

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION
MADE UNDER SECTIONS 55(1) AND 108A(1) OF THE TRADE UNION AND
LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

MR R RAWLINS

v

BRITISH MEDICAL ASSOCIATION

Date of Decisions:

2 February 2007

DECISIONS

Upon application by Mr Rawlins (“the Claimant”) under section 55(1) and section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

- (i) I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the British Medical Association breached section 52(4) of the 1992 Act by failing to send members a copy of the scrutineer’s report dated 21 April 2006 on the 2006 elections to the Association’s Council within three months of its receipt.
- (ii) I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the British Medical Association breached section 52(5) of the 1992 Act by failing to provide members with a statement that it would, on request, supply any member with a copy of the scrutineer’s report dated 21 April 2006, such statement to accompany the copy of the scrutineer’s report or its notification to be sent in accordance with section 52(4) of the 1992 Act.
- (iii) I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the British Medical Association breached section 52(6) of the 1992 Act by failing to supply a copy of the scrutineer’s report dated 21 April 2006 to Mr Rawlins pursuant to his requests made by e-mail on 1 May 2006 and letter on 30 May 2006.
- (iv) I refuse to make the declaration sought by the Claimant that on or around 28 April 2006, the British Medical Association breached paragraph 35 of the Standing Orders of Council 2005-6 by failing to inform Mr Rawlins, as a candidate in the 2006 election to Council, of the detailed results of that election as notified to candidates on 21 April.

- (v) I refuse to make the declaration sought by the Claimant that on or around 28 April 2006, the British Medical Association breached paragraph 40 of the 'Information for Candidates and Electoral Rules' by failing to notify Mr Rawlins, as a candidate in the 2006 election to Council, by post of the result of the election as allegedly declared on 21 April and the breakdown of those results, before the results of the election were publicised.

REASONS

1. Mr Rawlins is a consultant orthopaedic surgeon and an active member of his trade union, the British Medical Association ("the Association" or "the BMA"). By an application dated 24 July 2006, Mr Rawlins made five complaints against the BMA arising out of the elections to its Council ("the Council") in 2006. Following correspondence with Mr Rawlins, the complaints which Mr Rawlins wished to pursue were identified in the following terms:-

Complaint 1

'On or around 21 July 2006, in breach of section 52(4) of the 1992 Act the British Medical Association failed to send members a copy of the scrutineer's report on the election to the Association's Council 2006-2008, declared and notified to candidates on 21 April and published on or about 22 April 2006, within the period of three months after it received the report by either of the methods shown in subsections (a) and (b) of section 52(4) of the 1992 Act.'

Complaint 2

'On or around 21 July 2006, in breach of section 52(5) of the 1992 Act the British Medical Association failed to provide a statement with the scrutineer's report of the election to the Association's Council 2006-2008 declared and notified to candidates on 21 April and published on or about 22 April 2006, as required by section 52(5) of the 1992 Act, that the union will, on request, supply any member of the union with a copy of the report.'

Complaint 3

'On or around 21 July 2006 in breach of section 52(6) of the 1992 Act the British Medical Association failed to supply a copy of the scrutineer's report, submitted to the Association on or around 21 April 2006, declared and notified to candidates on 21 April and published on or about 22 April 2006, to Mr Rawlins as requested by Mr Rawlins e-mail of 1 May 2006 and letter of 30 May 2006.'

Complaint 4

'On or around 28 April 2006, in breach of Part 5 section 35 of its Standing Orders of Council 2005-6 the British Medical Association failed to inform Mr Rawlins, as a candidate in the election to the BMA Council 2006, of the detailed result of the election as declared and notified to candidates on 21 April and published on or about 22 April 2006, before they were declared and published.'

Complaint 5

'On or after 28 April 2006, in breach of paragraph 40 of the Electoral Rules of the Association the BMA failed to notify Mr Rawlins, as a candidate in the election to the BMA Council 2006, of the result of the election as declared and notified to candidates on 21 April and published on or about 22 April 2006, by post and the breakdown of the results before the results of the election were publicised.'

