IMPERIAL COLLEGE UNION COURT

DETERMINATION

Re No Confidence motion No.2 (No. 07/02)

Panel consisting of:
Hamish Common (Court Chair),
Katherine McGinn (Deputy Court Chair),
Sebastian Tallents,
Eleanor Jay and
Lara West.

31st JanuaryJanuaryJanuaryJanuary1st February 2007

OPINIONS:
The COURT CHAIR:

Facts

1. A motion of no confidence in D, a Union Deputy President, was proposed by Jon Matthews, the Deputy President (Finance and Services) and sent to John Collins, the President on the 11th January 2007. The President was concerned that the motion, the procedure in relation to it and various comments in the media were unconstitutional or gave rise to liability for the Union.

2. In light of the upcoming meeting of the Union Council on the 22nd January 2007, a meeting of the Union Court was convened swiftly on the 16th January which (in a determination the next day) suspended the motion prior to a final decision on the numerous issues raised. This meeting also decided that the motion had been properly proposed and seconded and the correct notice given to D.

3. The earlier meeting of the Court severed the main issue of the constitutionality and legality of the motion and sent it to a new panel, that is to say, us.

4. I set out ten issues distilled from the requests made by the President and D which were considered in turn.

5. Graeme Wise, the NUS London Political Development Advisor and Laura Welsh, the NUS London Regional Organiser attended, and the panel are greatly indebted to them for their assistance with many of the issues argued before it. The President, Deputy President (Finance and Services) and D also attended and were also very helpful.

Staff-student protocol

6. To what extent, if any, would the staff-student protocol apply to the conduct of a Deputy President? If a Deputy President (or for that matter any other elected officer holding sabbatical office) is employed by the Union, does that make him or her "staff" within the definition of the protocol?

7. The staff-student protocol is referred to in section 16.2 of the constitution, stating:

> "The Council shall establish by Regulation a Staff-Student Protocol setting out the divisions of responsibilities between the staff and elected officers, to promote the democratic structure of the Union and its integrity as an employer. It shall be responsibility of the President to clarify and enforce this protocol, unless the Court is meeting, in which case it is the responsibility of its chair to do so."

8. The protocol itself is set out in Annexe G of the Memorandum of Understanding, which is a regulation of the Union. The title says:

> "STAFF/STUDENT PROTOCOL
> (The Relationship of the Elected Officers of ICU, its Committees and its Permanent Staff)

9. The distinction made between "staff" and "permanent staff", and the "elected officers" persists in each reference in the protocol. There is no doubt that an elected officer, such as D, does not count as "staff" under the protocol, despite the fact that he or she may be employed by the Union. The procedure under which D falls to be dealt with is thus that for any other officer.

10. The President raised the issue, presumably for academic interest, of whether he was entitled to dismiss an elected officer merely according to the procedure for Union staff. One may turn to the various provisions, including the President's responsibility for "the appointment and management of Union staff" (constitution 16.1), "staffing and discipline issues" (regulation 1.16.viii), and for "the efficient organisation and administration of the Union" (regulation 1.16.iii).

11. The constitution provides in section 17.1.1 that

> "Misconduct, negligence or failure to maintain the confidence of the Council by Officers of the Union … may be dealt with by the Council or its committees under Regulations; this may include censure or dismissal."

12. Regulation 5 provides that "Officers and representatives may only be censured or dismissed under the terms of this regulation" (regulation 5.3) and "The Sabbatical Officers and Felix Editor may only by censured or dismissed by the Council."

13. This means that any purported dismissal by the President (or anyone else acting alone) of an elected officer or representative would certainly be unconstitutional. Given that D's contract in paragraph 6 also provides that "employment with the Union may be terminated … under the provision in the Unions [*sic*] Constitution…", breaching the constitution could also be construed as a breach of contract.

Is D an officer or employee, according to employment law?

14. There is a distinction in law between someone holding an "office" and an employee. The old distinction existed between a "master and servant" relationship, (where the "servant" had relatively few rights based only upon the contract with his employer), and the holding of office, for which public policy required some protection from improper pressures. When employees gained the right under the Industrial Relations Act 1971 not to be unfairly dismissed, the tenor of the debate changed, and status as an employee conferred greater protection. In many circumstances currently it grants more rights than given to those holding office.

15. In this case D may gain certain rights as a result of being treated as an employee. The question of whether D is an employee or not is a matter of law and the courts are entitled to hold that he or she is, irrespective of any position the Union would argue upon the matter.

