

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

MR D HIGGINBOTTOM

v

UNITED ROAD TRANSPORT UNION

Date of Decisions:

9 November 2006

DECISIONS

Upon application by Mr D Higginbottom (“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 a declaration that the United Road Transport Union (“the Union”) breached section 51(3)(a) of the 1992 Act in relation to the Union’s election for the position of General Secretary in 2006.
- (ii) I refuse to make a declaration that in its conduct of the election for the position of General Secretary in 2006, the United Road Transport Union breached an allegedly implied rule of the Union that it would not prefer or endorse any one candidate in elections for the position of General Secretary.

REASONS

1. By an application dated 1 February 2006 the Claimant made various allegations against his union, the United Road Transport Union (“the Union”). The Claimant subsequently instructed solicitors and, following correspondence with his solicitors, the complaints were identified in the following terms:-

Complaint 1

Breach of Section 51 of the 1992 Act

“that in relation to the Union’s 2006 election for the post of General Secretary the United Road Transport Union breached section 51(3)(a) of the 1992 Act by not allowing every person entitled to vote to do so without interference from, or constraint imposed by the Union or any of its members, officials or employees. The particulars of the alleged breach are that the Union:-

a) published a statement, namely a letter dated 28 December 2005 from Trevor Bray which was sent to all members and included as a loose leaf enclosure with the periodical trade magazine "Wheels" in December 2005. In particular the letter contained comments about David Higginbottom which were designed to influence voters in a negative way towards the candidature of David Higginbottom and further the letter contained a specific recommendation in favour of the candidature of Bob Monks; and

b) allowed or used an amount in excess of £4000 for the printing and dissemination of a loose leaf letter dated 28 December 2005 in favour of the candidature of Bob Monks together with an election poster on behalf of Bob Monks, also by way of loose leaf enclosure in the same periodical trade magazine."

Complaint 2

Breach of an Implied Rule

"that in relation to the Union's 2006 election for the post of General Secretary the United Road Transport Union breached an implied rule of the Union that it would not prefer or endorse anyone candidate and that it did so by allowing the periodical magazine "Wheels" to be used in support of the candidature of Bob Monks. It is alleged that such a rule is an implied rule of the Union through custom and practice. The particulars of the said custom and practice are: -

a) the custom and practice (of not allowing candidates in an election to circulate literature in support of their candidature in the Union's magazine) was demonstrated in the 1992 election for the General Secretary. The latter involved three candidates, namely the said David Higginbottom, Frank Griffin and Stan Parkinson. The said Frank Griffin placed with the "Wheels" magazine election materials on his behalf. When this was discovered the magazine (which had been printed) was withdrawn from circulation and a re-print followed which did not include election material of the said Frank Griffin; and.

b) this custom and practice was also confirmed in a letter from the then President of the United Road Transport Union, Mike Billingham, dated 30 March 1992 to D Bennet, United Road Transport Union Shop Steward, confirming "It would be wrong for that facility (circulation of a statement) to be granted to Mr Griffin and not to other candidates."

2. I investigated the alleged breaches in correspondence. The parties were offered the opportunity to be heard and a formal hearing took place on 4 October 2006. The Claimant was represented by Mr M Smith of counsel. Evidence for the Claimant was given by himself, Mr Billingham (Regional Officer), and Mr Bird (Regional Officer). A witness statement was submitted from Mr Marshall (a former President). The Union was represented by Ms J Eady QC, instructed by Mr Hantom of Whittles, solicitors. Evidence for the Union was given by Mr Bray (President) and Mr Monks (General Secretary). A 325 page bundle of documents was prepared for the hearing by my office. At the hearing a 55 page supplemental bundle was admitted. Each of the witnesses produced a written witness statement. Both counsel produced written skeleton arguments. The rules of the Union were also in evidence.

