

Information regarding why it is not possible for UCU to support the current crowd-funded USS case being pursued by two UCU members.

In summary:

1. the case has never been considered under the union's rules or its Legal Services Scheme and such consideration has never been sought or requested by the individual claimant members or their branches
2. the union, should it provide funding for the case being run outwith its own Legal Services Scheme, would not be a 'pure funder' and as such would be at risk of a costs order.

For these reasons the UK officers decided unanimously that it would not be possible to proceed with support for the case and this decision was endorsed by a majority of trustees.

The question that needed to be addressed was whether the union could support the case while avoiding risk to the union's resources of a significant costs order.

UCU received legal advice on the issue of whether the union would, in contributing to the legal expenses of this case, be a 'pure funder'. The advice has not been in relation to the merits of the case itself.

The advice received from counsel on the 'pure funder' point is that the union would not be a 'pure funder' were it to support the case financially.

In other words, the union would be at risk of a costs order in the event that the case was lost, and if a costs order was made, UCU may have to pay for the entire legal costs of both parties, USS and the claimants.

A costs order is a legally binding instruction issued by a court or tribunal concerning the costs of the proceedings or part of them, for example that one party should pay part or all of another party's costs. Here, if the union provided financial support for the case, USS could apply for and could obtain an order that the union pay USS their legal costs in the event that USS successfully defended the case. This would be in addition to the claimant members' costs of bringing the case.

The note below explains in more detail the reasons for the decision regarding support for the case, but the fundamental point to state is that **branches are instructed not to make any contribution**, or, if any has been made in the past, any further contribution to the legal expenses that will be incurred in taking the case.

The union legal scheme

The case has never been considered under the terms of the union's legal scheme as there has never been any request for legal support to be provided under the scheme by the individual claimants or their branches. This means that the union has never had the usual assessment and control of the case at any stage. The case has not been considered by the legal panel for the purposes of a decision as to whether legal services should be provided by the union.

The issue with this is that the rules of the union at rule 4.5 set out the process for any legal case

to be considered for support and thereafter supported, and rule 4.6 states what shall not and cannot be done if this process is not followed:*4.6 The Union shall not be bound to provide any assistance to any member who commits to a course of action without having obtained the Union's prior authority; and the Union shall not be bound to reimburse or indemnify any member in relation to any costs or expenses (including legal costs and expenses) incurred without the Union's prior authority.*

In this case, the matter has never been put through the legal scheme for consideration and as a result it is outside the union rules. The union is therefore prevented by rule 4.6 from backing it.

The question of 'pure funder' and the potential impact on the union

A major issue for the union here is whether it could, in the event of it making a financial contribution to the legal costs, be seen to have an interest and/or control that placed it outside of the 'pure funder' status required to protect it from an adverse costs order in the event the case fails.

A 'pure funder' is someone who contributes to the costs of a case but has no specific personal interest in its outcome (i.e. does not stand to benefit from a successful outcome) and exerts no control over how the case is run.

Whilst the individual claimants do not seek to have the union have any part in the running of this case, it is arguable that the union does indeed have a specific interest and a potential benefit in the event that the case succeeds. So many members of the union, and members of staff, are members of USS, that the union would clearly have a specific interest in the outcome.

Counsel examined the current position on 'pure funder' status and cases previously decided. The conclusion of this advice was that the union was not a pure funder. The union would therefore be at risk of being subject to a costs order against it in the event that the case was lost. The risk of a costs order would be small if:

- the union always makes clear that it is only a supporter of the case, rather than having any involvement in the case or any control over how it proceeds; and
- the unions financial support forms only a small proportion of the funds raised overall; and
- no funds were held in union accounts; and
- the union avoids engaging in any campaigns which might be seen as aligning itself with the case.

The more financial contribution the union makes, the higher the risk. The more a financial contribution is made in conjunction with any sort of campaign in support of the case, the higher the risk. If the union made the level of contribution being sought by the claimants, the legal advice is that the union would then be entirely taking on responsibility for costs, and if the costs exceeded the sums estimated by the claimants, it would be likely that a costs order would create union liability for any additional sums too.

The impact of this advice is that the union takes a significant risk in terms of its funds (which of course comprise of all members' money) on a case that falls outside the union's own rules and over which it has no control.

It is on the basis of these points - that the case is being pursued outside of union rules, and that supporting the case would put the union at risk of very significant costs - that the UK officers decided unanimously that it would not be possible to proceed with support for the case (a decision endorsed by a majority of the union's trustees); and it is on this basis that **branches are now instructed to refrain from contributing union funds to the case.**

Janet Farrar, UCU president

Steve Sangwine, UCU honorary treasurer