16. It is an uncontroversial statement that D is an officer. It is stated as such in a number of places in the constitution and regulations, notably in section 5.1 of the constitution and regulation 1.1.5. Union Deputy Presidents are known collectively with the President as "sabbatical officers". The definition in law of "office" being a subsisting, permanent, substantive position independent of the person holding it would appear to reinforce this view.

17. However, status as an officer and an employee is not mutually exclusive – one can be both. Sub-section 230(1) of the Employment Rights Act 1996 holds that

> "…'employee' means an individual who has entered into or works under … a contract of employment."

18. The then President, Permanent Secretary (now Union General Manager) and Senior Treasurer signed an "Imperial College Union Sabbatical Officers' Contract" with D upon D taking office. It mentions "employment" in paragraph 6, when providing for its potential early termination, and provides a salary. The construction of the contract also provides for Union and D to be mutually obliged to each other to work and provide work (through the holding of office).

19. It appears quite clear that D is an employee of the Union.

Does D have the right, under employment law, not to be unfairly dismissed?

20. Section 94 of the Employment Rights Act 1996, holds that "An employee has the right not to be unfairly dismissed by his employer." However, this is in part disapplied by section 108, stating "Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination."

21. D has been in continuous employment for less than one year, and thus does not have the general right not to be unfairly dismissed. There are exceptions to this one year rule, such as dismissal or constructive dismissal due to less favourable treatment of D, due to his or her sex, race, religion, sexual orientation or age. Further exceptions apply in cases where a person is dismissed for exercising various statutory rights. None of these examples, thankfully, apply in this case, which D confirmed to the panel at least in respect of less favourable treatment based upon the various listed criteria.

22. It follows that D does not have a right not to be unfairly dismissed, as a matter of employment law. There are however various principles of administrative law and rights to a fair hearing which would nevertheless apply, and as such any distinction between the required procedure for those with employment rights and those without, given the Union's procedural requirements for dismissing Union Officers, ought to be minor.

23. In particular, the statutory minimum 3 step dismissal procedures under the Employment Act 2002, along with the ACAS guidance which is taken into account in determining whether a dismissal is fair, does not apply in this case. The three stages are: firstly writing to an employee notifying them of the allegations; secondly holding a meeting to discuss the allegations and stating the decision; and thirdly, an appeal. However, this procedure is followed in any event by Regulation 5, if one presumes a no confidence motion has set out some allegations and can thus be treated as the equivalent of the "letter" providing advance notice of the disciplinary issues.

Role of College staff policies

24. The College has a detailed policy for staff, and another in its statutes for academic staff. However, setting aside any question of whether an employee of the Union would therefore be an employee of the College, the College Council, its governing body, approved and must approve further changes for Regulation 5, the Union's disciplinary regulation. This puts it at the same administrative status at least as the College staff policy.

25. Therefore it seems clear that there was no intent by the College to impose their standard staff disciplinary procedure upon those employed by virtue of holding Union office, instead promulgating a different system to do so under the Union's constitution and regulations.

Fair hearings – natural justice and democracy

26. The Union must obey the rules of natural justice in its administrative procedures if one possible end result is the disciplinary dismissal of one of its officers. This is a principle which should apply to any person of any level of seniority within the Union, disciplined by any level of committee or person with the requisite authority.

27. In considering matters of fairness, there is a tension between the Union as a democracy and the Union as an administrative entity which must be and be seen to be fair.

Fair hearing – is any person barred from voting for prejudice?

28. Prejudice in this context means a person who has already decided an issue so firmly that he or she is not capable of giving an issue a fair hearing.

29. Regulation 5 sets out a system whereby the Council debates a motion of no confidence, with the proposer (regulation 4.65) and defendant (regulation 5.17.2) to the motion being given additional speaking rights. In addition regulation 5.17.3 requires members of the Council to have "due regard for the gravity of the motion", and the classic regulation 4.97 enjoins members to "think before voting" (not, incidentally, a rule imposed upon other committees.)

30. It is a common sense principle of natural justice that members are able to hear the evidence and listen to arguments properly before arriving at a decision, one which is now determined by secret ballot under recent constitutional revisions. Members of Council will, however, know D and will have heard of how he or she has performed, and some indeed will have a close working relationship, as one would expect in any normally functioning Union. Others may have no personal connection with D, and base their vote wholly upon the tenor of the debate.

May the proposer and defendant vote?

