct dealing specifically with antisemitism. A draft 'Code of Conduct: Antisemitism' was produced with a view to adoption by the NEC. … The draft was reported to the NEC at its July 2018 meeting and adopted by consensus. …

[55] Nevertheless, following its adoption by the NEC Organisation Committee, controversy around the [2018] Code built swiftly. I consider that a large part of that controversy may have been generated by a perceived

> failure of the Party to consult sufficiently with its affiliated organisations about the 2018 Code. The July 2018 meeting of the full NEC agreed that the adopted Code should be reviewed. Public controversy about the 2018 Code nevertheless continued over what became a rather difficult summer for the Party. …
>
> [56] Because of the expectation that the 2018 Code would be reviewed during 2019, that Code was not included in the print version of the 2020 Rule book. I understand that as part of the review process, the Party approached the EHRC [ie the Equality and Human Rights Commission] for advice and input on the content of the Code. Once this review process is complete … the Party will take steps to publish the Code, with any agreed revisions, in the Rule Book. … Thus, one of the reasons the Party has decided not to include the 2018 Code in the Rule Book before the EHRC has advised on the Code, is that it is likely to be a significantly politically incendiary action, given the commitments the Party has rightly given to co-operate with the EHRC. In addition, the Party is keen to ensure that all the Party's affiliates are canvassed before it is included so the Party can avoid repeating the difficulties experienced in 2018."

15. I will return to the questions of what the relevant Claimants knew or could have known about the 2018 Code, its significance for the investigations into their conduct, and when it was ultimately published, below. At present, I set out certain of the terms of the 2018 Code, which are relevant to the complaints made by the Claimants.

> "…

[5] Labour is an anti-racist party. Antisemitism is racism. It is unacceptable in our Party and in wider society. To assist in understanding what constitutes antisemitism, the NEC has endorsed the definition produced by the International Holocaust Remembrance Alliance (IHRA) in 2016. This reads:

'Antisemitism is a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.'

…

[7] An area of particular difficulty, and the subject of much academic and legal debate around the IHRA definition, is the relationship between antisemitism and criticism of the state of Israel in the context of the long-running and complex dispute about political relations in the region. This is a dispute about which people have widely diverging and deeply held opinions, which can be closely bound with questions of personal identity.…

[8] What follows is a series of guidelines designed to help all those involved with the Party and its disciplinary processes understand what kind of behaviour is likely to be considered anti-Semitic, and – where a complaint is made – decide whether breach of Clause 2. I.8 has occurred.…

[9] The following are examples of conduct likely to be regarded as anti-Semitic. They are in part derived from the IHRA working examples:

a. Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.

b. Making mendacious, dehumanising, demonising, or stereotypical allegations about Jews as such or the power of Jews as collective – such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.

c. Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.

d. Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of Nazi Germany and its supporters and accomplices during World War II (the Holocaust).

e. Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.

f. Using the symbols and images associated with classic anti-Semitism… To characterise Israel or Israelis.…

g. Holding Jews collectively responsible for actions of the state of Israel.

[10] To those examples the Party would add the making of unjustified reference to the protected characteristic of being Jewish.…

[11] Discourse about the state of Israel raises two issues that can cause particular difficulty in the context of deciding whether language or behaviour is anti-Semitic: Israel's description (of itself, and frequently by others), as a 'Jewish state'; and the use of the term 'Zionism' and 'Zionist'.

[12] Article 1(2) of the 1948 UN Charter refers to 'respect for the principle of equal rights and self-determination of peoples'. The Party is clear that the Jewish people have the same right to self-determination as any other people. To deny that right is to treat the Jewish people unequally and is therefore a form of anti-Semitism. That does not, of course, preclude considered debate and discourse about the nature or content of the right of peoples to self-determination.

[13] In contrast, discussion of the circumstances of the foundation of the Israeli state (for example, in the context of its impact on the Palestinian people) forms a legitimate part of modern political discourse. So does discussion of – including critical comment on – differential impact of Israeli laws or policies on different people within its population or that of neighbouring territories. It is not racist to assess the conduct of Israel – or indeed of any other particular state or government – against the requirements of international law or the standards of behaviour expected of democratic states (bearing in mind that these requirements and standards may themselves be contentious).

[14] However, care must be taken when dealing with these topics. The fact of Israel's description as a Jewish state does not make it permissible to hold Jewish people or institutions in general responsible for alleged misconduct

> on the part of that state…. In addition, it is wrong to apply double standards by requiring more vociferous condemnation of such actions from Jewish people or organisations than from others… It is also wrong to accuse Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
>
> [15] … It is not antisemitism to refer to 'Zionism' and 'Zionists' as part of a considered discussion about the Israeli state. However, as the Chakrabarti Report advised, it is not permissible to use 'Zionist' (and still less any pejorative abbreviation such as 'zio' …) as a code word for 'Jew'. …
>
> [16] Discourse about international politics often employs metaphors drawn from examples of historic misconduct. It is not anti-Semitism to criticise conduct or policies of the Israeli state by reference to such examples unless there is evidence of anti-Semitic intent. Chakrabarti recommended that Labour members should resist the use of Hitler, Nazi and Holocaust metaphors and comparisons in debates about Israel – Palestine in particular. In this sensitive area, such language carries a strong risk of being regarded as prejudicial or grossly detrimental to the Party within Clause 2. I. 8."