Findings of Fact

3. Having considered the oral and documentary evidence and the representations made to me, I found the facts to be as follows:
4. Mr Higginbottom stood for election as General Secretary of the Union in 2006. His only opponent was the incumbent General Secretary, Mr Monks. The result of the election was declared on 6 February 2006. Mr Higginbottom lost. He received 1177 votes and Mr Monks received 3983 votes, a majority of 2,806. Mr Higginbottom now complains about the Union's conduct in relation to this election and seeks an order requiring that the election be re-run.
5. Mr Higginbottom had been the General Secretary of the Union between 1992 and 2000, when he resigned. His resignation was recorded in a Compromise Agreement, under the terms of which he was to receive a payment of £40,000 as compensation for loss of office and be entitled to retain his car and certain office equipment. The Compromise Agreement also provided for an agreed statement to be published in *Wheels*, the Union's journal or magazine. Both parties undertook not to make any statement inconsistent with the agreed statement. The agreed statement gave the reason for Mr Higginbottom's resignation as being the inability of the parties to resolve serious policy differences. In his evidence, Mr Higginbottom described this explanation as being a benign form of words, effectively masking the real reasons. Arising from these, and possibly other, events, the members of the Executive Committee ("the EC") of the Union, and its Assistant General Secretary ("AGS"), Mr Rogers, were not well disposed to the candidature of Mr Higginbottom in the 2006 election.
6. The timetable for the 2006 General Secretary election was published in *Wheels* in October 2005. Nominations were to be received by 14 November and voting was to take place between 4 January and 3 February 2006, with the successful candidate taking office from 1 March 2006. As a result of problems experienced in previous General Secretary elections, the Union instructed solicitors, Messrs Whittles, to advise on any issues that may arise.
7. On 10 December 2005, the EC met. It considered three matters in relation to the forthcoming election. First, it considered whether there was anything in the election address of either candidate which should be referred back to them for reconsideration due to factual inaccuracy or being otherwise actionable. Secondly, it considered whether it should formally recommend either candidate to the membership. Thirdly, if it was to recommend a candidate, it would consider which candidate that would be. As to the election addresses, the President obtained Mr Rogers' confirmation that there was nothing in the election address of either candidate which was inaccurate. Specifically, Mr Rogers confirmed the accuracy of various statements in Mr Monks' election address; namely, that the Union had traded at a loss in every year that Mr Higginbottom had been General Secretary, that overall membership of the Union had gone down during this period; that the funds of the Union had increased since Mr Monks had become General Secretary; and that, in this period, the Union had secured over £17 million for members in respect of

personal injury damages. Mr Rogers told the EC that he had specifically researched these figures at the request of Mr Monks. As to the election address of Mr Higginbottom, the EC noted his statement that membership had fallen since he had left office. An EC member observed that this was inconsistent with the election address of Mr Monks. Mr Rogers explained that both statements were in fact correct as there had been a five month gap between the resignation of Mr Higginbottom and Mr Monks taking up office. It was explained that during this period membership had indeed fallen. Having considered the content of both election addresses, the EC concluded that there were no factual inaccuracies in either of them to be referred back to the candidates. It was in this context that Mr Bray, the President, said in cross-examination that the EC had endorsed both election addresses. As to the making of a recommendation, there was a lengthy discussion of the relative merits of the candidates and the EC decided to recommend Mr Monks as being the more suitable candidate. The EC went on to decide that the membership should be informed that Mr Higginbottom had previously been General Secretary but had resigned in 2000. It considered that many members might have been unaware of this fact due to membership turnover. Only about 9000 of the 16000 or so members entitled to vote had been in membership in 2000. The method by which the membership should be informed of these decisions was left to be determined after legal advice.

8. During the course of the following week the Union's solicitors advised that the then Certification Officer had approved a Union communicating to its members in similar circumstances by means of a letter (*Re Association of Teachers & Lecturers (D/6/99)*). The President decided to follow this precedent and the AGS, Mr Rogers, drafted an appropriate letter which the President signed. This letter is of central importance to Mr Higginbottom's complaint and I therefore set it out in full:

"Dear Colleague

You will probably be aware by now that there is a contested election for the post of General Secretary of the URTU. An election is required by law every five years for the General Secretary of all trades unions. In this election there are two candidates: Bob Monks, the present post-holder, and David Higginbottom, who resigned as General Secretary on 20th October 2000.

Mr Higginbottom resigned over serious policy differences relating to the future direction of the Union. He received from the Union £40,000 as a compensation payment and, at no cost, a Union provided motor car and office equipment and sundries.