31. Both the proposer and D are members of the Council and, by default, would be entitled to vote in these proceedings. In other administrative disciplinary proceedings it would be regarded as a gross breach of natural justice to permit the prosecutor (whose function it can be assumed the motion's proposer is undertaking) a right to vote on the outcome of his prosecution. The case of a defendant voting similarly is more unusual.

32. The greatest objection to the fairness of either the proposer or D being permitted to vote can be seen in contrasting the position with a Full Member of the Union not on the Council proposing a censure or no confidence motion, which they are entitled to do. Certainly not everyone who could be subject to a disciplinary motion sits on the Council. Were twin motions of no confidence to be presented in respect of one person on the Council and another not on the Council (for example, a CSC chair and treasurer), the Council member has a built in advantage. This cannot be fair – the Council's purposes as the governing and mostly sovereign body of the Union cannot also be implied to include the preservation of its own members' careers in the Union.

33. The second objection is the difficulty in accepting that a proposer or defendant would listen to the evidence and arguments with the proper objectivity one would expect of the rest of the Council: indeed it is more likely, if they are doing their respective jobs, for both to be preparing rejoinders to the arguments against them. In a previous similar motion in respect of a sabbatical officer the proposer notoriously voted against his own motion, as did some of the seconders. However that instance had its own peculiarities and was under rather different procedural rules from the current system.

34. The provision of secret ballots for voting on disciplinary motions, and a small number of other motions, means that members of the Council are not accountable to their various constituents for the manner in which they vote. This is justified on the basis that disciplinary motions are votes of conscience made after listening to evidence and argument, and ensuring it is difficult to apply improper pressure to a decision best made judiciously. However, the decrease in democratic legitimacy of such votes makes it all the more important that they are conducted fairly.

35. I would have no difficulty in holding that neither the proposer of nor defendant to a motion of no confidence (or for that matter censure) are entitled to vote in the proceedings.

May seconders vote?

36. To what extent does this principle apply to seconders? The list of seconders to the motion is a roll-call of some of the most senior non-sabbatical officers in the Union, of whom 12 sit upon the Council. It would not be too great a speculation to suggest that the proposer, aware of the democratic nature of the Union, would be keen to seek the support from a wide range of such people as seconders. Such a course of action provides the motion with greater democratic legitimacy than some of the possible routes of a no confidence motion to the Council.

37. In considering the right of seconders to vote the tension between a democracy and a fair hearing becomes more acute. Removing the right of over one fifth of the Council to vote upon a motion by virtue of having earlier apparently supported it (though Jon Matthews said, uncontradicted, that some seconders wanted the subject debated but were non-committal about its outcome) would appear to be a travesty of democracy. It would be saying that the more a motion was supported by members in advance, the less support it could be entitled to at a hearing and thus to be passed.

38. One also has in mind, in considering the impositions of natural justice, section 22(1) of the Education Act 1994, requires that:

39. Seconders do not hold any procedural position or privileges in the meeting at which a motion is discussed to which they have put their names. Some may vehemently favour the motion, though it seems unlikely that signing it beforehand would make any difference to their views. Others, it appears, merely want the motion discussed: though this would suggest that they do not perhaps overwhelmingly support D.

40. The authorities on administrative law and a fair hearing hold a strict line upon any apparent predetermination of the issues, and prior support in the nature of a seconder to a motion would in normal circumstances be likely to render them disqualified from hearing the cause to which they pledged their support. However, the distinction one can draw here is the statutory requirement for the Union to be democratic – indeed the statute mentioned above mentions both the fairness and democracy which here seem to oppose.

41. The requirement to be democratic means that the Union must be governed by its members, and when necessary by those elected to represent them – the body drawing most democratic legitimacy being the Council. There is no concept in a democracy of voters or interest groups being prohibited from having their opinion expressed because they may previously have formed a view about something, however firmly. This applies as much to the value such groups place upon continuation in office of members of the government as upon the value of its proposed policies.

42. In considering the interests of democracy and fairness, the balance falls differently for seconders compared with the proposer. I would hold that the seconders are entitled to vote in the proceedings, though they must be enjoined to set aside any potential pre-determination and listen objectively and fairly to the debate.

43. The same principles apply to those on the Council who indicated an intention to vote one way or the other. If evidence were brought, which it has not as yet, that a member of the Council had held views so forthrightly and was so blind to reason that they could not reasonably be expected to pay proper attention to the debate, then there would be a case for removing their vote. No such person has been mentioned, and the matter can be left there.