2. I investigated the alleged breaches in correspondence and a hearing took place on 11 January 2007. At the hearing, Mr Rawlins represented himself and called no other witnesses. He provided a witness statement which incorporated his submissions. The Association was represented by Mr Tim Kerr QC, instructed by Mr Jonathan Waters, Director of the Association's Legal Services. Evidence for the BMA was given by Mr Tony Bourne, Chief Executive and Secretary, Dr Ian Wilson, Chairman of the Organisation Committee, Ms Jacqueline Foukas, Head of the Council Secretariat, and Mr Adrian Wilkins, a Senior Consultant of Electoral Reform Services. Each of these witnesses provided a witness statement. A 300 page bundle of documents was prepared for the hearing by my office. Also in evidence, but separately, were the 'Memorandum and Articles of Association and Bye-laws' of the BMA, the 'Standing Orders of Council and Decisions of Council 2005-06' and the 'Information for Candidates and Electoral Rules' for the 2006 Council elections. Mr Kerr QC provided a skeleton argument and copies of a number of authorities.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows.
4. The BMA is both a trade union and a company limited by guarantee. This is an unusual status but one that the BMA is entitled to hold by virtue of section 117(2) and (3) of the 1992 Act, as a special register body. The affairs of the BMA are governed principally by its Memorandum and Articles of Association and its Bye-Laws. The Articles of Association provide for the general control and direction of the policy of the Association to be vested in "the Representative Body" which shall hold an annual meeting called "the Annual Representative Meeting" ("the ARM"). In between such annual meetings, the power to formulate and implement policy is vested in Council, the membership of which is elected in accordance with the bye-laws. Mr Rawlins' application concerns the elections to Council in 2006.
5. In 2004, the ARM decided upon a constitutional review, including a review of the process of electing the members of Council. The Organisation Committee, chaired by Dr Wilson, conducted such a review and its proposals were submitted to Council in March and May 2005. Council agreed to a wide package of reforms being submitted to the ARM to be held in Manchester in June 2005. The ARM in 2005 adopted the majority of the proposed reforms. It agreed that Council would consist of a number of non-voting ex-officio members and 34 voting members. Bye-law 56(2), as eventually adopted, provides in effect that Council shall have at least one voting member from each of the Association's ten geographical election zones and one from each of the Association's 11 branches of practice. However, special provision was made for medical student members and retired members. In the case of these two branches of practice, bye-law 56(2) now provides, "*Medical student members shall be limited to two elected members and retired members to one*

elected member." The correct interpretation of this sentence became central to the determination of Mr Rawlins' complaints.

6. Both parties adduced evidence to show the genesis of the above sentence in bye-law 56(2). The original proposal of Council was that both retired members and medical students should be restricted to just one voting member, on the basis that the members of neither category are active in medical practice. However, prior to the ARM, various amendments were proposed to the effect that the number of voting medical student members be increased from one to two. These and other related amendments were grouped together and considered by the Agenda Committee. The one chosen for debate was that from the Birmingham Division, which was in the terms set out above. It was carried and became a part of bye-law 56(2). No one spoke against the motion and there was no call for the motions that were not debated to be restored to the order paper. Dr Wilson responded on behalf of the Organisation Committee. He recommended that the amendment be supported, explaining that the effect of it would be to guarantee medical students at least one seat on the Council but limit them to a maximum of two seats. He explained this by reference to a definition he had found in an American dictionary; namely that "*limited is a point or level beyond which something does not extent or pass*".
7. The first Council elections to be held under the new arrangements were in 2006. Electoral Reform Services ("ERS") was appointed as the scrutineer on 20 October 2005. Paragraph 32 of Standing Orders provides that the Chief Executive/Secretary of the BMA is to be the returning officer. At all material times this was Mr Bourne. The new arrangements provide for the elections to be conducted under the single transferable vote system ("STV"). This system enabled voters to rank the candidates by preference, in theory from one to 34. The complex part of such elections is the counting. It is not necessary to describe this process in detail, other than to record that it proceeds in stages by a consideration of individual candidates; firstly the most successful candidates and then the least successful, redistributing some or all of their votes in accordance with a particular formula as they are successful or are excluded. In these elections the process was made even more complex by the presence of 'voting constraints' and 'guarded candidates'. These were the means to ensure that there would be at least one person elected from each of the geographical zones and each of the branches of practice, no matter how few votes that person achieved. The procedure required a voting constraint to be applied at the stage when a candidate would have been excluded but for the fact that he or she was the sole remaining candidate from that geographical zone or branch of practice. That person then became a guarded candidate. ERS has considerable experience and expertise in the conduct of elections under the STV system.
8. In January 2006 Ms Foukas, Head of Council Secretariat, prepared a document entitled "Information for Candidates and Electoral Rules" in consultation with ERS, Mr Bourne and Dr Wilson. A similar document had been prepared before each Council election for distribution to anyone interested in becoming a candidate. The document was not submitted to Council for approval. It

described the position of medical students in words very similar to bye-law 56(2), namely “*Medical students will be limited to two elected members...*”.