The agreement reached with the Executive Committee to provide Mr Higginbottom with the above was in full and final settlement of the termination of his employment.

In the next few days the official election material from both candidates will be sent to you together with a ballot paper. This material comprises an address by each candidate.

At a meeting on Sunday 10th December 2005, the Executive Committee considered the information provided by the two candidates. In the light of

its knowledge and understanding of the role of the General Secretary, and the crucial importance of that role to the well-being of the Union, the Committee passed the following resolution:

That the Executive Committee, after careful consideration of all the available information, recommends to the membership that they should vote for Bob Monks as being the more suitable candidate for the role of General Secretary of the URTU. They reached that decision knowing what Bob Monks had achieved for the Union and his future goals for the membership.

In making this recommendation the Executive Committee was very conscious of the need to allow for a proper democratic vote. However, the Executive Committee also felt that it had a clear duty to give a lead in this matter.

The Executive Committee urges you to consider very carefully its recommendation before you vote.

Yours sincerely

TREVOR BRAY
President"

9. It was Mr Bray's intention to include this letter as a loose leaf insert in the December 2005 edition of *Wheels*, in order to save costs. However, in the week before Christmas, the printers informed the Union that there would be a delay in the printing and distribution of *Wheels*. Fearing that his letter would not be distributed before voting commenced on 2 January 2006, Mr Bray obtained the consent of the members of the EC by telephone to the letter being distributed to each member by a separate mailing. The letter to members was sent on or around 28 December. Coincidentally, the printers overcame their difficulties and distributed *Wheels* at or about the same time. Each copy of the journal contained a photocopy of the President's letter, in loose leaf form, together with a poster in support of Mr Monks' candidature.
10. Mr Monks had requested that the printers insert a poster in *Wheels* on his behalf without having first obtained the consent of and without having consulted with the President or members of the EC. The printers accepted the poster in good faith as being an instruction from the General Secretary of the Union. Mr Monks personally paid for the production of the poster. In addition, Mr Monks had prepared a campaign leaflet which was distributed more conventionally. In this leaflet Mr Monks compared his record as General Secretary with that of Mr Higginbottom and drew attention to the fact that Mr Higginbottom had resigned from the position of General Secretary and received a compensation payment.
11. When Mr Higginbottom received the President's letter of 28 December 2005 and, separately, the December edition of *Wheels*, with its inserts, he was both surprised and upset. He knew of no previous election for the position of General Secretary in which anything similar had occurred. He did his best to reduce the effect of this development by the use of his website, the address of which was published in his election address, and by issuing a circular.

12. Mr Higginbottom commenced this application on 1 February 2006, before the result of the election was declared on 6 February. As noted above, Mr Monks was elected by a sizeable majority.

Custom and Practice - Findings of Fact

13. Mr Higginbottom's second complaint alleged a breach of an implied rule of the Union. The alleged implied rule was that the Union would not prefer or endorse any one candidate in elections for the position of General Secretary. It is alleged that this became an implied rule of the Union by way of custom and practice. I set out below my findings of fact on the issue of custom and practice.
14. There was evidence before me of the conduct of previous elections for the position of General Secretary in 1987, 1992, 1997 and 2001. In 1987, the election was by a card vote at a Special Delegate Meeting, not in accordance with the statutory procedures. The successful candidate, Mr Frank Griffin, won 92.4% of the card vote. Whilst there may not have been an official endorsement of any single candidate by the Union in this election, I find that it is of little assistance to me in determining whether a custom and practice as alleged existed in subsequent elections which were conducted on the basis of one member one vote in accordance with the statutory procedures contained in the Trade Union Act 1984 and the 1992 Act.
15. In 1992, the candidates in the election for the position of General Secretary were the incumbent, Mr Griffin, Mr Higginbottom, and Mr Parkinson. Mr Higginbottom won that election by 31 votes. This was the first General Secretary election to be conducted in accordance with the statutory procedures. The possibility of adopting rules specifically to regulate statutory elections was discussed by the EC in 1991 and 1992 but no such rules were adopted. In fact, there are still no such rules, although I was informed that the matter is now under active consideration. A number of problems arose during the 1992 election. First, the election address of Mr Griffin was reproduced almost verbatim in an article on the front page of *Wheels*. Mr Higginbottom complained and the Union obtained legal advice. The Union's solicitors advised that the journal should not be circulated with this article. They considered that the publication may breach section 13 of the Employment Act 1988 by enabling one candidate to gain an advantage from the method used by the Union in producing the election addresses. The Union withdrew that edition of *Wheels* before circulation. Secondly, Mr Higginbottom and Mr Griffin had made complaints of "*Injurious Statements*" about each other which were determined by the EC. In January 1992, the EC found that the complaint against Mr Griffin was well founded and he was warned that any further occurrence could lead to his expulsion. The Union proposed circulating the minutes of this decision but Mr Griffin made an application to the High Court for an interlocutory injunction to restrain any such circulation. This application was rejected on 26 February. The Union then circulated a statement dated 1 March 1992 setting out the relevant facts. The statement was sent to shop stewards and branch secretaries for the purpose of informing members. Mr Griffin requested similar facilities to circulate his own statement

