

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

MR J ECCLESTONE

V

THE NATIONAL UNION OF JOURNALISTS

Date of Decision:

10 April 2002

DECISION

Upon applications by the Applicant under section 108A(1) and section 55(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

1) I refuse to make the declaration sought by the Applicant that the National Union of Journalists (“NUJ”) acted in breach of rule 4(l) of the rules of the Union by permitting a candidate to stand in the election for the position of General Secretary in 2001 knowing him to be more than three calendar months in arrears with his contributions.

2) I refuse to make the declaration sought by the Applicant that the Union acted in breach of section 51(3)(a) of the 1992 Act by not allowing members to vote without interference from or constraint imposed by the Union in the election for General Secretary in 2001.

REASONS

1. By an application dated 13 November 2001, the Applicant made two complaints against his union, the National Union of Journalists. The two complaints are that: -
 - 1.1 The Union breached rule 4(*l*) of the rules of the Union by permitting Mr Youett to stand as a candidate in the election for the position of General Secretary in 2001 knowing him to be more than three calendar months in arrears with his contributions.
 - 1.2 The Union breached section 51(3)(a) of the 1992 Act by permitting Mr Youett to stand in the election for the position of General Secretary in 2001 knowing him to be more than three calendar months in arrears with his contributions, thereby breaching the obligation that every person who is entitled to vote in the election must be allowed to vote without interference from or constraint imposed by the Union.
2. I investigated these matters in correspondence. As required by sections 55(2) and 108B(2) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 11 March 2002. The Union was represented by Ms Jennifer Eady of Counsel. Mr John Foster, former General Secretary, and Ms Linda York, Assistant to the General Secretary, gave evidence. A written statement was provided by Mr John Eaton, Membership Manager, who did not attend the hearing. Mr Ecclestone acted in person and gave evidence. A bundle of documents was prepared for the hearing by my Office which consisted of documents submitted by the parties. The Union submitted one further document at the hearing to which the Applicant raised no objection and which I admitted. This decision has been reached on the basis of the representations made by the Applicant and the Union, together with such documents as were provided by them.

Findings of Fact

3. Having heard the witnesses and considered the documents to which I was referred I find the facts to be as follows: -
4. In the summer of 2001 Mr Foster, the then General Secretary of the Union, announced his intention to retire on 1 March 2002. Arrangements for a ballot to elect Mr Foster's successor were agreed by the National Executive Council (NEC) of the Union at its meeting on 1 and 2 June 2001. The timetable that was agreed was as follows: -
 - 28 June 2001 - Advertisement placed with "The Journalist" (the Union's magazine for members).
 - 28 August 2001 - Deadline for receipt of applications.
 - 13 September 2001 - October edition of The Journalist carries candidates' material.
 - 20 September 2001 - Ballot papers issued.
 - 23 October 2001 - Closing date for receipt of ballot papers.
 - 24 October 2001 - Count by election.com.
5. In addition, the minutes of the NEC meeting of 1 and 2 June 2001 record the following two resolutions: -
 - 5.1 **"Nominations and shortlisting** - The Council agreed that the only criteria for eligibility to stand should be that the member was in benefit. Applicants must agree to accept the terms and conditions of the post in line with the details circulated to the Council."
 - 5.2 **"Eligibility to vote and be in benefit to stand for the post** - The Council agreed that the date for these two elements be **18 June 2001.**"
6. Six members applied to be candidates in the General Secretary election. These included Mr Ecclestone (the Applicant), Mr Dear (the successful candidate) and Mr Youett whose

withdrawal from the election during the voting period has led to this application. Mr Youett withdrew from the election on 18 October 2001, during the voting period, when it was pointed out to him that his arrears of contributions were such that he had been lapsed as a member. I find that Mr Youett's contribution position was as follows: -

6.1 Before the events in question Mr Youett last paid a contribution to the Union in April 1999, when he paid £100. His rate of contribution was £3.52 per month payable monthly in advance. By the end of April 2001 all but 52p of the £100 had been accounted for as contributions. The remaining 52p retained Mr Youett in membership for approximately 4 days of May 2001. He made no further contribution before withdrawing from the General Secretary election on 18 October 2001.

6.2 The rules relevant to Mr Youett's contribution position are as follows: -

Rule 4(a) "Full members shall pay contributions monthly in advance by direct debit. Where this is not possible, members shall pay by standing order, cheque, cash or deduction at source."