9. The period for nominations closed on 17 February 2006. There were 93 candidates for the 34 places. Voting papers were issued on 27 March together with ‘instructions for voters’ which informed voters how they should indicate their preferences and that the elections would be counted by the STV method. Voters were also sent a booklet entitled ‘Candidates Details and Election Statements’, which gave information for voters. The drafting of this booklet was said to be an office exercise in consultation with ERS. In its introduction it described the branch of practice constraint in the following terms: “*A minimum of one elected member from each branch of practice group, other than retired members, who will have one member, and medical students who will have two members*”. Voting closed on 13 April.
10. ERS completed its count by Friday 21 April 2006. This was necessarily a complex process which ERS performed with the assistance of optical character recognition technology and computers. The detailed breakdown of the count is contained on a spreadsheet which occupied 30 pages of the bundle and described 67 stages of vote reallocation. On 21 April ERS emailed the BMA with its scrutineer’s report and supporting spreadsheet. The report named the 34 successful candidates, including Mr Rawlins. By letters dated 21 April, Mr Bourne advised Mr Rawlins and each of the successful candidates that they had been elected. The BMA did not give any wider publicity to this result. It did not appear on the BMA website.
11. Over the weekend of 22/23 April 2006, Ms Foukas had a closer look at the results. She observed that the medical student constraint had been interpreted so as to require the election of two medical students. The two medical students with most votes had become ‘protected candidates’ no matter how few votes they achieved. Ms Foukas considered this to be a clear error as, in her view, the constraint should have been applied to protect the candidature of only one medical student.
12. On Monday 24 April 2006, Ms Foukas raised this matter with Mr Bourne and ERS was consulted. ERS acknowledged that it had applied the medical student constraint so as to secure the election of two medical students. In evidence, Mr Wilkins explained that he had followed the description of the constraint in the booklet ‘Candidates Details and Election Statements’. However, upon being shown bye-law 56(2), ERS accepted that what it had done did not accord with the bye-law and Mr Wilkins now accepts that ERS had applied the constraint in error. ERS advised the BMA that the medical student with the lowest vote, and who would not otherwise have been elected, was Mr Chung and that the candidate who would have been elected, if it had not been for the error, was Dr Fielden. Ms Foukas consulted internally before telling these two candidates of the error that had occurred. During the course of the afternoon of 24 April a revised list of successful candidates was prepared, which was posted on the BMA website. Mr Rawlins remained elected. At this stage the BMA had not received a revised scrutineer’s report.

13. On Tuesday 25 April 2006, the BMA asked ERS for a full breakdown of the amended list of successful candidates. It was only at this stage that ERS stated that in order to prepare such a breakdown it was necessary to conduct a partial recount from the stage at which the second of the two medical students had become a protected candidate. This proved to be at stage 34 of the count. ERS concluded its recount on 26 April and prepared a second scrutineer's report of that date in which the successful candidates were listed. The effect of the redistribution of the preferences, following the exclusion of Mr Chung, was that Mr Rawlins was no longer elected. He was replaced by Dr S Chaudhry. Mr Rawlins was the runner-up with the highest number of votes.
14. On Thursday 27 April 2006, ERS e-mailed the BMA with its further report and the supporting spreadsheet. The BMA immediately withdrew the previous list of successful candidates from its website. Ms Foukas unsuccessfully attempted to contact Mr Rawlins to inform him of the outcome of the partial recount.
15. On Friday 28 April 2006, Ms Foukas and Mr Bourne both spoke to Mr Rawlins, explaining that he was no longer elected and why. Later that afternoon ERS e-mailed the BMA to confirm the result of the recount and that there was no need for a further recount. The e-mail states,

"I can confirm, following the re-count of the Election to Council 2006-2010 that Electoral Reform Services conducted in order to take account of the change of wording of the Medical Students' Branch of Practice constraint, that there is no need to conduct a further re-count. We are satisfied that our certified report of voting dated 26 April 2006 meets the changed constraint, it is therefore the definitive version, and it should be taken as superseding the original version dated 21 April 2006".
16. On the 28 April 2006 the BMA e-mailed all candidates, attaching a list of successful candidates and the relevant spreadsheet. The e-mail described the error which had arisen out of the misapplication of the medical student constraint and a further error that had been identified but which is not relevant to these proceedings. The corrected list of successful candidates (but not the breakdown of results) was posted on the BMA website that afternoon.
17. By a letter dated 30 April 2006, Mr Rawlins complained to Mr Bourne about his removal from the list of successful candidates and an exchange of correspondence ensued. By an e-mail of 1 May and a letter of 30 May, Mr Rawlins asked to be supplied with a copy of the scrutineer's report in connection with the Council elections. In his letter of 30 May, Mr Rawlins referred expressly to the scrutineer's report produced on 21 April. Mr Bourne did not accede to this request on the grounds that the revised scrutineer's report dated 26 April had superseded the original version.
18. On 19 June 2006, the BMA posted on its website a version of the scrutineer's report dated 26 April together with a statement that the report of ERS was available free of charge to members upon request.

19. Mr Rawlins first contacted the Certification Office regarding this matter on 8 July 2006 and his registration of complaint form was received on 25 July.