The Notices to the Claimants

16. Between 2 April 2018 and 4 August 2020, each of the Claimants received from the Party a Notice of Investigation or a Notice of Administrative Suspension pending investigation. The Eighth and Ninth Claimants are currently suspended from the Party pending the outcome of the investigations into their cases.

17. Each of the Notices, save in respect of the Eighth Claimant, contained a Draft Charge. The Draft Charges contained certain particulars of the alleged anti-Semitic conduct. The particular sources of the standards of which the draft charges alleged breaches were not identified in the Draft Charges themselves.

18. It is apparent that, in a number of cases, those standards, and thus the charges, were drawn from the 2018 Code. Thus, in one case, the Draft Charges were as follows:

> "… the Respondent … has engaged in conduct prejudicial and/or grossly detrimental to the Party in breach of Chapter 2 Clause I. 8 of the Labour Party Rule Book 2019 by engaging in conduct which:
>
> 1. May reasonably be seen to demonstrate hostility or prejudice based on race, religion or belief; and/or
>
> 2. May reasonably be seen to involve anti-Semitic actions, stereotypes and sentiments…
>
> 3. Uses Hitler, Nazi and Holocaust metaphors, distortions and comparisons in debates about Israel-Palestine…
>
> 4. Accuses Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations…
>
> 5. Requires more vociferous condemnation of the actions of Israel from Jewish people or organisations and from others…
>
> 6. Undermines Labour's ability to campaign against any form of racism…"

19. It is apparent in this instance that the terms of draft charges 3-5, at least, directly draw on the terms of the 2018 Code, and use language which is not in the Rule Book, including its Appendix 9. A similar point applies to draft charges 4 and 5 against Mr O'Driscoll.

20. None of the Notices provided details of the complainant(s) involved. Each contained a paragraph in these terms:

> "The Labour Party's investigation process operates confidentially. That is vital to ensure fairness to you and the complainant, and to protect the rights of all concerned under the Data Protection Act 2018. We must therefore ask you to ensure that you keep all information and correspondence relating to this investigation private, and that you do not share it with third parties or the media (including social media). That includes any information you receive from the Party identifying the name of the person who has made a complaint about you, any witnesses, the allegations against you, and the names of Party staff dealing with the matter. If you fail to do so, the Party reserves the right to take action to protect confidentiality, and you may be liable to disciplinary action for breach of the Party's rules. The Party will not share information about the case publicly unless, as a result of a breach of confidentiality, it becomes necessary to correct inaccurate reports. In that case we will only release the minimum information necessary to make the correction. The Party may also disclose information in order to comply with its safeguarding obligations."

21. Following a meeting of the NEC's Disputes Panel on 18 February 2021, Ms Neslen received a Formal Warning about her Conduct, which was

communicated to her by letter dated 19 February 2021. Mr O'Driscoll was, at the time of the issue of the present claim, awaiting the outcome of an appeal against a decision made on 22 June 2020 to expel him from the Party. This appeal led to a re-determination of his case by the NCC and a decision, following a meeting of the NCC panel on 1 March 2021, that Mr O'Driscoll's membership of the Party should be cancelled for a period of 18 months. That decision was communicated to Mr O'Driscoll by letter dated 10 March 2021.

The EHRC Report and the Party's Response

22. In May 2019 the EHRC commenced an investigation into the Party's handling of anti-Semitism complaints. While that investigation was proceeding, during 2019/20 the Party made certain improvements to its procedures.

23. In October 2020 the EHRC published its Report on its Investigation into anti-Semitism in the Labour Party. Contained in its Executive summary were the following:

> "Background
>
> …
>
> The investigation aimed to determine whether the Labour Party committed a breach of the Equality Act 2010, related to Jewish ethnicity or Judaism, against its members, associates or guests, through the actions of its employees or agents. We also investigated the steps taken by the Party to implement the recommendations of previous reports, and whether the Party handled anti-Semitism complaints lawfully, efficiently and effectively.

We looked at a wide range of evidence from the Labour Party, the Jewish Labour Movement (JLM), Campaign Against Anti-Semitism (CAA), the Jewish Voice for Labour, a number of whistleblowers and other individuals and organisations.

We carried out in-depth analysis of a sample of 70 complaint investigation files.…

Anti-Semitism in the Labour Party

Our investigation has identified serious failings in leadership and an inadequate process for handling anti-Semitism complaints across the Labour Party, and we have identified multiple failures in the systems it uses to resolve them. We have concluded that there were unlawful acts of harassment and discrimination for which the Labour Party is responsible.

While there have been some recent improvements in how the Labour Party deals with anti-Semitism complaints, our analysis points to a culture within the Party which, at best, did not do enough to prevent anti-Semitism and, at worst, could be seen to accept it.…

Our findings

Unlawful acts

Our investigation found that the Labour Party breached the Equality Act 2010 by committing unlawful harassment through the activity of agents in two of the complaints we investigated. These included using anti-Semitic tropes and suggesting that complaints of anti-Semitism were fake or smears.