Rule 4(k) "Any member failing to pay an annual contribution, quarterly instalment of the annual contribution or a general levy within a period of three calendar months from the due date shall be sent a warning notice of lapsing by the appropriate union office to his/her last known address. If any part of the amount due remains unpaid at the end of 28 days the member shall be lapsed."

6.3 The administrative arrangements underpinning these rules involve the membership department carrying out a quarterly computer check on the position of each member. The computer automatically triggers a letter to each member who is three calendar months or more in arrears, informing the member that he or she will be lapsed if the appropriate contributions are not brought up to date within 28 days. A further similar letter is automatically triggered by the computer and sent to all such members who are still in arrears 10 days before the projected date for them being lapsed.

- 6.4 There is an inconsistency between rule 4(k) and 4(a), in that rule 4(k) refers to annual contributions and quarterly instalments of annual contributions whereas rule 4(a), the principle rule dealing with contributions, provides for contributions being paid monthly in advance. As the rules of trade unions are not to be interpreted as the provisions of a statute, I find that rule 4(k) applies equally to the monthly payment of contributions. I find that to imply such words into rule 4(k) is to formalise the present understanding of the Union and members as to the meaning of that rule, is required by business efficacy for the collection of contributions and the maintenance of a register of members and is confirmed by custom and practise.
- 6.5 It is to be noted that rule 4(k) applies to those members whose contributions are three calendar months (my emphasis) or more in arrears. Therefore Mr Youett only became subject to this procedure once three complete calendar months had elapsed in which he had made no contributions. Mr Youett made contributions for the first four days of May but made no contributions for June, July and August 2001. I therefore find that Mr Youett's contributions became three calendar months in arrears at midnight on 31 August 2001.
7. At its meeting on 1 and 2 June 2001 the NEC decided that the Eligibility Date for members to vote and the Eligibility Date for candidates to stand for election would be 18 June 2001. The Eligibility Date for members to vote was communicated to members by circulars issued to the Union's branches and chapels dated June and 29 August 2001. The Eligibility Date of candidates was not communicated to members at large nor to prospective candidates. It was not contained in the job advertisement which appeared in the July/August edition of The Journalist.
8. The closing date for applications for the position of General Secretary was 28 August 2001. A check on the membership position of each of the candidates on that date was carried out by Ms York, the assistant to the General Secretary. She noted that Mr Youett's contributions were not up to date on 18 June 2001 but that he was within the

three calendar month period of grace provided for by rule. Ms York advised the President of the Union that each of the candidates met the eligibility criterion set by the NEC. Ms York did not inform the President or the General Secretary that Mr Youett was in arrears with his contributions.

9. On 11 September 2001 the membership department carried out its quarterly check on the contribution position of each member. As usual, about 350-500 members were identified as being three or more calendar months in arrears with their contributions. Amongst them was Mr Youett. The computer automatically triggered a standard letter to be sent to each of these members. The manager of the membership department, Mr Eaton, noticed that such a letter was to be sent to Mr Youett but he did not think it appropriate to inform the General Secretary.
10. The ballot papers were distributed to members on 20 September 2001 and the ballot closed just over four weeks later on 23 October.
11. A second computer-generated letter was sent to Mr Youett on 1 October 2001. This letter advised him that if the outstanding arrears were not paid by 10 October the Union would have no alternative but to lapse his Union membership. Mr Eaton again noticed that such a letter was to be sent to Mr Youett but he still did not inform the General Secretary.
12. Mr Youett did not pay his arrears by 10 October 2001 and his membership of the Union lapsed in accordance with rule 4(k).
13. On 11 October 2001 Mr Eaton informed Ms York that Mr Youett's membership had lapsed. Ms York discussed the matter with a colleague and with Mr Goodman of election.com, the independent scrutineer for the election. Ms York and Mr Goodman took the view that as Mr Youett was less than three calendar months in arrears on 18 June he was entitled to stand as a candidate, although under rule 4(l) he would be disqualified from taking up office if he were to be successful. Rule 4(l) provides: -

“Any member whose contributions are three calendar months or more in arrears, or who has failed to pay the whole of a general levy within a period of six months, shall be disqualified from voting in union elections and from being nominated for or holding any office in the union or acting as a branch or union delegate or representative.”