The Relevant Statutory Provisions

20. The provisions of the 1992 Act which are most relevant for the purpose of this application are as follows:-

S52 Scrutineer's Report

- (3) *The trade union shall not publish the result of the election until after it has received the scrutineer's report.*
- (4) *The trade union shall within the period of three months after it receives the report either-*
- (a) *send a copy of the report to every member of the union to whom it is reasonably practicable to send such a copy; or*
 - (b) *take all such other steps for notifying the contents of the report to the members of the union (whether by publishing the report or otherwise) as it is the practice of the union to take when matters of general interest to all its members need to be brought to their attention.*
- (5) *Any such copy or notification shall be accompanied by a statement that the union will, on request, supply any member of the union with a copy of the report, either free of charge or on payment of such reasonable fee as may be specified in the notification.*
- (6) *The trade union shall so supply any member of the union who makes such a request and pays the fee (if any) notified to him.*

S.55 Application to Certification Officer

- (1) *A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.*
- (2) *On an application being made to him, the Certification Officer shall –*
- (a) *make such enquiries as he thinks fit, and*
 - (b) *... give the applicant and the trade union an opportunity to be heard, and may make or refuse the declaration asked for.*

108A Right to apply to the Certification Officer

- (1) *A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) and (7).*
- (2) *The matters are-*
- (a) *the appointment or election of a person to, or the removal of a person from, any office;*
 - (b) *...*

The Relevant Union Rules

21. Paragraph 56(2) of the bye-laws of the BMA provides as follows:

56(2) "Council shall consist of 34 voting members. Council may from time to time increase the number of voting members up to a maximum total of 38. Any such additional members shall have a term of office not exceeding two years and their number shall not be taken into account for the purposes of bye-law 59.

Voting members will be elected from a single UK constituency by secret ballot by single transferable vote.

Voting members of Council shall be drawn from all UK electoral zones (as defined in paragraph 2.1 below) and from all branches of practice (as defined in paragraph 2.2 below). Medical student members shall be limited to two elected members and retired members to one elected member."

22. Paragraph 35 of the document "Standing Orders of Council and Decisions of Council 2005-06" provides as follows:

35. "Every candidate in an election to Council shall be informed of the detailed results of the election and these results may also be published."

23. In a document "Information for Candidates and Electoral Rules - Elections to the Council of the BMA for the sessions 2006-10", paragraph 40 provides as follows:

40. "The candidates in the election will be notified of the result by post and the breakdown of the results will be made available to them before the results of the election are publicised. Please note that a detailed breakdown of all the results will also appear on the BMA's website and will be made available to the press for publication."

Conclusions

Complaint 1

24. Mr Rawlins alleged that the BMA had breached section 52(4) of the 1992 Act by having failed to send members a copy of the scrutineer's report dated 21 April 2006.

25. Section 52(4) of the 1992 Act provides:

52(4) The trade union shall within the period of three months after it receives the report either-

- (a) send a copy of the report to every member of the union to whom it is reasonably practicable to send such a copy; or*
- (b) take all such other steps for notifying the contents of the report to the members of the union (whether by publishing the report or otherwise) as it is the practice of the union to take when matters of general interest to all its members need to be brought to their attention"*

Summary of Submissions

26. Mr Rawlins submitted that the true result of the 2006 Council Elections was declared by ERS in its report dated 21 April in which he was named as a successful candidate. He argued that, as this was the true result, it was that scrutineer's report that the BMA was required to circulate by section 52(4) of the 1992 Act. In Mr Rawlins' submission, ERS did not err in the way it had originally applied the medical student constraint to the counting process. He maintained that the proper interpretation of the relevant part of bye-law 56(2) was that two medical students must be elected. In Mr Rawlins' submission the expression "*shall be limited to two members*" means that there shall be two members; the purpose of the expression being to exclude any lesser or greater number. He supported this proposition by reference to the motions to the 2005 ARM which were not debated but which called for the number of elected medical students to be increased from one to two. He submitted that the motion which was debated and carried should be interpreted in accordance with the meaning of those which were not debated as it must be presumed that the lead motion was chosen to reflect the meaning of the others. Mr Rawlins also argued that once the BMA had notified him of his result in the ballot, the BMA could not declare any different result. He supported this submission by reference to the case of *Douglas v GPMU* (1995) IRLR 426. He further submitted that after Mr Bourne, as the returning officer, had notified him of his successful election by letter of 21 April, Mr Bourne's role as returning officer was complete and that he had no subsequent authority to rescind the original result and order a partial recount. Mr Rawlins contended that if there was any such authority, it lay with Council, not the former returning officer. Further, Mr Rawlins submitted that the BMA had changed the relevant voting constraint. He supported this contention by reference to the statement in the booklet "Candidates Details and Election Statements" to the effect that medical students would have two members and also to the e-mail from ERS dated 28 April in which Mr Wilkins referred to the "changed constraint". Mr Rawlins argued that the constraint was changed impermissibly, confusingly and without the authority of Council.
27. Mr Kerr QC, for the BMA, submitted that the result of the 2006 Council Election was the one declared on 28 April 2006 and that this result had been properly notified to members on 19 June when it was put on the BMA website. Accordingly, it was the BMA's case that there had been no breach of section 52(4) of the 1992 Act. Mr Kerr argued that the proposition that the result of the 2006 Council elections was that contained in the ERS report of 21 April was wrong both in law and principle. As a matter of law, he submitted that the plain meaning of the relevant words of bye-law 56(2) was that there should be no more than two elected medical students, no matter how many votes they achieved, and no less than one elected medical student, no matter how few votes he or she achieved. Mr Kerr submitted that this meaning was supported by Dr Wilson's evidence of the debate at the 2005 ARM and paragraph 14 of the document "Information for Candidates and Electoral Rules". He commented that the reference to there being two elected student members in the booklet "Candidate Details and Election Statements" was a regrettable error but that this was information about how ERS would count the