but this request was refused on the grounds that one of the other candidates had requested such facilities and had been refused. Although the Union did not publish any poster or any document supporting any individual candidate, the EC met on 13 April 1992, during the ballot period, and passed the following resolution:

"The President, on behalf of the Executive Committee who wished it to be recorded, stated the Executive Committee expressed the wish for a successful outcome in the forthcoming election to the present General Secretary, Frank Griffin, and thanked him for all his past services."

16. In 1996, there was a further attempt to agree a set of rules to regulate the election of the General Secretary. Draft Rules were prepared by a sub-committee of the EC which proposed a tight control on the use of Union facilities by candidates and, specifically, that the EC should remain neutral as a body in relation to all candidates. Mr Higginbottom, who was then the General Secretary and due for re-election the following year, commented on these proposals in a letter dated 25 November 1996. He considered that the proposals were generally unworkable. With regard to the specific recommendation of neutrality by the EC "*as a body*", he commented that this would ring hollow if individual members of the EC were still allowed to express their personal preferences. Mr Higginbottom considered that legal advice was required.
17. In 1997, Mr Higginbottom was re-elected to the position of General Secretary unopposed.
18. The General Secretary election in 2001 was precipitated by the resignation of Mr Higginbottom on 20 October 2000. The candidates in this election were Mr Monks, Mr Rogers (the AGS) and Mr Billingham. In the course of this election, on 7 November 2000, Mr Rogers had a routine meeting with officers at which he told them that he had the support of the EC as a body. This prompted a letter of 9 November from Mr Billingham, Mr Bird and two others to Mr Rogers. This letter stated inter alia:

"We believe it is also inappropriate that the Executive Committee, as a body should declare their support for any individual candidate, especially when the election has not even begun and neither the names of other candidates or the policies, on which their campaigns will be based, are not yet known. Whilst Executive Committee members have every right to support any candidate as individuals, in the interests of natural justice, they should, as a body, remain impartial."

The authors of this letter wished meetings to be arranged in each region for the members to meet the candidates as had occurred in 1987 and 1992. As Mr Rogers was a candidate in the election, the reply was sent by the then President, Mr Marshall. In a letter dated 6 December 2000 he stated, "*The Executive Committee has not made any declaration of support for Nigel Rogers and, indeed, no such decision has been made*". Nevertheless, in his election address, Mr Rogers declared that he had the support of the individual EC members of each region of the Union as well as all trustees, the President and others. In this election, the candidates were specifically

informed by the President that permission had not been given for any of them to electioneer using Union facilities or property (including Union notice boards) or by using the Union's logo. Mr Monks won the election by 308 votes.

The Relevant Statutory Provisions

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

Section 51 Voting

- (3) Every person who is entitled to vote at the election must –
(a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees, and
(b) ...

Section 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.

Section 108A Right to apply to 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) to (7).
- (2) The matters are -
- (a) the appointment or election of a person to, or the removal of a person from, any office;
(b) disciplinary proceedings by the union (including expulsion);
(c) the balloting of members on any issue other than industrial action;
(d) the constitution or proceedings of any executive committee or of any decision-making meeting;
(e) ...