14. The General Secretary was absent from his office between 12 and 16 October 2001 inclusive and gave evidence that he was unaware of Mr Youett’s membership position until Wednesday 17 October. On Thursday 18 October, the General Secretary spoke with Mr Youett about his membership position. By a letter dated 18 October, sent by fax to the Union, Mr Youett said that he had discussed this matter with the General Secretary, the President and the Assistant General Secretary, Mr Norris, and that on Mr Norris’s advice he was withdrawing his name from the election. Mr Ecclestone and the other candidates were advised of Mr Youett’s withdrawal the same day.
15. The ballot closed on 23 October 2001 and the ballot papers were counted on 24 October. The ballot was conducted under the single transferrable vote system. There were 24,872 ballot papers distributed and 6,359 valid ballot papers were returned. Mr Dear received 2,437 first preference votes. This was 1,328 more votes than his nearest rival. Mr Youett received 173 first preference votes. On the advice of the scrutineer the first preference votes for Mr Youett were discounted but the second and third preference votes on these ballot papers were redistributed to the relevant candidates.
16. On 13 November 2001 the Applicant made this complaint to the Certification Officer.

The Relevant Statutory Provisions

17. The provisions of the 1992 Act which are relevant for the purpose of these applications are as follows: -

Section 49(6) “The trade union shall secure that the scrutineer duly carries out his functions and that there is no interference with his carrying out of those functions which would make it reasonable for any person to call the scrutineer’s independence in relation to the union into question.”

Section 51(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,”

Section 108A.-(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)
(c)
(d)”

18. Section 108B(2) of the Act empowers me to make such enquiries as I think fit and, after giving the applicant and the union an opportunity to be heard, to make or refuse to make the declarations asked for. I am required, whether I make or refuse the declarations sought, to give reasons for my decision in writing.

The Relevant Union Rules

19. The Union rules relevant to the Applicant’s complaint are as follows: -

Rule 4(k)

“Any member failing to pay an annual contribution, quarterly instalments of the annual contribution or the general levy within a period of three calendar months from the due date shall be sent a warning notice of lapsing by the appropriate union office to his/her last known address. If any part of the amount due remains unpaid at the end of 28 days the member shall be lapsed. Each office shall inform the member’s branch of each stage of the lapsing process. This clause shall not apply to a member subject to an instruction of the NEC to withdraw from his/her employment or to one who is subject to disciplinary proceedings under rule 24.”

Rule 4(l)

“Any member whose contributions are three calendar months or more in arrears, or who has failed to pay the whole of a general levy within a period of six months, shall be disqualified from voting in union elections and from being nominated for or holding any office in the union or acting as a branch or union delegate or representative.”

Rule 8(q)

“The NEC shall administer the affairs of the union and shall have power in accordance with the rules to do such things on behalf of the union as may be expedient. Unless specifically prevented by these rules the NEC shall have power to interpret the rules and to determine any questions on which the rules are silent and no policy has been laid down by ADM.”

Rule 10

- (b) *“(i) The General Secretary , Deputy General Secretary and the editor of the union’s journal shall be elected from members of the union. The NEC shall prepare a shortlist of applicants who have the required qualifications and submit the list to a postal ballot of the whole of the members qualified to vote, to be conducted on the principle of the single transferable vote. Before being considered for the shortlist, each applicant shall sign an undertaking that he/she accepts the terms and conditions of employment specified by the NEC.*
- (b) *(ii)....*
- (b) *(iii)....*
- (b) *(iv)....*
- (b) *(v)....*
- (b) *“(vi) The ballot shall be taken in accordance with conditions to be laid down by the NEC. The NEC may impose a limit on expenditure by any member on behalf of or against any candidate. No branch shall incur any expenditure on canvassing on behalf of or against any candidate.”*

Rule 20

- (a) *“Full members and members of honour are entitled to vote and stand for office in all union elections.*
- (b) *All ballots shall be in accordance with conditions laid down by the NEC. All elections shall be conducted by the single transferable vote method other than those within chapels, chapel branches, branches and for all ADM-elected bodies and delegations which shall be by the first past the post method.*
- (f) *The last date for receipt of ballot papers in such elections shall be no less than six and no more than eight weeks after close of nominations.”*