…

Political interference

Throughout the period we investigated, there was political interference in the handling of anti-Semitism complaints.… Within the sample of 70 complaint files, we found 23 instances of political interference… We found that this political interference was not part of the Labour Party's formal complaints process, so it was not a legitimate approach to determining complaints.

We concluded that this was indirectly discriminatory and unlawful, and that the Labour Party was legally responsible for it.

This practice has created a lack of transparency and consistency in the complaints process and a serious risk of actual or perceived discriminatory treatment in particular complaints. It is also fundamentally undermined public confidence in the complaints process.

Complaints process

An effective and transparent complaints process is critical to building trust with members and the general public, yet the Labour Party's response to anti-Semitism complaints has been inconsistent, poor, and lacking in transparency.

…

Our recommendations for change

We make the following recommendations to avoid repetition or continuation of the unlawful acts we found.…

Living up to a zero tolerance commitment

The Labour Party must live up to its commitment to be a political party with zero tolerance of anti-Semitism.…

Rebuilding trust and confidence in anti-Semitism complaint handling

The Labour Party must rebuild trust and confidence that anti-Semitism complaints are handled independently, lawfully, efficiently and effectively.

- In line with its commitment, and as soon as rule changes allow, commission an independent process to handle and determine anti-Semitism complaints. This should last until trust and confidence in the process is fully restored and should ensure that independent oversight and auditing are permanently embedded in the new process.

- Acknowledge, through its leadership, the effect the political interference has had on the handling of anti-Semitism complaints, and implement clear rule and guidance that prohibited and sanction political interference in the complaints process.

- Publish a comprehensive policy and procedure, setting out how anti-Semitism complaints will be handled and how decisions on them will be made. This should include published criteria on what conduct will be subject to investigation and suspension, and what will be considered

> an appropriate sanction for different types of proven anti-Semitic conduct.
>
> …
>
> Next steps
>
> Our investigation found that the Labour Party has committed unlawful acts. We have therefore served an unlawful act notice on the Party.…
>
> The Labour Party is now legally obliged to draft an action plan by Thursday, 10 December 2020 to tackle the unlawful act findings that we have made in this report. The action plan should be based on our recommendations to avoid such acts from happening again.
>
> The action plan set out by the Labour Party has to be agreed with us. We will make sure that the action plan includes specific timescales and success measures to achieve compliance with our recommendations. Once it is agreed we will continue to monitor it. If the Labour Party fails to live up to its commitments in the legally binding action plan, then we may take enforcement action."

24. On the day that the EHRC Report was published, the Party published a response. This recorded that the EHRC Report had made a number of recommendations, including that the Party should commission an independent process to handle and determine anti-Semitism complaints and put in place long-term arrangements for independent oversight of the complaint handling process, should publish a comprehensive policy and procedure setting out how anti-Semitism complaints were to be handled, and commission and provide

education and practical training for all individuals involved in the anti-Semitism complaints process. The document stated: "The leadership is committed to implementing all of the EHRC's recommendations in full and as quickly as possible." In addition, the leader of the Labour Party, Sir Keir Starmer MP issued a statement on 29 October 2020 which said, in part, "The Labour Party I lead accept this report in full. And without qualification. We will implement all the recommendations. And we will implement them in full. That process starts today. I have already instructed my staff to start work with the Commission to implement the recommendations at the earliest possible opportunity. We will establish an independent complaints process – and it will be in place as soon as possible in the New Year."

25. On the same day in answer to media questions Sir Keir Starmer made a number of further comments in relation to the EHRC Report, including the following:

i) "We will accept this report in full, recognise the hurt that has been caused in act on the recommendations with speed";

ii) "We will take action on the report and fully implement all of the recommendations and we will do it speedily, but I recognise the challenge is also about the culture of the Labour Party and we are determined to take up that challenge";

iii) "The Commission have been clear about what they think the appropriate action is. They've set it out in terms in the recommendations, I intend to implement all of the recommendations and to implement them swiftly";

iv) "The commitment to an independent process is very, very firm and we will have an independent process in place and the sooner the better. We will work with the Commission to get that up and running, just as soon as we can and as quickly as possible";

v) "We have put a lot of work into the Governance and Legal Unit and the way these cases are handled, that's why we've got through so many cases in the last six months, so the team will look at them. It's right that they do so and we will have an independent process in place, but whilst I have a line of sight on that, it is important for me not to pick out individual cases".

26. On 17 November 2020, Sir Keir Starmer made the following statements on Twitter:

> "… I stand by the commitments I made last month to accept the findings and the recommendations of the EHRC's report in full.
>
> That must mean establishing an independent complaints process as soon as possible in the New Year.
>
> This is my commitment and my promise to our party, the Jewish community and the British people".

The First Declaration Sought

27. As I have already set out, the first declaration sought is that the Party's investigation and adjudication of complaints of anti-Semitism was in breach of the principles of natural justice and procedural fairness because it applied

criteria contained in a Code of Conduct that the Party had not published nor made available to those who were subject to it.

28. This declaration is sought only by Ms Neslen and Mr O'Driscoll. This, the Claimants say, is because the 2018 Code was ultimately published by the Party, including on its website, on 31 March 2021, and because the Party at that stage made it clear that the Claimants, with the exception of Ms Neslen and Mr O'Driscoll would be permitted to make submissions in their disciplinary proceedings by reference to the 2018 Code. Ms Neslen and Mr O'Driscoll were excepted because their investigations had already been concluded, and the Party did not agree to re-issue notices of investigation in their cases in the circumstances.