Brief Summary of Submissions

20. I am indebted to both counsel for their cogent and concise representations without which this case could not have been concluded in one day. I am also grateful for their comprehensive written closing submissions.
21. For the Claimant, Mr Smith accepted that, in order for him to establish a breach of section 51(3)(a) of the 1992 Act, it was not enough for him to establish that the Union was partisan, even blatantly partisan, in its

communication with voting members. He accepted that, as a matter of statute, the Union was not required to be neutral or even-handed and that for Mr Higginbottom to succeed he had to establish that Mr Bray's letter of 28 December 2005 amounted to a "blatant lie or seriously misleading statement". He argued that the letter passed this test for the following reasons. First, he argued that it referred to Mr Higginbottom's previous resignation as General Secretary in terms that were deliberately incomplete and seriously misleading in that a significant part of the statement was omitted. Secondly, Mr Smith argued that Mr Bray's letter endorsed Mr Monks' election literature as being factually accurate. Thirdly, he argued that, to the extent that Mr Monks' election literature contained blatant lies, Mr Bray's letter endorsed and adopted those statements. Fourthly, he argued that by juxtaposing the positive endorsement of Mr Monks and the negative comments on Mr Higginbottom, Mr Bray's letter amounted to interference and constraint. Finally, he argued that it was relevant to take into account how the relevant edition of *Wheels* had been delivered at the last moment before voting began so that Mr Higginbottom would find it difficult to rebut the assertions made. As to the second complaint, that of breach of an implied rule, Mr Smith accepted that the only basis upon which he could advance an implied rule was that of custom and practice. He maintained that the implied rule that his client sought to establish was "reasonable, certain and notorious", in accordance with the conventional tests. He argued that it was clear that such an implied rule was reasonable and certain and that the only real issue was whether, by early 2006, it was so well established within the Union that it could be said to be notorious. He argued that, on the basis of the elections since 1992, the custom and practice upon which Mr Higginbottom relied had been made out.

22. For the Union, Ms Eady QC referred to various cases in which the statutory expression "...allowed to vote without interference from, or constraint imposed by the Union..." (now found in section 51(3)(a) of the 1992 Act), had been discussed. She referred to the High Court case of *RJB Mining (UK) Limited v National Union of Mineworkers* (1997) IRLR 621 and to the following cases before the Certification Officer: *Clare v The Eagle Star Staff Association* (1981) - CO/1964/3); *Paul v NALGO* (1987) IRLR 43; *Re USDAW* (1994 - D/1-2/95); *Re NUM Yorkshire Area* (1994 - CO/1964/13); *Re CPSA* (1995 - D/1/95); *Re Association of Teachers and Lecturers* (1999 - D/6/99); and *Cook v RMT* (2004 - D/21-28/04). On the basis of these authorities, Ms Eady submitted that a statement issued by a Union could only amount to interference and constraint if it was "*the most blatant lie or seriously misleading statement*", going beyond a statement which merely exaggerated or misled or contained an inaccuracy. Having analysed Mr Bray's letter of 28 December 2005, Ms Eady contended that this letter did not amount to a breach of section 51(3)(a) of the 1992 Act. Indeed, Ms Eady went further to argue that the particulars upon which Mr Higginbottom relied were insufficient to make good his complaint. She argued that there would be no breach of the section 51(3)(a) even if Mr Higginbottom established that the letter was, in the words of his complaint, "*designed to influence voters in a negative way towards the candidature of David Higginbottom and ... contained a specific recommendation in favour of the candidature of Bob Monks*", and even if the Union spent money on the printing and dissemination

of Mr Bray's letter and Mr Monks' election poster. As to the alleged breach of an implied rule of the Union, Ms Eady argued that the alleged implied rule was neither sufficiently certain nor notorious. Having analysed the facts, Ms Eady submitted that the best that could be said about the Union's practices in this regard is that it had a fairly ad hoc approach to the kind of support given by the EC to any particular candidate.