vote, not an instruction to voters. He referred to the separate instruction to voters which accompanied the voting papers and which asked members to mark their preferences numerically. In these circumstances, Mr Kerr submitted that the results contained in the ERS report of 21 April were arrived at in breach of the bye-laws of the BMA, properly interpreted, and it was therefore the duty of the scrutineer and returning officer to take such steps as were necessary to achieve a result which correctly applied the bye-laws. He argued that the scrutineer was a figure of public law and that, as such, he was entitled to correct a mistake in the exercise of his public functions. He further argued that a returning officer's functions since time immemorial have included specific responsibilities for ordering a recount where necessary due to error; *Morgan v. Simpson* (1975) 1 QB 151. Mr Kerr submitted that the role of the scrutineer and returning officer was to secure a result was declared that reflected the votes of members in accordance with the rules of the BMA. He argued that there was no allegation of any voting irregularity. The only issue related to the counting of votes and the correct application of the bye-laws. As a matter of principle, Mr Kerr commented that, if the BMA had given effect to the ERS report of 21 April, it would have not only breached the bye-laws but it would have failed to give effect to the democratic wishes of the membership under the rules. He argued that I should be slow to adopt a construction that had the effect of defeating the democratic wishes of the members, so expressed.

Conclusion - Complaint 1

28. Mr Rawlins' complaint of a breach of section 52(4) of the 1992 Act turns upon the correct analysis of the result of the 2006 Council election. In order for his complaint to succeed he must establish that the correct result is that contained in the scrutineer's report of 21 April 2006. The BMA accepted that it did not send a copy of this report to members.
29. In determining the result of this election, it is necessary that I consider the correct interpretation of bye-law 56(2), so far as it concerns the medical student voting constraint. In my judgment, the straightforward literal meaning of the expression "*Medical student members shall be limited to two elected members...*" is that there shall be no more than two elected student members. The expression defines the upper limit of elected medical students. It does not prescribe that there shall be two elected student members. This is supported by the definition of the word 'limited' in the Shorter Oxford English Dictionary, namely "confined within definite limits; restricted in scope, extent, amount etc". In my judgment, there is nothing in the context in which these words appear to suggest any other meaning and it is therefore not appropriate that I look for guidance to the work of the Agenda Committee or the debate at the ARM. If I were to do so, I would find that the ARM supported the meaning put to it in debate by Dr Wilson, namely that 'limited' connotes "a point or level beyond which something does not extent or pass". In consequence, I find that the BMA would have acted in breach of bye-law 56(2) had it given effect to the outcome of the election contained in the scrutineer's report of 21 April, in which the votes were counted so as to require the election of two student members.

30. Mr Rawlins submitted that, even if I found against him on the interpretation of bye-law 56(2), I should still uphold his complaint as the BMA was obliged to give effect to the result as declared in the scrutineer's report of 21 April 2006, whether flawed or not. I disagree. First, the scrutineer does not normally declare the result of a trade union election. The scrutineer makes a report to the trade union on the basis of which the trade union declares or, in the words of section 52(3) of the 1992 Act, '*publishes*' the result. Contrary to Mr Rawlins' original evidence, I find that the BMA did not publish the list of successful candidates as contained in the scrutineer's report of 21 April on its website. Mr Bourne wrote to the successful candidates and no more. No list of successful candidates was published in any form on 21 April. In my judgment, the actions of Mr Bourne did not amount to a formal declaration or a publication of the results. I find that the letters he sent to the candidates were sent to comply with paragraph 40 of the document 'Information for Candidates and Election Rules'. This provides that candidates will be notified of the result by post and the breakdown of the results will be made available to them before the results of the election are publicised. This indicates that the prior notification of the candidates was intended to precede the publication of the results.
31. On Monday 24 April 2006, Mr Bourne discovered that the outcome set out in the scrutineer's report of Friday 21 April was the product of a flawed count. Following a conversation with ERS, a corrected list of successful candidates was quickly prepared and this revised list was posted on the BMA website later that day. Mr Rawlins' name appeared on the revised list. However, Mr Rawlins does not assert that this publication was the declaration of the result of the election. I note, in passing, that Section 52(3) of the 1992 Act provides that the result of the election shall not be published until the union has received the scrutineer's report and this list of names was not supported by any further scrutineer's report.
32. On Tuesday 25 April 2006, the BMA was informed by ERS that the revised list was unreliable and that the production of a reliable result would require there to be a partial recount of the voting papers. Mr Bourne ordered such a recount. The third and definitive list of successful candidates appeared in the ERS report of 26 April. This report was not communicated to the BMA until 27 April, when the revised list was removed from the BMA website. Mr Rawlins' name did not appear in the ERS report of 26 April. Having sought and obtained written confirmation from the ERS on 28 April that the third set of results, contained in its report of 26 April, were authoritative, the BMA declared those results by publishing them on 28 April.
33. In my judgment these events do not disclose that Mr Bourne, as Returning Officer, acted outside the scope of his authority. A Returning Officer has a duty to ensure that an election is conducted lawfully, in accordance with the 1992 Act and the rules of the union. In this election, there was no allegation of any irregularity as to how votes were cast. The central allegation concerned the counting of the votes. The first count, which led to the scrutineer's report of 21 April, was conducted in breach of the BMA's bye-laws and it was accordingly open to Mr Bourne to treat it as a nullity. Similarly, the second list