The Contentions of the Parties

29. The essential complaint of Ms Neslen and Mr O'Driscoll was not that, had the 2018 Code been published, they or either of them would have altered their behaviour so as not to do or say the things complained of. Indeed, the matters for which they were investigated largely if not entirely predated the adoption of the 2018 Code. Instead Ms Neslen and Mr O'Driscoll contend that it was procedurally unfair for the investigation of the complaints into their conduct to have been by reference to a Code which had not been openly published and avowed by the Party as a standard against which their conduct would be judged.

30. Ms Lester QC emphasised three particular respects in which, she argued, the use of the 2018 Code gave rise to procedural unfairness.

(1) The first was that it was unfair that the charges against Ms Neslen and Mr O'Driscoll should have been formulated by reference to an unpublished Code.

(2) The second was that it was unfair that Ms Neslen and Mr O'Driscoll were not told that the 2018 Code was being used, and the terms of that Code, because had they been, they could have made reference to the whole of that Code, including those parts which indicated some of the matters which the Party would consider not to display anti-Semitism. Especial emphasis was placed on that part of the 2018 Code which stated that the expression even of contentious views criticising the State of Israel would not be regarded as anti-Semitic unless accompanied by specific anti-Semitic content, and that part which stated that it was not racist to assess the conduct of the State of Israel against the requirements of international law or the standards to be expected of democratic states. It was unfair, said Ms Lester, that Ms Neslen and Mr O'Driscoll had not been able to point to, rely on and make submissions in relation to these statements, and the 2018 Code taken as a whole. It was not enough that Ms Neslen and Mr O'Driscoll could have made submissions that conduct which involved criticism of the State of Israel and the exercise of free speech on the subject should not per se be regarded as anti-Semitic: they were entitled to point out that that was explicitly embodied in a Code which was being used to assess their behaviour.

(3) The third was that, in the absence of publication of the Code by which their conduct was being judged, the Claimants, and in particular Ms Neslen and

Mr O'Driscoll could not know or make representations as to whether the Party was applying the Code consistently and non-arbitrarily to different members of the Party.

31. The Party's answer to this case had four main aspects.

(1) In the first place, the Party argued that there had been no contravention of the requirements of procedural fairness. The core requirements of fairness in the relevant area were that a person should be given sufficient notice of the allegations against her, so that she might set out her position in relation to them, and that any representations made should be considered in good faith and without bias. What was required in relation to notice was that it should be sufficient for a person to comment effectively on matters which might weigh against her, and in the context of disciplinary proceedings a notice will suffice if it sets out the gist or essence of the allegations and the nature of the Party's concerns, and draws the attention of the person accused to any evidence relevant to the allegations. The notices to Ms Neslen and Mr O'Driscoll had complied with these requirements: they had set out the gist of the case against those Claimants, set out the substance of the allegations and the evidence relevant and invited the Claimants to raise any further matters they wished to in their defence. This allowed the Claimants to make meaningful representations.

(2) That the contents of the 2018 Code were either so obvious that they did not need restating, or were at all material times "in substance" reproduced on the Party's website in the leaflet "No Place for Antisemitism". An email had been sent to all the Claimants by the Party, alerting them to the "No

Place for Antisemitism" leaflet in 2019. "No Place for Antisemitism" had included the point that sensitivity in relation to concepts of Israel and Zionism

> "… does not mean limiting legitimate criticism of the Israeli state or its policies or diluting support for the Palestinian people's struggle for justice, their own state, and the rights of refugees and their descendants. The impact that the creation of Israel had and still has on the Palestinian people means the struggle for justice for them and an end to their dispossession is a noble one; Labour supports Palestinian statehood and a two-state solution to the conflict."

(3) That it would be incumbent on Ms Neslen and Mr O'Driscoll to demonstrate that they had sustained actual unfairness. Reference was made to R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, and what was said by Lord Mustill at 560D-561B, including that:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in

> every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.…
> (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer. … it is not enough for [the applicants] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair…."

In the present case there was no actual unfairness. Ms Neslen and Mr O'Driscoll knew the charges they had to face, and could make representations in relation to them. This is borne out by the fact that they did indeed make representations in response: Ms Neslen's of 2418 words, and Mr O'Driscoll's of 1727. Both sets of representations made points about the distinction between criticism of "Zionist ideology" or of the Israeli government and anti-Semitism. Ms Neslen's stated that Zionism was an "ideology in the same way that capitalism, socialism, communism, neo-liberalism are" and that "[t]hose who support any of these ideologies are entitled to argue their corner in the same way as those who disagree have the right to air their objections."

(4) That from at least November 2020 the Claimants knew that the 2018 Code was being applied to them, and that it is to be inferred that Ms Neslen and Mr O'Driscoll were from at least that time fully aware of its terms.

Analysis and Conclusions as to the First Declaration

32. The contractual obligation on the part of the Party which it is alleged that it breached was an obligation to act fairly, and not capriciously, arbitrarily or unreasonably. While given in the context of a statutory discretion the guidance in R v Secretary of State ex parte Doody is relevant in the present context in indicating that "what fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects", and that what matters is whether the procedure adopted was "actually unfair", not whether some other procedure might have been "better or more fair".