Conclusions

Complaint One

23. Mr Higginbottom's first complaint is in the following terms:

Breach of Section 51 of the 1992 Act

"that in relation to the Union's 2006 election for the post of General Secretary the United Road Transport Union breached section 51(3)(a) of the 1992 Act by not allowing every person entitled to vote to do so without interference from, or constraint imposed by the Union or any of its members, officials or employees. The particulars of the alleged breach are that the Union:-

a) published a statement, namely a letter dated 28 December 2005 from Trevor Bray which was sent to all members and included as a loose leaf enclosure with the periodical trade magazine "Wheels" in December 2005. In particular the letter contained comments about David Higginbottom which were designed to influence voters in a negative way towards the candidature of David Higginbottom and further the letter contained a specific recommendation in favour of the candidature of Bob Monks; and

b) allowed or used an amount in excess of £4000 for the printing and dissemination of a loose leaf letter dated 28 December 2005 in favour of the candidature of Bob Monks together with an election poster on behalf of Bob Monks, also by way of loose leaf enclosure in the same periodical trade magazine."

24. Section 51(3)(a) of the 1992 Act provides as follows:

*(3) Every person who is entitled to vote at the election must –
(a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees*

25. Counsel for both parties agreed on the relevant law. The statutory concept of interference or constraint implies improper interference or constraint. The most obvious example of such interference and constraint is that which would intimidate or put a member in fear of voting or amount to physical interference. To extend the coverage of this provision to the making of statements during the electioneering process involves a considerable leap. Trade union elections, like many others, are often conducted in a robust manner with each candidate seeking to put his or her case at its highest and to comment adversely on any opponent. I find it improbable that Parliament intended that the Certification Officer should become involved in unpicking and adjudicating upon the rival claims that might be made by, or in support of, candidates in statutory elections. This approach to the interpretation of section 51 is supported by the heading to this particular section being "Voting", which

suggests that it is directed more to the physical process of voting than to the hustings. It is further supported by a consideration of who is restrained from imposing improper interference or constraint. The restraint is not only imposed on the Union but also on “*any of its members, officials or employees*”. In any normal election it is to be expected that lay members, shop stewards and branch officials will campaign for the person they consider most suited for the position. Not all such campaigning will be fair and balanced in the eyes of the rival candidates but I doubt if Parliament intended that its fairness and accuracy should be justiciable before the Certification Officer. If that had been the intention, I would have expected it to be expressed in clear language. Accordingly, whilst I do not dissent from the comments of my predecessor, Mr Whybrew, that section 51(3)(a) might encompass “*the most blatant lie or seriously misleading statement*” I incline to the view that such an argument is only likely to succeed in the most exceptional case.

26. On the facts of this case, Mr Higginbottom complains firstly about the terms of Mr Bray’s letter of 28 December 2005. The major purpose of this letter was to inform members of the decision of the EC to recommend Mr Monks as the most suitable candidate. As a matter of statute, the EC is plainly entitled to take that decision. The letter also refers to Mr Higginbottom’s resignation as General Secretary in 2000. It accurately records the compensation payment that was made and gives the reason for his resignation in the terms which were not merely agreed but from which the parties undertook not to dissent. Mr Higginbottom cannot now legitimately complain that the Union did not refer to any underlying reasons for his resignation. Nor can he legitimately complain about the reference to his compensation payment, there being no confidentiality clause in the Compromise Agreement. Mr Smith argued that Mr Higginbottom would not have considered the reference to the reason for his resignation to have been problematical had the letter also included a further sentence from the agreed statement. That sentence reads, “*The Executive Committee acknowledges the contribution David has made to the Union over a period of many years, particularly as General Secretary.*” In my judgment, the omission of this sentence cannot be the basis for, or contribute significantly to, a finding of unlawful interference or constraint. It does not qualify the accuracy of the preceding statements and the full text of the agreed statement had been made available to members in 2000. Mr Smith also argued that, by implication, Mr Bray’s letter endorsed or incorporated Mr Monks’ election address and campaign leaflet. Whilst he made no complaint against Mr Monks for these documents being partial in Mr Monks’ favour, he did complain that by endorsing them, the EC and Mr Bray breached section 51(3)(a) of the 1992 Act. I find that neither the EC nor Mr Bray’s letter endorsed Mr Monks’ election material in the sense of adopting its content as being their own and recommending it to members. The check that was carried out by the EC at its meeting on 10 December 2005 was to expose any clear error of fact, so as to give the candidates an opportunity to reconsider their election addresses. By section 48 of the 1992 Act, the Union cannot amend unilaterally any such election address. Any modification is a matter for the candidate. On the information before it, the EC was satisfied that both election addresses were factually accurate, even though the facts may have been presented in a way which best suited the particular candidate. In these

circumstances it is unnecessary for me to analyse the various statements made by Mr Monks in his election materials and the criticism of them which is made by Mr Higginbottom. Accordingly, I do not find that there is anything in Mr Bray's letter of 28 December 2005 which amounts to unlawful interference or constraint within the meaning of section 51(3)(a) of the 1992 Act.