Summary of the Submissions

The Alleged Breach of Rule 4(l) of the Rules of the Union

20. The Applicant argued that rule 4(l) is explicit, unambiguous and mandatory. He maintained that a member who is three months or more in arrears with his contributions automatically forfeits the right to vote and to stand in a relevant election. He argued that as soon as Mr Youett became more than three months in arrears during this election process he should have been disqualified from standing. The Applicant submitted that the eligibility date of 18 June 2001 did not have the significance attributed to it by the Union and could not override the clear words of rule 4(l). He noted that the Union purported to justify the eligibility date by reference to the obligation in rule 10(b)(i) for the NEC to *“prepare a shortlist of applicants who have the required qualifications”* and also by reference to rules 10(b)(vi) and rule 20(b), both of which state that ballots should be in

accordance with conditions laid down by the NEC. In the Applicant's submission, the only qualification that had been required by the NEC was that the candidate should be in benefit and this could only mean that they were less than three months in arrears with their contributions. The Applicant submitted that rule 8(q) restricted the NEC's discretion under rules 10(b)(vi) and 20(b), enabling it to interpret or determine any rule, only if that rule is silent and no policy has been laid down by the annual conference. In this case, the Applicant maintained that rule 4(l) is clear and that the NEC therefore had no power to give it anything other than its clear meaning.

21. For the Union Ms Eady submitted that the eligibility date of 18 June 2001 for candidates was set by the NEC in accordance with rule 10(b)(i) which requires the NEC to "*prepare a shortlist of applicants who have the required qualifications*". In this case, there was no shortlist but, it was submitted, the required qualification was that candidates must be "*in benefit*" on 18 June. The Union further argued that the fixing of an eligibility date was in accordance with the discretion expressly given to the NEC under rules 10(b)(vi) and 20(b). The Union maintained that this was a reasonable course for the NEC to take and consistent with its standard practice. Evidence was produced of an eligibility date having been set for members wishing to vote in the Deputy General Secretary elections of 1991, 1996 and 1997/98. Evidence was also given of a Committee of Enquiry which reported in 1999 into problems that arose in an NEC election. The members of the Committee of Enquiry were Jim Mortimer, Ron Todd and John Bailey, a former president of the Union, and they had recommended that the list of members eligible to vote should be regarded as closed as at a date eight weeks prior to the distribution of ballot papers in order to allow time for any appeals over inclusions or exclusions. The Union submitted that on 18 June 2001 Mr Youett was not three calendar months or even three months in arrears with his contributions. However if there was valid criticism of the eligibility date, the Union further submitted that Mr Youett was still not three calendar months in arrears on the closing date for applications, 28 August. Accordingly, the Union submitted there was no breach of rule 4(l).

Conclusions

22. I have already found that Mr Youett became three calendar months or more in arrears

with his contributions at midnight on 31 August 2001. Accordingly Mr Youett was less than three calendar months in arrears on both 18 June, the eligibility date, and on 28 August, the closing date for applications. He was, however, more than three calendar months in arrears both when the ballot papers were distributed on 20 September and throughout the voting period.

23. By rule 4(l) a member who is three or more calendar months in arrears is disqualified from four activities, namely; from:-
- (a) voting in Union elections.
 - (b) being nominated for ... any office in the Union.
 - (c) holding any office in the Union.
 - (d) acting as a branch or Union delegate or representative.
24. There is no practical difficulty in applying rule 4(l) to persons holding any office or acting as a branch or Union delegate or representative. Such a person will be either disqualified from taking up such a position or effectively removed from it. There is, however, a practical difficulty in applying rule 4(l) to those voting in Union elections. In its literal sense, rule 4(l) may require the Union to ascertain the membership position of each person at the time he or she intends to vote. This would be impossible to operate in practice and cannot have been the intention of the meeting which agreed the rules. There must therefore exist a means for the Union to determine an eligibility date for voters. Whilst the present case does not require me to determine this issue it would appear that rule 10(b)(vi) and/or 20(b) provide a means whereby such an eligibility date for voters can be set. Under these provisions the NEC has a wide discretion but it is not a discretion which is unfettered.
25. The Applicant's specific complaint is that rule 4(l) requires that Mr Youett should have been disqualified "*from being nominated for ... any office in the Union*". However, the rules do not provide for the candidates in an election for General Secretary to emerge through a process of nomination, unlike other positions within the Union, such as membership of the NEC. Rule 10(b)(i) is the rule which provides for the election of the

General Secretary. It refers to “applicants” and it is clear that the process of putting ones name forward under this rule is by application, not nomination. However, in my judgement, it would be extremely surprising if it had been intended that candidates in other elections were to be subject to rule 4(l) but not the positions dealt with in rule 10(b)(i). These are the most important salaried position within the Union, those of General Secretary, Deputy General Secretary and editor of the Union’s journal. I accordingly find that in the context of these rules, the expression “*from being nominated for*” in rule 4(l) comprehends the activity of “*making an application for*”. Analysed in this way, the expression applies to a particular moment in time, the time of nomination or application. It is not a continuing activity which requires membership with not less than three calendar months in arrears to be maintained throughout the voting process. In his written submissions, the Applicant frequently substitutes the expression “*from standing for any office*” for the expression “*from being nominated for ... any office*”, as it appears in rule 4(l). This error demonstrates a fundamental weakness in the Applicant’s construction of the rules.