33. I do not accept the argument which, at one point, Ms Crasnow QC advanced on behalf of the Party that to show that the process was "actually unfair" the relevant Claimants would have had to show that the result would have been different without it. I do accept, however, that it is necessary to look at all the circumstances of the case to see whether the procedure applied to the relevant Claimant can properly be described as unfair.

34. In my judgment, the present case is one where, though it may be the case that it would have been better for the Party to have make explicit in the Notices of Investigation that the 2018 Code was being used in relation to the framing of the draft charges, what its relevant terms were and that would be taken into account in assessing whether there had been a breach of Chapter 2, Clause I, 8

of the Rule Book, nevertheless the procedure in fact adopted cannot be described as having been actually unfair to Ms Neslen or Mr O'Driscoll.

35. In reaching this conclusion, I consider that the following points are significant:

(1) A principal requirement of the Notices was that there should have been set out the concerns of the Party in a way which was sufficient for the member to address the allegations made against her if she wished to do so, and sufficient particulars of the evidence to answer the allegations made on the basis of it. This is consistent with what is stated or assumed in Choudhry v Treisman [2003] EWHC 1203 (Comm) at [77] and Walsh v McCluskie (unreported) The Times, 16 December 1983, p. 7. The Notices did that. They stated the gist of the case made against the relevant Claimants, and provided particulars of the evidence said to be relevant to the allegations. The fact that the source of the wording of some of the draft charges was not identified as the 2018 Code does not alter the fact that the draft charges did convey the substance of the allegations.

(2) The relevant Claimants were able to make meaningful representations in response. The fact that the 2018 Code was not specifically referred to did not prevent the Claimants making essentially the same points which could have been made by reference to those passages of the 2018 Code to which I have already referred which indicated what might be called limitations on the matters which the Party would regard as displaying anti-Semitism. Those passages were in line with what were in any event obvious responses to the charges made: responses which were in fact made without reference to those parts of the 2018 Code. Furthermore, the point that the Party had

itself adopted the position that legitimate criticism of the Israeli state or its policies was not anti-Semitism could have been made by reference to the Party's website and the "No Place for Antisemitism" leaflet.

(3) There is no evidence of any specific arguments which Ms Neslen or Mr O'Driscoll would have raised in their defence had they been provided with the 2018 Code which they did not in fact make.

(4) The 2018 Code had not been withheld from the Claimants in bad faith, or in order to put them at a disadvantage in the disciplinary proceedings. This was not suggested by the Claimants, and the reasons why the 2018 Code was not published must be taken to be those which are given by Mr Barros-Curtis in his witness statement which I have quoted above.

(5) No case is made in these proceedings that there was any failure by the Party properly to consider the representations which were made by Ms Neslen or Mr O'Driscoll, nor do those Claimants ask the court to conclude that findings against them were not ones which could properly have been arrived at on the basis of a consideration of the Rule Book and Codes of Conduct, including the 2018 Code.

36. The Claimants relied on the case of R (oao Lumba) v Secretary of State for the Home Department [2012] 1 AC 245. It was argued on their behalf that the present case was similar to Lumba, and that the present case also involved the determination of the cases against the relevant Claimants by reference to a set of criteria which had not been made known. In my judgment the position in the present case is materially different from that in Lumba. The nature of the decision impugned in that case was very different from the present, and involved

the removal of people's liberty, which is of a different order of severity compared to the decisions of an unincorporated association such as those arising here. This is relevant because the requirements of fairness depend in significant part on the nature of the decision being made. In addition, in Lumba the unpublished policy in relation to detention was inconsistent with the published policy. In the present case, the 2018 Code is not inconsistent with the Rule Book or with the Codes which were published in Appendix 9 of the Rule Book, nor with the "No Place for Antisemitism" leaflet on the Party's website. Furthermore, as I have said, in the present case the non-publication of the 2018 Code did not mean that the relevant Claimants were unable to make meaningful representations.

37. The conclusion that there was no actual unfairness to Ms Neslen or Mr O'Driscoll can be reached without regard to the Party's case that Ms Neslen and Mr O'Driscoll and those representing them, were in fact fully aware of the terms of the 2018 Code and knew that regard was being had to its terms in the investigations. I have, however, considered that case, and I conclude that it gives further support to the Party's case that there no actual unfairness, for the reasons which follow.

38. While I do not consider that the evidence before me allows me to infer, as the Party invited me to, that both Ms Neslen and Mr O'Driscoll were themselves "fully aware of the terms of the 2018 Code that applied to them by November 2020 at the latest", nevertheless it does seem clear that those representing Ms Neslen and Mr O'Driscoll were, by then, aware that an unpublished Code was being applied in their cases, and knew that that Code was the 2018 Code. I am

prepared to infer that if Ms Neslen and Mr O'Driscoll did not actually know the terms of the 2018 Code by then that was because they had not wanted to, or it had not been thought expedient that they should, see it.