27. Mr Higginbottom also complained that the money expended by the Union in the printing and distribution of Mr Bray's letter and Mr Monks' election poster constituted unlawful interference or constraint. I find as a fact that Mr Monks paid for the cost of production of his election poster. As to the circulation of the letter by a separate mailing and as an insert in *Wheels*, it would be inconsistent to find that the Union did not act in breach of section 51(3)(a) by recommending the candidature of Mr Monks but that it did so by informing its members of that recommendation. Accordingly, I do not find that the Union acted in breach of section 51(3)(a) of the 1992 Act by expending money as alleged.
28. For the above reasons I refuse to make a declaration that the Union breached section 51(3)(a) of the 1992 Act in relation to the Union's election for the position of General Secretary in 2006.

Complaint 2

29. Mr Higginbottom's second complaint is in the following terms:

Breach of an Implied Rule

"that in relation to the Union's 2006 election for the post of General Secretary the United Road Transport Union breached an implied rule of the Union that it would not prefer or endorse anyone candidate and that it did so by allowing the periodical magazine "Wheels" to be used in support of the candidature of Bob Monks. It is alleged that such a rule is an implied rule of the Union through custom and practice. The particulars of the said custom and practice are: -

a) the custom and practice (of not allowing candidates in an election to circulate literature in support of their candidature in the Union's magazine) was demonstrated in the 1992 election for the General Secretary. The latter involved three candidates, namely the said David Higginbottom, Frank Griffin and Stan Parkinson. The said Frank Griffin placed with the "Wheels" magazine election materials on his behalf. When this was discovered the magazine (which had been printed) was withdrawn from circulation and a re-print followed which did not include election material of the said Frank Griffin; and.

b) this custom and practice was also confirmed in a letter from the then President of the United Road Transport Union, Mike Billingham, dated 30 March 1992 to D Bennet, United Road Transport Union Shop Steward, confirming "It would be wrong for that facility (circulation of a statement) to be granted to Mr Griffin and not to other candidates."

30. Counsel for both parties again agreed on the relevant law. In determining whether a rule is to be implied by reason of custom and practice it is appropriate to consider whether the alleged rule is "reasonable, certain and notorious" (*Sagar v H Ridehalgh and Sons Ltd* (1931)1Ch 310 CA). It was

agreed that the alleged implied rule was reasonable and I accept Mr Smith's submission that it was certain, in the sense that it would be capable of being enforced with certainty. I reject Ms Eady's submission that a rule also lacks certainty if it would be ineffective in achieving the purpose for which it was intended. The remaining issue for me to determine is whether, on the facts of this case, the alleged implied rule was notorious. I was assisted in my consideration of this matter by the decision of the Vice-Chancellor in *AB v. CD*. In that case Morritt VC found as follows:

"If it is asserted that custom and practice warrants the implication of a term into a contract then, in principle, it must be known to or readily ascertainable by all the parties to the contract. Sagar v Ridehalgh (1931) 1 Ch. 310 is an example of the extent of the knowledge or notoriety required. A custom or practice alleged to justify an implication into the contract between all the members of the Union and the Union itself must, therefore, be known to or readily ascertainable by all the members, not only those concerned with the conduct of the elections."