Proxy votes

44. Regulations 4.27 – 4.29 permit the proxying of votes in Union meetings. Until 1997 people were entitled to proxy an unlimited number of votes, and it was not unusual at the Council for the President to hold ten votes or more, happily provided by absent Council members. This was then stopped and a maximum of one proxy could be held by anyone in any Union meeting.

45. Though the issue was not raised by any of the interested parties, the Court was interested to hear why it should be that proxies could be used for disciplinary motions. As previously discussed, disciplinary motions differ from others in that they are not held to pass policy, but to consider one or more allegations of misconduct. This requires members to listen to the evidence and arguments, and then form a view. One's prior views of the defendant may have some relevance, but it could easily be the case that a Council member's concerns about a defendant are answered in a meeting. A proxy vote would deprive the absent member of his or her ability to give the defendant any kind of hearing at all, let alone a fair one.

46. There is a possible distinction between a proxy vote with a mandate (such as voting against a particular motion) and a proxy vote with no mandate at all. With secret ballots, the enforceability of such a mandate is entirely within the conscience of the person to whom the vote is proxied. With a mandate a vote is put for or against a person's dismissal without having heard any evidence or argument at all. Without a mandate, one member of the Council is granted twice the influence and inferred wisdom upon the correctness of one side or another in the debate.

47. An example of the potential travesty to justice of permitting proxy votes in disciplinary hearings could be seen in imagining a jury trial, where two of the jurors skip the second half of the hearing and give their votes to other jurors, telling them to convict the defendant. Giving their vote without a mandate to vote one way or the other does not seem a great deal fairer either, providing certain jurors with twice the voting power without giving them the benefit of the

original jurors' views or reasoning about the facts when listening to the evidence or arguments and deliberating.

48. I could not see how the proxying of votes in disciplinary hearings would survive a test of fairness and would hold that it is unfair, unlawful and thus unconstitutional.

Prejudicial remarks in publications

49. The complaints about the conduct of the publication editors were separately sent to the Mediation Board, which so far is awaiting D's detailed response. Here one is considering merely whether any published article may have prejudiced the minds of the members of the Council in such a way that D could not receive a fair hearing.

50. The Felix article, on the front page, set out and summarised parts of the earlier version of the motion, not now used. The delay between the first edition of Felix and the Council motion has meant that the original effect of the article would have been somewhat diminished. There was no remark in the publications that would have, even if false, so prejudiced the members of Council that they could not set such thoughts aside in the meeting. Each assertion was relevant to D's appointment and D was given the opportunity to respond at the end. Opinion and conjecture were generally absent.

51. The same applies to the *Live!* articles. Some of the comments appended at the end contained some opinion and conjecture, though this did not seem to relate to D's conduct.

52. I would hold that members of Council, acting reasonably, would not be prejudiced by the contents of Union publications so far. I would also recommend that members of Council restrict their considerations to the evidence and arguments in the debate.

Union publications - guidelines

53. A discussion was held about whether the Union Court could impose guidelines, in pursuance of its role to ensure the Union (which acts as publisher of Felix and *Live!*) does not attract liability. Their editors were present for the discussion. Particular concern was raised over liability for defamation and harassment. The law concerning each was discussed in outline terms. The President was concerned that he would be potentially personally liable for the contents of the Union publications.

54. We came to the view that the editors had so far acted responsibly, and that the Press Complaints Commission Code of Practice, which already applies to Union publications under the Memorandum of Understanding, did not need any perfecting or additions by us. The story was one of public interest, and in discussing the motion, the less well-founded allegations were not referred to. The *Live!* editor commented that he did not want to censor articles already placed online, but accepted, as did everyone, that were the Union to be placed at specific risk of liability as a result of one, then it would have to be redacted or removed. This was the normal practice for independent publications.

Fair hearings – D to know the case against him or her

55. A standard rule of a fair hearing is that a person potentially subject to some form of sanction knows the case against him or her. This rule is expressed in regulations 4.4, 4.5 and particularly 5.12 and 5.16. The motion must state in writing the grounds of the complaints and be presented to the appropriate authority (in this case the President) seven College (i.e. working) days before Council; the President in this case must provide the defendant with a copy of the motion as soon as is practicable. The question of advance notice of this form has already been determined by the Court and is not revisited here.

56. However, various members of the Council will have had dealings with D, or heard accounts about D, which may have an impact upon how they choose to vote. This is in itself unobjectionable, as the Council is not a remote tribunal but the democratic body to which D is accountable.