26. The Union has not given evidence of the date upon which Mr Youett applied to be a candidate in the General Secretary election but he had clearly done so by 28 August, the closing date for applications. As I have already found, Mr Youett was not then three calendar months or more in arrears with his contributions. Accordingly his application to be a candidate in the General Secretary election did not fall to be disqualified under rule 4(l). I therefore find that there was no breach of rule 4(l) of the rules of the Union in respect of Mr Youett’s position as a candidate in the election for the position of General Secretary and I refuse to make the declaration sought by the Applicant.

The Alleged Breach of Section 51(3)(a) of the 1992 Act

Summary of Submissions

27. The Applicant argued that by allowing Mr Youett to stand as a candidate in the General Secretary election in breach of rule 4(l) the Union failed to secure that every person entitled to vote in the election was allowed to do so without interference, in breach of

section 51(3)(a) of the 1992 Act. The interference alleged by the Applicant was that Mr Youett was given the names and addresses of members to whom he was able to distribute his election material, was given £500 for election expenses along with all other candidates and was given travel and hotel expenses to attend election meetings. The Applicant submitted that all these activities were positive acts intended to influence the way members cast their vote. Being aware of the restrictive interpretation that my predecessors had given to section 51(3)(a) of the 1992 Act the Applicant drew my attention to section 49(6) of that Act and in particular to the use of the word “*interference*” in that subsection. The Applicant argued that the word “*interference*” in section 49(6) must have a wider meaning than that which had been attributed to the same word in section 51(3)(a) and that I should therefore give a wider interpretation to that word in section 51(3)(a) than have my predecessors. He submitted that I should look afresh at the interpretation that had so far been given to section 51(3)(a) and find that the Union had failed to secure that members were allowed to vote without interference.

28. The Union submitted that this complaint must necessarily fail if I were to find that there had been no breach of rule 4(*l*), as the Union cannot be criticised for the normal conduct of an election within its rules. In the alternative, if I were to find for the Applicant on his rule 4(*l*) complaint, Ms Eady directed my attention to a number of authorities; **Paul v NALGO** (1987) IRLR 43, **RJB Mining (UK) Ltd v NUM** (1997) IRLR 621, **Rey v Film Artistes Association** (D/2/86 - Certification Officer), **Re USDAW** (D/3/89 - Certification Officer), **Re USDAW** (D/1/94 - Certification Officer), **Re CPSA** (D/1/95 - Certification Officer) and **Re TGWU** (D/1-3/96 - Certification Officer). Ms Eady submitted that there was no evidence of improper conduct by the Union in allowing the ballot papers to be distributed on 20 September 2001 as Mr Youett was not three calendar months or more in arrears on either 18 June or 28 August. She further submitted that the nature of the alleged interference was not such as to be capable of constituting interference for the purpose of section 51(3)(a) of the 1992 Act and that section 49(6) does not assist as that concerns possible interference with the scrutineer, not with voters, and that the nature of the interference in section 49(6) is specified in the legislation itself.

Conclusions

29. The Applicant's complaint of a breach of section 51(3)(a) of the 1992 Act can only be substantiated if the Union had acted in breach of rule 4(*l*) by failing to disqualify Mr Youett from standing in the election for being more than three calendar months in arrears with his contributions. As I find that the Union was not in breach of rule 4(*l*) by not disqualifying Mr Youett from standing in the election, there is no basis upon which the Applicant's complaint can succeed. I accordingly refuse to make the declaration sought by the Applicant.

Observations

30. The effect of setting an eligibility date in rule 10(b)(i) elections is to require candidates to overcome two separate hurdles; the provisions of rule 4(*l*) and the eligibility date. The lawfulness of the eligibility date is a matter to be considered having regard to section 47 of the 1992 Act, which deals with the unreasonable exclusion of candidates and, in particular, section 47(3) which provides that a member shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all the members are excluded by the rules of the Union. This is not a matter for me to determine in the present case.

D COCKBURN
Certification Officer