31. In this connection, I observed that Mr Higginbottom's carefully constructed claim form stated as follows "*URTU has no written rules for governing the way in which elections for General Secretary are conducted. In the past, however, they had been conducted by adhering consistently to a commonly understood Code of Practice. Knowledge of this Code has been common amongst EC members, full time officials and members of staff*".
32. I also observed that in corresponding with my office Mr Higginbottom and his solicitors had both expressed themselves in terms of fairness and the rules of natural justice. In evidence, Mr Higginbottom explained that the criticisms made of his tenure in office as General Secretary gave a false impression, even if factually accurate, and that viewed fairly he had a very good record as General Secretary. There is no doubt that Mr Higginbottom was genuinely and deeply aggrieved by the events about which he now complains. That, however, is not the issue I must determine. I have to consider whether the conduct of the elections in 1987, 1992, 1997 and 2001 gave rise to an implied rule, as alleged, which was known to, or readily ascertainable by, all members not just those concerned with the running of those elections.
33. As to the election in 1987, which was by card vote at a Special Delegates Meeting, I find it improbable that anyone could achieve a majority of 92.4% in an election for General Secretary without some direction or recommendation from the Union. However, as this was not an election carried out under the statutory procedures or on the basis of one member one vote, I derive little help from it in establishing a custom and practise in the conduct of a statutory election.
34. In 1992, the journal *Wheels* was not distributed after a complaint was received that the front page contained an article virtually reproducing the election address of the incumbent General Secretary. I find that the decision not to distribute *Wheels* in these circumstances was made on specific legal advice that to do so may breach the statutory provision relating to the method by which election addresses are produced. I therefore find that the withdrawal of *Wheels* on this occasion is neutral as to the existence of the alleged implied

term. Further, I heard no evidence as to whether the withdrawal of the journal was made known to the members at large, as opposed to being something known only to those with a close interest in the election. I further find that Mr Higginbottom's assertion of an implied rule was not significantly advanced by the refusal of Mr Griffin's request in 1992 to circulate a statement to all members. Although this request was made in the context of a General Secretary election, the refusal related to a statement that Mr Griffin wished to make regarding a disciplinary finding against him. Further, the reason given for the refusal was not the application of a generally known rule or principle, but a specific earlier decision not to allow another candidate to circulate a statement to members. On the other hand, I find that it is significant that the EC resolved at its meeting on 13 April 1992 to wish Mr Griffin a successful outcome in the forthcoming election. Although this resolution was approved during the actual balloting period and may therefore have had little effect in practice, it is significant in demonstrating that the EC did not feel constrained by any implied rule from stating its preference for Mr Griffin in a formal resolution, which would inevitably become known to members. EC resolutions are circulated to branches after being approved at the subsequent meeting of the EC. Accordingly, any interested member would be aware that in April 1992 the EC expressed support for a particular candidate during the voting period.

35. The election in 1997 does not take the issue any further as Mr Higginbottom was re-elected unopposed.
36. As to the election in 2001, I find that the members of the EC did express their unofficial support for Mr Rogers prior to the Officers meeting on 7 November 2000 but that the EC reconsidered whether to officially declare that support upon receipt of the letter of complaint from Messrs Billingham, Bird and others of 9 November. In the event, Mr Rogers felt able to state in his election address that all individual members of the EC supported him. On the balance of probabilities, I find that these events are more consistent with the EC considering what it should do on this occasion in an ad hoc manner, rather than considering itself to be bound by a well known implied term.
37. More generally, I find it to be significant that when Mr Higginbottom commented upon the proposed draft Rules in 1996, he did not raise any issue about custom and practice. Rather, he made practical criticisms of the proposed rule which would have required the EC, as a body, to be neutral, whilst allowing individual members of the EC to express a personal preference. I further note that in 1987 and 1992 the Union had arranged for meetings to take place in the regions between candidates and members. There were no such meetings in 2002 and 2006 and it has not been suggested that the continuation of this practice over the period of two elections constitutes a custom and practice so as to give rise to an implied rule. This suggests a recognition that certain electoral practices may be repeated without becoming an implied rule.
38. Having regard to the above, I find on the balance of probabilities that the custom and practice for which Mr Higginbottom contends is not made out.

Accordingly, I refuse to make a declaration that in the conduct of the election for the position of General Secretary in 2006, the Union breached an allegedly implied rule of the Union that it would not prefer or endorse any one candidate in elections for the position of General Secretary.

Observations

39. I note that the Union is currently in the process of drawing up rules for future statutory elections. Such rules might usefully deal with the situation of the General Secretary, should he or she be a candidate in any such election, wishing to place his or her electoral material in the Union journal shortly before the election without the approval of the EC or other authorised person or body.

David Cockburn
The Certification Officer