39. In more detail, the position was as follows:

(1) In July 2018 Jewish Voice for Labour ('JVL'), of whose steering group Ms Neslen was in 2018 a member, published the 2018 Code in full on its website, as well as a "model motion in defence of the NEC Antisemitism Code of Conduct [ie the 2018 Code]". The copy of the 2018 Code which appeared on the JVL website has been referred to by Mr Potter, of Bindmans LLP ('Bindmans'), as "purporting to be a leaked copy of a version of [the 2018 Code] which appears in media reports from 2018".

(2) On 10 July 2020, after the Notice of Investigation in relation to Ms Neslen was issued, Bindmans wrote to the Party on behalf of Ms Neslen amongst others, saying, inter alia:

> "5.28 We also understand that, while the Anti-Semitism Code of Conduct in the Rule Book extends to just four paragraphs, the Party has prepared and used a longer Policy or other Code of Conduct specifically relating to anti-Semitism, as well as the IHRA Definition and/or the NEC policy on the IHRA definition, to which it has regard during investigations, but which is not published or otherwise publicly available."

(3) On 16 September 2020 the Party replied, stating (para. 99) that the "extended Code of Conduct" had to be applied to Bindmans' clients' cases "whether or not [it was] publicly available".

(4) I am willing to infer that Bindmans were by then aware of the terms of the version of the 2018 Code which had been published and was still available on the JVL website. Certainly Bindmans had a copy of it by 6 November 2020, when they referred to it, and quoted from it in two letters to the Party.

(5) On 9 December 2020, Mr Potter of Bindmans exhibited the copy of the 2018 Code which had appeared on the JVL website to his first witness statement (paragraph 4.4, F/179f).

(6) In paragraph 28 of Mr Barros-Curtis's first Witness Statement in these proceedings, dated 23 December 2020, he referred to, as being "in force", the 2018 Code which had been exhibited by Mr Potter. In paragraph 65 of the same Witness Statement Mr Barros-Curtis referred to the fact that the JVL website (which he exhibited) had on 5 July 2018 published "in full the 2018 Code" and that the same website had, later in July 2018, published "a 'model motion in defence of the NEC Antisemitism Code of Conduct' (ie the 2018 Code)", and he said that he did not, in consequence, accept that Ms Neslen "did not know the terms of the 2018 Code".

(7) On 11 January 2021 Bindmans on behalf of the Claimants noted in a letter (at paragraph 4.3) that the Party had "accepted that [it] applies the Unpublished Code to investigate and determine complaints of anti-Semitism…" At paragraph 4.8 of the same letter, Bindmans had said that it was not clear whether the Code which had been applied was the same as that

which had been published on the JVL website, in view of Mr Barros-Curtis's statement that revisions of that Code were still in contemplation. However, given the terms of Mr Barros-Curtis's witness statement and in particular its paragraphs 28 and 65, I consider that the degree of uncertainty was being, to a degree, forensically overstated, and that it was clear that the unpublished Code which had been being used in relation to complaints was in essentially the same terms as that which had appeared on the JVL website.

(8) On 18 March 2021, Bindmans on behalf of the Claimants sought the Party's consent to use the copy of the 2018 Code which had been exhibited to Mr Barros-Curtis's first witness statement for other purposes than these proceedings, namely to make submissions in the disciplinary proceedings.

(9) On 31 March 2021, Blaser Mills LLP ('Blaser Mills') for the Party stated that the 2018 Code, in a form identical to that exhibited to Mr Barros-Curtis's witness statement (save for a typographical amendment to para. 9) had now been published on the Party's website. Because they could have made submissions in relation to it before then, the Party was not willing to reissue Notices of Investigation in relation to those Claimants whose investigations had been concluded by 31 March 2021, namely Ms Neslen and Mr O'Driscoll, for the purposes of their making submissions in relation to the 2018 Code.

40. In my view, what this history indicates is that, even though it had not prior to the conclusion of their investigations been confirmed to Ms Neslen and Mr O'Driscoll by the Party that the 2018 Code, in the form exhibited to Mr Barros-Curtis's first witness statement had been used and taken into account in those

investigations, nevertheless it was apparent to those Claimants and their representatives, well before the relevant investigations were concluded - pursuant to the NEC's Disputes Panel's meeting of 18 February 2021 in the case of Ms Neslen, and the NCC Panel's meeting of 1 March 2021 in the case of Mr O'Driscoll - that that Code had indeed been and was being used. Even if Ms Neslen and Mr O'Driscoll had not informed themselves by that stage of the contents of the 2018 Code, either in its leaked version or as exhibited to Mr Barros-Curtis's first witness statement, the complaint that there was unfairness because of its unpublished nature can be seen to be a rather a technical one, which, to my mind, seeks to emphasise the formal position of whether the 2018 Code had been officially published by the Party over the matter of substance, namely whether the fact and content of the 2018 Code was actually known to the Claimants or their representatives.

The Second Declaration Sought

The Contentions of the Parties

41. The Claimants seek the Second Declaration on a confined basis. They contend that it is unfair for Investigations to proceed against any of them under the present system, in circumstances where, they say, the Party has accepted that that system is fundamentally unfair. The Claimants do not suggest that the Court can or should itself decide that the existing system **is** unfair on any other basis than that Party has, as they contend, accepted that it is. Nor do they make any case that the statements made by the Party in relation to the findings of the EHRC give rise to any private law estoppel. The case is only that, the Investigations having been opened and conducted pursuant to a system which

the Party has accepted is unfair and which it has committed to replacing, it is unfair for the Party to proceed with those Investigations without remedying the defects in the system which they say the Party has accepted exist.