of successful candidates, prepared on 24 April, was fundamentally flawed as not having been correctly counted under the bye-laws. It was therefore similarly open to Mr Bourne to treat that result as a nullity. A distinction can be made between a flaw in the process of voting which can only be cured by a re-ballot and a flaw in the process of counting which can be cured by a recount. On the facts of this case, the Returning Officer decided to order a recount in order to correct the errors in counting that had already occurred. I find that in so doing Mr Bourne not only acted within the scope of his authority but that he would have been in breach of his duty had he not done so.

34. Mr Rawlins argued that the BMA had changed the medical student voting constraint to achieve a result different to that contained in the scrutineer's report of 21 April. His principal submission was that the true meaning of the constraint in bye-law 56(2) was that there should be two elected medical students and that the interpretation of this voting constraint had been changed without authority by Mr Bourne to require the election of only one medical student. In my judgment, Mr Bourne believed at all times that bye-law 56(2) required the election of only one medical student and acted accordingly. I find that when he discovered the error that ERS had made he took prompt steps to correct the error and ensure that the votes were counted in accordance with the bye-laws. I do not accept Mr Rawlins submission that Mr Bourne changed the voting constraint. The true meaning of the voting constraint is a matter of law and its meaning was not changed by an incorrect description of it appearing in the booklet, 'Candidates' Details and Election Statements'.
35. Mr Rawlins then argued that the erroneous description of the medical student constraint in the booklet 'Candidates' Details and Election Statements' may have resulted in voter confusion and did result in the scrutineer applying the wrong constraint, with the result that the outcome of the election was unsafe. In my judgment, however, the admitted error in this booklet was a mis-description of the counting process, not the voting process. The voters were specifically and correctly instructed as to how they should list their preferences and there was no evidence before me that any voter was misled in the way his or her vote was cast by the mis-description. I find on the balance of probabilities, that the mis-description did not affect the result, having regard to the nature of this election and the absence of relevant evidence.
36. In conclusion therefore I find that the result of the 2006 Council Election was the result declared on 28 April. It was not the result contained in the scrutineer's report dated 21 April. I further find that the Returning Officer was entitled to disregard the scrutineer's report of 21 April in favour of that dated 26 April, which correctly recorded the democratic wishes of the voters under the relevant bye-laws, properly construed.
37. For the above reasons I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the British Medical Association breached section 52(4) of the 1992 Act by failing to send members a copy of the scrutineer's report dated 21 April 2006 on the 2006 elections to the Association's Council within three months of its receipt.

Complaint 2

38. Mr Rawlins alleged that the BMA had breached section 52(5) of the 1992 Act by having failed to ensure that the copy of the scrutineer's report of 21 April 2006 (or its notification of the contents of that report), which was to be sent to all members, was accompanied by a statement that the BMA would supply any member with a copy of that report free of charge upon request.
39. Section 52(5) of the 1992 Act provides as follows:-

52(5) Any such copy or notification shall be accompanied by a statement that the union will, on request, supply any members of the union with a copy of the report, either free of charge or on payment of such reasonable fee as may be specified in the notification.

Summary of submissions

40. Both parties adopted the submissions that they had made when addressing the first complaint. Mr Rawlins maintained that a copy of the scrutineer's report of 21 April 2006 had not been sent to members as required by section 52(4) of the 1992 Act and so it followed that the BMA had failed to send the document that should have accompanied it. Mr Kerr QC, for the BMA, maintained that his client was under no obligation to send members a copy of the scrutineer's report of 21 April and that it was accordingly under no obligation to send members any document that should have accompanied it. Mr Kerr stated that such a statement was given to members on 19 June 2006, when notifying them of the content of the scrutineer's report dated 26 April.