57. However, since each of the members of the Council act as judges of D's fate, they may be in possession of facts or allegations about D which may persuade them to vote to dismiss D. Some

of these allegations may not have found their way into the motion, or may have arisen since the motion was drafted in its current form. D may or may not have an answer to these allegations, but without knowing them he or she is restrained from being able to answer them. This puts D in an invidious and unfair position. Any sensible member of the Council, if concerned about D's conduct in some respect, will want to hear what answer D has to say to such concerns.

58. In addition, some more complex or subtle allegations may require D to consider his or her response more carefully – any such new allegations should be provided to D in advance so that he or she can prepare for them. Leaving D to face such matters at the last minute does not assist justice.

59. I would hold that members of Council, if personally aware of or suspecting facts about D which would tend to make them support a vote of no confidence (or censure, were it to be amended as such) should ensure D is told about them. If members of the Council knowknow other such members are in possession of relevant information, they should also tell the Council. D should be told of more complex or subtle allegations in advance.

60. The question then arose as to whether this duty was reciprocal: that is, should members of Council who are aware of mitigating features or examples of good conduct not in the motion, which would make them vote against the motion, tell the proposer so that he can prepare responses. I do not envisage such a duty: firstly, the proposer's possession of office is not at risk, so his rights are not engaged in the same way as D's; secondly it requires those who may support D (which could also include D himself or herself) to assist in the prosecution against him or her, which is particularly unpalatable; and thirdly it may risk creating a number of ancillary issues for the debate which distract from the major ones set out in the motion.

61. I would hold that there is no duty upon members of the Council who know facts about D which may assist him or her in the motion to inform the proposer (or indeed anyone) in advance.

62. There was a previous version of the motion which contained a number of other items and allegations not present in the current version. It appears that this version was seen be some of the motion's seconders and leaked to Felix. In light of the previous views on the importance of D being aware of all allegations against him or her of which Council members are aware, it would be necessary that D is provided with a copy of that motion. This has now been done.

Factual inaccuracies in the motion and prejudicial assertions

63. There are various suggestions that parts of the motion are factually inaccurate, or cast aspersions on D's conduct that are not warranted. These include:

    1. D's report to the Executive Committee of the 21st September 2006, which was rejected, then revised by D and subsequentlysubsequently accepted;

    2. the fact that D has not (according to D's submissions to us) worked during a weekend, when D's contract states the D "is required to work such hours as are reasonably required to carry out the duties of the Office which entails working outside normal working hours and weekends";

    3. D's absence from the officer training events;

    4. breaches of financial regulations which may have been due to inadequate training;

    5. planning to take sick leave for improper reasons;

    6. the complaint about the election expenses;

64. The complaint about the election expenses, however, appears to be that D did not submit election receipts, to which D responded that was because he or she had not spent anything. This must have been something the returning officer and elections committee were aware of and accepted. The matter did not go to appeal, and any time limit on it has long since expired. I have difficulty seeing how this could be relevant to D's conduct in office and this motion.

Factual determinations

65. The primary fact-determining body in a motion of no confidence is the Council. There is no formal provision for facts to be 'screened' in advance, or indeed for an investigation – though one has clearly been undertaken here. The Council is best equipped to consider the allegations and come to a view on which it accepts as fact – which could be undertaken by amending the motion should it choose to do so.

66. The only circumstances in which the Union Court could step in would be if assertions made in the motionmotion were so unreasonable that the Council would or could not accept them as true. That is not the position with these, though we take no view as to their truth or otherwise. Some points, such as D not working on weekends, are only relevant to the extent that he or she would have been "reasonably required" to do – something which the Council is in the position to assess not least because the sabbatical officers report regularly to it.

67. Members of the Council, if intending to vote to dismiss D from office upon the basis of a disputed allegation, should believe it to be true, have looked for reasonable grounds to form that belief (that is, not by mere whim or suspicion), and be satisfied that there was some form of investigation, as far as would have been reasonable in circumstances, to ascertain the truth.

68. Dishonesty, which is an issue in the motion of no confidence, has a legal definition: members of Council should only proceed on the basis that D was dishonest if firstly, according to the standards of reasonable and honest people, what was done was dishonest; and secondly, if D would have realised what he or she was doing was by those standards dishonest.

Anonymous evidence

69. One part of the motion alleged that D had been seen somewhere when D asserted to the Council that he or she had been elsewhere, and thus that D had misled the Council. The evidence that D had done so was anonymous. This evidence was particularly dangerous as it was uncorroborated and practically impossible to refute, except for D to say that he or she wasn't there. This example did not need a decision from the Union Court as the proposer agreed to withdraw this allegation from the motion.