42. For the Party, it is contended that the Claimants' case in relation to the Second Declaration fails for three main reasons:

(1) First, it says that the EHRC did not find that the Party's existing disciplinary process was systematically or fundamentally unfair in such a way that it should no longer be used for any complaints.

(2) Second, that the Party has not made any general unequivocal promise to cease to use its existing disciplinary process to determine disciplinary cases in the short term, nor has it made any promise to the Claimants that their disciplinary processes would be determined under a new procedure.

(3) Third, that there is no unfairness in the application of the Party's current disciplinary procedures to the Claimants' cases.

Analysis and Conclusions in relation to the Second Declaration

43. In my judgment the Party is right in relation to the Second Declaration for each of the reasons which I have broadly summarised in the preceding paragraph. I will take each in turn.

44. I have already set out that the EHRC Report made findings that there had been certain breaches of the Equality Act 2010; that there had been political interference in the handling of anti-Semitism complaints; and that the Party's response to antisemitism complaints had been inconsistent, poor and lacking in

transparency. In its recommendations, it had said that the Party "must rebuild trust and confidence that anti-Semitism complaints are handled independently, lawfully, efficiently and effectively" and had made the particular recommendations at pages 13-15 which I have in part quoted above.

45. It is significant, however, that the Report stated that in various respects there had been recent improvements in the way in which complaints were handled under the complaints procedure (see in particular pages 7, 11, 33, 35, 36, 37, 38, 39, 40, 41). The Report considered that a number of problems remained (see in particular page 73) and made recommendations as to how they should be addressed. It was not stated, however, that those problems meant that the existing disciplinary system, as it had been improved in the respects mentioned in the Report, was fundamentally unfair or should be immediately discontinued. The recommendation that an independent process should be commissioned, which appears at pages 13 and 57, was that this should be done "as soon as rule changes allow". Furthermore, the Action Plan which the Report said the Party should draw up and agree with the EHRC (page 15), and which was in fact drawn up and approved by the EHRC, envisages that a new independent process will be brought about "as soon as possible", but that cases will proceed under the "existing system". What the "Monitoring points" in paragraph 2.1 indicate is that it is recognised that existing cases may proceed through the adjudication stage under the existing system, but that it is intended that all anti-Semitism complaints which by 10 December 2021 are not at the adjudication stage, and all new complaints, should be subject to a new independent process.

46. In the light of these facets of the Report, I do not consider that it is correct to say that the EHCR found that the Party's disciplinary processes, as recently improved, were fundamentally unfair. While it was certainly the case that the EHCR considered that there were still matters which could be further improved, and that the commissioning of an independent process was necessary to rebuild trust and confidence, this did not amount to a finding or indication that the present system could no longer be used.

47. As to the Party's second point, because I find that the EHRC Report did not say that the existing system was not to be used or was, as improved, fundamentally unfair, I consider that the Party's statements that it accepted the findings and recommendations of the Report did not amount to an acceptance that use for existing complaints of the current system, as improved in the manner referred to in the Report, was unfair.

48. The statements by the Party in relation to the findings of the EHRC relied on by the Claimants, which I have referred to and quoted from above, did not involve a statement that the Claimants' cases would be determined under a new disciplinary process. Those statements emphasise that a new and independent process should be put in place as soon as possible. This was in the context of a need to avoid, and for the Party to be seen to avoid, political interference in complaints. But I do not consider that they can be read as indicating that until a new system was in place, existing complaints would not be processed. Indeed, I agree with the Party's submission that a suggestion that all existing complaints should be put into abeyance until there were rule changes was one which it was inherently improbable that the Party would have made.

49. In relation to the Party's third point, I agree that it has not been established that there is any unfairness by reason of the application of the current disciplinary procedures to the Claimants' cases, notwithstanding the Party's acceptance of the recommendations of the EHCR.

50. Under the Rule Book (Chapter 1, Clause VIII.3.A) the Party is to uphold and enforce the rules in force, and under Chapter 1, VIII.3.A (i) to (iii) that involves the determination of cases according to Chapter 6. Chapter 6, I.1 requires that the NEC "shall take such disciplinary measures as it deems necessary", and that its powers include those in Chapter 6, I, 1.B, which contains a provision that an officer "shall investigate and report" on any incident which in the NEC's view might reasonably be seen to demonstrate hostility based on (inter alia) race or religion. As the Rule Book contains the contract between the Claimants and the Party (which itself is an unincorporated association of all its members), there is a contractual provision which requires the Party to apply its current disciplinary procedures. That is itself highly germane to, albeit not conclusive of, the question of whether it is unfair to the Claimants for the Party to apply the existing disciplinary procedures.

51. It is also significant that, as I have already said, the Claimants, putting aside the complaints which found the claims for the First and Third Declarations, do not seek to establish or invite the court to find that the existing procedures are unfair in any particular respects. Other than in relation to Ms Neslen and Mr O'Driscoll's complaint in relation to the 2018 Code, which I have already considered, no case is made of a breach of contract by reason of the requirements of natural justice not being met in the investigations of the

Claimants' cases. There have been, furthermore, no allegations of bias or apparent bias. The Party does not accept that the current procedures are unfair. In those circumstances I have no basis on which to conclude that the procedures being applied to the Claimants' cases are actually unfair or will lead to unfairness.