Conclusion - Complaint 2

41. The success or failure of this complaint rested on the outcome of Mr Rawlins' first complaint. I have already found that the result of the 2006 Council Election was not that contained in the scrutineer's report of 21 April and that, accordingly, the BMA had no obligation to send members a copy of that report or notify them of its contents. It follows that the BMA had no obligation to send with that notification a statement of the kind required by section 52(5) of the 1992 Act.
42. For the above reasons, I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the BMA breached section 52(5) of the 1992 Act by failing to provide members with a statement that the BMA would, on request, supply any member with a copy of the scrutineer's report dated 21 April 2006, such statement to accompany the copy of the scrutineer's report or its notification to be sent in accordance with section 52(4) of the 1992 Act.

Complaint 3

43. Mr Rawlins alleged that the BMA had breached section 52(6) of the 1992 Act by having failed to supply him with a copy of the scrutineer's report dated 21 April 2006 pursuant to his requests dated 1 and 30 May.

44. Section 52(6) of the 1992 Act provides as follows:

52(6) The trade union shall so supply any member of the union who makes such a request and pays the fee (if any) notified to him.

Summary of submissions

45. Both parties again adopted the submissions that they had made when addressing the first complaint. They accepted that the outcome of this complaint depended upon my finding as to whether the result of the 2006 Council elections was contained in the scrutineer's report of 21 April.

Conclusion - Complaint 3

46. As I have already found, the result of the 2006 Council elections was not contained in the scrutineer's report of 21 April but that of 26 April. Mr Rawlins was not therefore entitled to be supplied with a copy of the scrutineer's report dated 21 April, pursuant to section 52(6) of the 1992 Act.

47. For the above reasons, I refuse to make the declaration sought by the Claimant that on or around 21 July 2006, the BMA breached section 52(6) of the 1992 Act by failing to supply a copy of the scrutineer's report dated 21 April 2006 to Mr Rawlins pursuant to his request made by e-mail on 1 May 2006 and letter on 30 May 2006.

Complaint 4

48. This is a complaint of breach of rule. Mr Rawlins alleged that the Association breached paragraph 35 of the Standing Orders of Council by failing to inform him, as a candidate in the 2006 Council Elections, of the detailed results of the election as declared on 21 April 2006.

49. Paragraph 35 of the Standing Orders of Council provides as follows:

35 Every candidate in an election to Council shall be informed of the detailed results of the election and these results may also be published

Summary of Submissions

50. Mr Rawlins again submitted that the true result of the 2006 Council elections was that contained in the scrutineer's report of 21 April 2006 and that paragraph 35 of Standing Orders gave him the right to be provided with the detailed results, as contained in that scrutineer's report.

51. Mr Kerr QC, for the BMA, submitted that this complaint fell outside my jurisdiction on two grounds. First, he submitted that the Standing Orders of Council were not rules of the BMA within the meaning of section 108A of the 1992 Act. Counsel maintained that in the case of the BMA, its rules were restricted to the Memorandum and Articles of Association and the Bye-Laws. He argued that the 1992 Act gave 'the rules' a particular meaning and that the only extension beyond the written constitution which was allowed by the 1992

Act is found in section 108A(8), which includes the rules of any branch or section. Secondly, he submitted that the alleged breach was not of a rule within section 108A(2); particularly, it was not within subsection (2)(a), namely one relating to “the appointment or election of a person to or the removal of a person from any office”. Further and in the alternative, Mr Kerr submitted that the entitlement under paragraph 35 was to the detailed result of the election as validly and finally declared by the BMA. On this premise, the result to which Mr Rawlins was entitled was the result declared on 28 April 2006 not that in the scrutineer’s report of 21 April. Mr Kerr observed that the candidates had been sent the detailed results as declared on 28 April. He further observed in passing that during the course of these proceedings Mr Rawlins had also been provided with the detailed results as contained in the scrutineer’s report of 21 April.

Conclusion - Complaint 4

52. The rules of a union are not always to be found exclusively in its rule book or the rule books of its branches or sections. Trade Unions operate in many different ways and each has its own history and tradition. Whilst the rules may be found principally in the rule book and other documents to which express reference is made in the rule book, other rules may be implied by way of custom and practice or any of the other established methods of identifying an implied term. In the case of the Standing Orders of Council of the BMA, I heard evidence that they were expressly approved by Council, that they were longstanding and that they have generally been regarded as binding by members of Council. I also find that they are expressed with the precision necessary to give them certainty and in a language which suggests that they were intended to have normative effect. Having regard to their purpose, language and history, I find that the Standing Orders of Council are rules of the BMA for the purpose of section 108A of the 1992 Act.
53. I have jurisdiction to hear a complaint of breach of rule if it is one relating to one of the matters listed in section 108A(2) of the 1992 Act. One of those matters is “*the appointment or election of a person to, or the removal of a person from, any office*”. In my judgment, paragraph 35 of Standing Orders is a rule which relates to the election of a person and an alleged breach of that rule is within my jurisdiction.
54. Turning to the substance of Mr Rawlins’ complaint, paragraph 35 of Standing Orders entitles candidates to be informed of the detailed results which determined the Council election. Mr Rawlins’ complaint seeks the detailed results as contained in the scrutineer’s report of 21 April 2006. These were not the results which determined the election. The results which determined the Council elections were those contained in the scrutineer’s report of 26 April. Mr Rawlins was not therefore entitled by paragraph 35 of Standing Orders to be provided with the detailed results he seeks.
55. For the above reasons I refuse the declaration sought by the Claimant that on or around 28 April 2006, the BMA breached paragraph 35 of the Standing Orders of Council 2005-6 by failing to inform Mr Rawlins, as a candidate in