Confidentiality

Can Council go into closed session?

70. There has been concern that disciplinary measures of this type attract much publicity which puts those defending them in a particularly invidious position. The President was particularly keen that any measures to make the proceedings as discreet as possible were to be welcomed.

71. The difficulty with this is that the Union has a culture of openness, and the rules in particular are full of 'protections' to enforce it, so that decisions affecting its members are not routinely taken behind closed doors. There is no exception for disciplinary proceedings, with the minor novelty of a compulsory secret ballot.

72. The Council and Executive Committee are entitled – and are the only committees entitled (except for the Court which has its own rules) – to authorise themselves or others to go into closed session: regulation 4.46. When a meeting goes into closed session "only members and permanent observers may attend", though it may "allow other individuals to observe": regulation 4.43.

73. However, the Council is also bound by regulation 4.62, which says "any Full Member present may…[propose motions, amendments, *etc.*]" This does suggest that if any Full Member may propose business, any Full Member is entitled to attend the meeting. An alternative reading of the rule would be that such Full Members as are present may propose business, but Full Members not on the Council would need permission to attend from the Council itself, if in closed session. But this seems to be contrary to the spirit and intent of what the Council's purpose is, which is to permit the free participation of all interested Full Members of the Union: it is not an interpretation I would accept..

74. I am of the view that any Full Member may attend Council, even if in closed session. Those who are not Full Members may only attend if permanent observers, invited to do so, or are D's representative or 'friend'.

May the Council redact its minutes?

75. Regulation 4.43 states in part that

> "Proceedings in closed session shall remain confidential unless otherwise prescribed."

This clearly permits the redaction of minutes. However, since any Full Member of the Union is permitted to participate in the business of the Council, it follows that they may inspect the full unexpurgated minutes. There is no rule requiring those minutes to be online. The Council is entitled to make such exceptions as it wishes to the rule.

Role of the previous warnings

76. Regulation 5.13 requires the motion to:

> "…include details of previous warnings under Part B, or lack of them."

Part B permits warning warnings to be made by the appropriate authority, in this case the President, for conduct bringing a person within the ambit of Regulation 5. The President did this on the 5th December, in the form of a letter. There were a number of other minor warnings and discussions about conduct.

77. These warnings are referred to in the motion, under a sub-title (above paragraph 26) saying "Warnings not heeded…" The successive paragraphs allege that, following a warning based upon certain aspects of poor conduct, no change was forthcoming. This is a line of reasoning which is clearly acceptable. Whereas the Council should not normally take into account conduct which has been dealt with in a formal warning, it may do so if comparing conduct before and after the warning was imposed, if for that purpose only.

Evidence obtained from D's professional e-mail account

78. There was some concern over whether a set of e-mails sent by D referred to, but not quoted currently in full, in the motion were permissible. The e-mails were accessed by the proposer, in his guise as the holder of an account which had been granted permission to look at D's e-mails. This had been set up on D's *Outlook* account, and was not unusual: the proposer may also view another sabbatical colleague's account as well. The setting of rights to share folders can only be done by the owner of the account, and may be reversed at any time.

79. The proposer did not know and did not attempt to find out what degree of sharing rights he possessed; he knew he could look at e-mails, but had not tried to send any. He had never logged in under D's personal or professional account, and did not know those passwords in any event. His ability to look at D's account derived solely from access to his own professional account, and D sharing access to his or her professional e-mail account with the proposer's professional e-mail account... This ability does not extend to D's private e-mail account.

80. D had not been successful in securing the assistance of College ICT over the summer to complete the process of setting up his or her computer in the office, and the proposer had provided some assistance to do so. In this he was successful. In the course of setting up D's computer he saw that D's *Outlook* account had granted permission to his professional account to look at D's e-mail. He mentioned this to D. The proposer did not see this us particularly unusual, and nor do we. The sharing of D's folders had thus existed prior to D taking office.

81. D says that he or she did receive assistance from the proposer, but had not fully grasped the consequences of what he or she was told, as D was not particularly computer literate. The issue was not raised again until reference to D's e-mails appeared in the motion.

82. There was some discussion about whether D would have known that his or her electronic correspondence could be monitored. The College make this clear in its Information Systems Security Policy (paragraph 18 and code of practice no. 7), and pop-up notices appear on some, but not all College administered computers. These notices have been suppressed on Union

administered machines. A student who registers for an account with the College is supposed toto sign a document which includes notification of the College's authority to monitor communications, though D insisted that no such document had been signed. ICT code of practice number 8 sets out a procedure and various tests for approval of monitoring by an individual to be granted.