52. In addition, as the Party submits, it is in the interests of the other members of the Party, as well as of the wider public, that the Party should not cease determining discrimination claims but should proceed with determining them properly: such interests having been recognised in Unite the Union v McFadden [2021] EWCA Civ 199, [2021] IRLR 362, at [75]. This again tells against there being unfairness to the Claimants in having their complaints resolved under the existing procedures as opposed to being held in abeyance, provided that those procedures are not themselves shown to be unfair, which is the previous point I have considered.

53. For these reasons I conclude that it has not been shown that the Party has breached the express and implied terms of fairness in failing to close the Investigations / or revoke the suspensions / expulsions where relevant following the EHRC Report and the Party's acceptance of its recommendations.

The Third Declaration Sought

The Parties' Contentions

54. The case of the Claimants in relation to the Third Declaration, as it was put in the skeleton argument submitted on behalf their behalf, is that the conduct of the Party was "unfair, and therefore in breach of contract, in that … the Party

has materially mis-stated the Claimants' obligations of confidentiality in the Notices of Investigation."

55. The Claimants contend that the only obligation of confidentiality imposed on them by the Rule Book is that in Chapter 2, Clause I.8, which I have already set out above. This, the Claimants contend, is limited to (1) information that can properly be considered as confidential, and (2) information that relates to the Party or to another member. The confidentiality provisions of the Notices which were sent to the Claimants went beyond that, and misstated the confidence on which the Party was contractually entitled to insist. In particular, the Notices suggested that their recipients could not talk to others, or take advice about the allegations made against them.

56. The Party contends that Chapter 2, Clause I.8 of the Rule Book does not impose a duty of confidentiality in the disciplinary process: it simply forbids the Party's members from behaving in a way prejudicial to the Party, and requires the NEC to consider that disclosure of confidential information is prejudicial to the Party. The relevant paragraph in the Notices did not refer or purport to recite Rule Book Chapter 2, Clause I.8, or any rule. Instead the relevant paragraph contained a request that the member should keep information and correspondence relating to the investigation private ("*… We must therefore ask you…*"); and contains a warning that the Party reserves the right to protect "confidentiality" and that the member "may be liable to disciplinary action for breach of the Party's rules." That, the Party contends, must be right. Details of the disciplinary process might indeed contain confidential information which

fell within Chapter 2, Clause I.8 as being "confidential information relating to the Party or to any other member".

57. In any event, the Party contends that there was no breach of the contractual term as to fairness, which is the only basis on which the declaration is sought. The Claimants have not suffered any actual unfairness. They have felt able to instruct solicitors who have written extensively to the Party on their behalf, and to publicise their cases on CrowdJustice and YouTube. Furthermore, the Party contends that it would be inappropriate for the court to issue declaratory relief.

Analysis and Conclusions as to the Third Declaration

58. In my judgment, the Party is correct to submit that Chapter 2, Clause I.8 is not intended to, and does not, seek to establish the ambit of what the Party may ask a member to keep private in the context of disciplinary proceedings. I do not consider that in asking members to keep information and correspondence relating to the investigation private, there is any breach of Chapter 2, Clause I.8.

59. Nor does it appear to me that the inclusion of the relevant paragraph of the Notices constitutes a breach of the fairness term. What would have been required to have been shown was that the inclusion of the relevant paragraph led to actual unfairness to the Claimants. The Claimants have not shown any actual unfairness to themselves as a result of the inclusion of that paragraph. In particular they have not shown that its inclusion prevented them from taking advice or communicating about the investigations into them.

60. I should add, furthermore, that I would, even if I had considered there to have been a breach of contract, have been unwilling to grant a declaration in relation

to it at this juncture. If there was a breach of the fairness term, which, as I have said, I do not consider that there was, it would undoubtedly be at the less consequential end of the spectrum. The courts are very reluctant to intervene in ongoing disciplinary proceedings, and will only do so if the matter in question is such a breach as cannot be remedied in the proceedings themselves, and will not micromanage the disciplinary process: Hendy v Ministry of Justice [2014] EWHC 2535 (Ch), [49], [87], per Mann J; Chakrabarty v Ipswich Hospital NHS Trust [2014] EWHC 2735 (QB), [161] per Simler J; Williamson v Formby, loc. cit., [65].

61. While the "intervention" commonly sought may usually be an interim injunction, or an interim declaration (as referred to in Hendy), the considerations which I have mentioned appear to me to be relevant to whether the court should, as a matter of its discretion, grant a final declaration as to unfairness during the pendency of disciplinary proceedings. If any potential unfairness is capable of cure during the course of the disciplinary proceedings, then the making of a declaration before their conclusion may serve no useful purpose, and be an unnecessary intervention by the court in a procedure which it should not be micro-managing. The interests of justice would not, in my view, be best served by the grant of a declaration in those circumstances.

Conclusions

62. For the reasons I have given, I do not consider that the Claimants are entitled to any of the three declarations sought; and their claim for them will be dismissed.