the 2006 election to Council, of the detailed results of that election as notified to candidates on 21 April.

Complaint 5

56. Mr Rawlins alleged that the BMA had breached paragraph 40 of a document entitled “Information for Candidates and Electoral Rules” by not notifying him of the result of the 2006 Council elections nor the breakdown of the results as contained in the scrutineer’s report of 21 April 2006 before the results of the elections were publicised.
57. Paragraph 40 of the document ‘Information for Candidates and Electoral Rules’ provides as follows:

“40. The candidates in the election will be notified of the result by post and the breakdown of the results will be made available to them before the results of the election are publicised. Please note that a detailed breakdown of all the results will also appear on the BMA’s website and will be made available to the press for publication.”

Summary of Submissions

58. Mr Rawlins submitted that the document in question was described as containing ‘The Electoral Rules’ and that accordingly paragraph 40 should be treated as a rule of the Association relating to elections. He repeated his arguments that the result of the elections was that contained in the scrutineer’s report dated 21 April 2006. On this basis, he submitted that he had not received the results of that election by post, other than the notification of his own election, and had not had made available to him the breakdown of those results until after the commencement of these proceedings. Mr Rawlins submitted that the results in question had never been publicised.
59. Mr Kerr QC, for the BMA, made two preliminary submissions on jurisdiction. He argued that the document in question did not contain rules within the meaning of section 108A of the 1992 Act. In his submission it was a document prepared for the information of candidates. Secondly, in the alternative, he argued that even if paragraph 40 was a rule, it did not fall within the categories of rules set out in section 108A(2) over which I have jurisdiction. In the further alternative, Mr Kerr submitted that the result of the 2006 Council election was not the one set out in the scrutineer’s report dated 21 April.

Conclusion - Complaint 5

60. Whilst the rules of a union may include those found in documents other than its basic constitution, it is necessary to examine carefully any such alleged extension on a case by case basis. On the facts of this case, I note that the title of the relevant document is “Information For Candidates And Electoral Rules”. I note that the document was drafted by Ms Foukas, Head of Council Secretariat, in consultation with Mr Bourne, Dr Wilson and ERS and was not put to Council for approval or adoption. I also observe that there is no reference in the Memorandum and Articles of Association or the Bye-Laws to

such a document. Further, I note the introduction to the document is in the following terms:

"This information has been prepared for those who are thinking of standing for election to the BMA's Council. It covers what the Council does and its constitutional position within the Association, what is expected of members and includes details about the elections. If anything is unclear or you would like further information please contact Jacqueline Foukas, Head of Council Secretariat ... "

The document is divided into two parts. Part 1 gives information about the BMA Council. This is descriptive and cannot, in my judgment, be considered any part of the BMA's rules. Part 2 is headed "Elections to Council" and is, in my judgment, more descriptive than normative. It repeats matters which are contained in the bye-laws and gives information about other matters, such as how the Returning Officer would propose to deal with the disruption of postal services during the balloting period. Where this part of the document goes beyond a description of the bye-laws, I find that it either describes the administrative process or sets out the proposed manner in which the Returning Officer would deal with certain eventualities. In my judgment, having considered the origins and contents of this document, it does not form part of the rules of the BMA.

61. Were I to be wrong about the status of the booklet "Information for Candidates and Electoral Rules", I would have found that a breach of paragraph 40 of that document fell within my jurisdiction, it being a rule relating to the "election of a person" within the meaning of section 108A(2)(a) of the 1992 Act. However, I would also have found that there was no breach of paragraph 40 as this paragraph concerns the actual results of the elections, as I have found them to be, namely those declared on 28 April 2006. I would have found that paragraph 40 gave Mr Rawlins no entitlement to be provided with the results and breakdown as recorded in the scrutineer's report dated 21 April.
62. For the above reasons, I refuse to make the declaration sought by the Claimant that on or around 28 April 2006, the BMA breached paragraph 40 of the document 'Information for Candidates and Electoral Rules' by failing to notify Mr Rawlins, as a candidate in the 2006 election to Council, by post of the result of the election as notified to candidates on 21 April, together with the breakdown of the results, before the results of the election were publicised.

David Cockburn
The Certification Officer