83. However, if a person consents to another colleague reading their e-mail messages, then the questions of permission to monitor and intercept fall away. Consent permits interception. We were of the view (by a majority) that D, being a post-graduate student at Imperial College, and having attended while the proposer had set up his or her machine, and it appears paying reasonable attention, would have been aware that the proposer could see D's e-mails. No comment was made at that point, as the matter was uncontroversial. Although the issue was not raised again, we do not see this making a difference.

84. I would hold that D was aware of and had, in effect, consented to the proposer viewing his or her professional account. This does not prevent the Council from taking a different view of the facts and amending to remove this allegation, should they wish.

Union Court's jurisdiction to act

85. The Union Court's jurisdiction to act to apparently alter the regulations of the Union stem from its role as the sovereign body for their interpretation, along with a restriction upon it only to act according to law. Regulation 7.54.2 states that the Union Court may not make any order "requiring, in the opinion of the Court, the Union or any person to act unlawfully, including any contractual breach or tort".

86. If, in our opinion, the no confidence motion was unsuspended and left to return to the Council, without making certain orders in relation to the interpretations of regulations, then the Union would be acting in breach of a legal obligation upon it, namely natural justice: it would thus be acting unlawfully. The Union Court has thus taken what appears to be minimum number of steps necessary to bring the procedure in line with the Union's legal obligations. Anything further can only be in the gift of the Council.

Position of trustees

87. A concern was raised by the President that since D was trustee of the Union he or she could only be removed by other trustees, and that the Council had no jurisdiction to act. D is a "trustee" under the constitution, by virtue of automatically being a member of the Executive Committee (constitution section 10.5.a) which must "act as trustees of the Union" (section 10.4.l); further mention of its members' role as trustees is found in regulation 1.4.

88. The consequences of the President's line of reasoning would be that members of the Executive Committee would not be removable by anyone outside their own number. This does seem an extraordinary proposition. It is one of sufficient importance that is should be considered, though I am confident that it does not apply.

89. Firstly the constitution sets out a regime for the removal of individuals from their posts: section 17.1 explicitly provides for dismissal of Union Officers, of which D is one. Regulation 5 sets out the procedure, which so far has been complied with, and one result of which may be dismissal.

90. I note *Tudor on Charities* (paragraphs 5 – 051, 9th Edition, 2003, *Sweet & Maxwell*) which says that a constitution of an unincorporated association may set out the circumstances in which a member of the governing committee may lose his seat. It indicates that the rules of natural justice must be complied with, a matter we have already considered in some detail. The law on trusts also permit the removal of a trustee by an express or implied power, which could be in the governing document (and is, in this case). An alternative analysis is that it is only D's office that provides D with the position of trustee: when D vacates office, the position of trustee vacates automatically.

91. The position may have been different were the Union to have been set up as a trust under a duly executed trust deed, however it has not been and it is not a matter to which we need pay attention. The definition of "trustee" can also vary. For example "charity trustees" have a

specific definition in the Charities Act 1993 as those having "general control and management of the administration of a charity". It does not follow that the Union becomes a trust. Status as a trustee is of significance in that a person may be sued in his own name as a result of action by the Union – however the courts are not restricted to what the constitution defines as trustees; they may hold other people to be constructive trustees and thus also liable.

92. This does raise further point of significance, to which reference can be found in *Tudor*, paragraph 6 – 037. This, incidentally, asserts that members of a committee of an unincorporated association who do not hold property are not, in law, trustees (despite the "charity trustee" definition in the Charities Act 1993, s.97(1)). However, they are probably bound by a "fiduciary duty". As such any person exercising control and management of the Union, even if only through exercising a vote, must act in the interests of the Union as a whole. Any voting powers should only be used for the reasons they were given (in this case "misconduct, negligence or failure to maintain the confidence of the Council"; constitution section 17.1.1). The fact that this rule would appear only to apply to the conscience of a member of the Council does not reduce its importance.

The DEPUTY COURT CHAIR:

93. I agree.

Sebastian Tallents:

94. I agree in most respects with the opinion of the Court Chair. I respectfully dissent on the matter of the voting rights of the proposer and defendant, and whether D had provided the proposer with permission to read D's e-mails.

95. The constitution does not specifically state that the proposer and defendant should lose their vote in a motion of no confidence, and it has always been presumed they retain their own votes. Furthermore, simply removing the right of the proposer to vote will simply mean that a would-be proposer of a motion of no confidence will get a non-voting member to bring the motion to preserve their vote. No such option is available to the subject of a no confidence motion. If there is seen to be a deficit of justice in both parties retaining their vote, simply removing the votes of proposer and subject will not remedy it.

96. More importantly, while a motion of no confidence is similar in many ways to a trial, and ought to conform to principles of natural justice, it should be seen first and foremost as a political motion in which council as a whole is voting on whether they have confidence in the officer in question. This may not actually require a breach of regulations: Ideally the option to bring a no confidence motion against an officer to remove them from office and their position as a trustee for political reasons (for example failure to implement, or acting directly in contradiction to their manifesto pledges) should be available, in which case the no-confidence motion would not resemble a trial but would be purely political over policy direction. In such a political dispute, I do not see why supporters of either side of what is at root a question of policy should lose their vote.

97. I do not think that both subject and proposer voting is sufficiently against the principles of natural justice (nor that removing them would improve the situation sufficiently greatly) in this case to justify interfering with Council's voting procedures and set a precedent on this matter. However, I would recommend that Council consider a revision of the censure and no confidence procedures to decide for themselves if they should be seen as political or a trial, and to differentiate between the various positions held by a sabbatical officer as officer, trustee and employee.

98. In relation to the e-mails, I am concerned that should the case be that the Deputy President (Finance & Services) can be considered to be the System Controller and the partial sharing of accounts can be considered interception, then the verbal communication between the DP(F&S) and D when configuring his or her account as reported to the court does not constitute a reasonable warning that D's professional email was being monitored for the present purposes. If it is the case that the College is considered to be the System Controller, then D would not have had reasonable warning either, as formal ICT procedures were not followed, nor is it necessarily obvious that Union computers are also subject to ICT rules.

Eleanor Jay:

99. I agree in most respects with the opinion of the Court Chair. I respectfully dissent on the matter of the proposer being informed about mitigating facts about D, and join in Lara West's dissent.

Lara West:

100. I agree in most respects with the opinion of the Court Chair. I respectfully dissent on the matter of the proposer being informed about mitigating facts about D.

101. I think that both the proposer and D should be informed of any facts about D which are not included within the motion. As I believe the provision of these to both parties, rather than just D, is required for a fair hearing.

DIRECTIONS:

1. None.

ORDERS:

1. It is declared that a subject of a motion of censure or no confidence is entitled have it heard according to the rules of natural justice, according to the common law, which overrides the Union's constitution.

2. It is declared that the proxying of any vote in relation to a motion of censure or no confidence under Regulation 5, at the Council or elsewhere, is unlawful and unconstitutional.

3. It is declared that the exercising of a vote by the proposer or subject of a motion of no confidence or censure under Regulation 5, at the Council or elsewhere, is unlawful and unconstitutional. [*By majority*]

4. It is declared that members of the Council who have knowledge or suspicion of any adverse fact or allegation about D which would tend to make them vote against him or her, or who have knowledge that other members do, are under a duty to tell D in order that he or she may respond to them.

5. The evidence of D's e-mails, mentioned in paragraph 6, is permissible. [*By majority*]

6. The motion of no confidence against D sent to the President on Thursday 11th January 2007 and suspended by the Union Court on the 17th January 2007 is constitutional and re-instated.

RECOMMENDATIONS:

1. The publication editors should consider carefully the legal consequences of what they publish or allow to be published, particularly in relation to the law of defamation and harassment.

2. Members of the Council should be careful to keep an open mind and only to consider the merits of the motion upon the evidence and argument they hear at the meeting.

3. The part of the motion relating to election expenses and anonymous evidence should be ignored. The conduct mentioned in the formal warning should be taken into account only to the extent that it continued after the warning was made, in order to demonstrate that it was not complied with.

4. Members of the Council are likely to be under a fiduciary duty to the Union and its members. This means they must exercise their vote upon the Council for the purposes for which it was given: in a case of a motion of no confidence or censure, only to vote for it if they find there to be misconduct, negligence or failure to maintain the confidence of the Council. It must also be exercised in good faith, and not capriciously or arbitrarily.

5. Members of the Council are urged not to ignore the orders made above, as a motion passed after they have been ignored is highly likely to be quashed.

Each direction, order and recommendation was approved unanimously, except orders 3 and 5, to which Sebastian Tallents dissented.