

**DECISIONS OF THE ASSISTANT CERTIFICATION OFFICER ON
APPLICATIONS MADE UNDER SECTION 108A OF THE TRADE UNION
AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

MR E FINLAY

v

**UNITE THE UNION
(TGWU Section)
(No2) & (No3)**

Date of Decisions:

16 December 2008

DECISIONS

Upon applications by Mr Finlay (“the Claimant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

- (i) I dismiss the complaint that on or around 8 August 2007 Unite the Union (TGWU Section) breached its rule 10 (2) by its closure of branch 1/944 and re-allocation of its members without right of appeal.
- (ii) I dismiss the complaint that on or around 18 December 2006 Unite the Union (TGWU Section) breached its rule 4 (2) by failing to ensure branch 1/944 held a meeting at which it could participate in the nomination of delegates to the 2007 Biennial Delegate Conference.
- (iii) I dismiss the complaint that in or around December 2006 Unite the Union (TGWU Section) breached its rule 4 (6) by failing to ensure branch 1/944 held a meeting to debate and respond to the General Secretary’s invitation to forward general motions for the 2007 Biennial Delegate Conference.
- (iv) I dismiss the complaint that during the period 12 December 2006 until May 2007 Unite the Union (TGWU Section) breached its constitution and procedures by failing to ensure branch 1/944 convened regular meetings in accordance with rule 10 (2) of the Rules of the Union.
- (v) I dismiss the complaint that on or around 12 December 2006 Unite the Union (TGWU Section) breached its constitution and procedures by failing to ensure branch 1/944 held a meeting to nominate candidates for elections in respect of lay officials in accordance with rule 10 (4) (a) of the Rules of the Union.

- (vi) I dismiss the complaint that on or around 12 December 2006 Unite the Union (TGWU Section) breached its constitution and procedures by failing to ensure branch 1/944 held a meeting to elect lay officials in accordance with rule 10 (4) (b) of the Rules of the Union.

REASONS

1. Mr Finlay is a member of his trade union Unite the Union (TGWU Section), (“Unite” or “the Union”). By an application signed by him on 3 December 2007, Mr Finlay made allegations against his Union arising from the closure of branch 1/944 of which he was a member. Following correspondence with Mr Finlay, one complaint was identified which was confirmed by him in the following terms:-

“that on or around 8 August 2007 Unite the Union (Transport and General Workers Section) breached rule 10(2) of the Rules of the Union by the decision of the Regional Committee (Region One) to suspend Branch 1/944 and re-allocate its members, full in the knowledge that those members would be denied their right, through their Branch, to appeal that decision to the General Executive Council. This was because of the fact that all members of the Regional Committee were fully aware, at the time of their decision, that no 1/944 Branch meetings had been called by the Pro-tem Secretary since 26 April 2006”

I shall refer to this application as **Finlay (No2)**.

Mr Finlay had previously brought an application before me which I determined on 30 October 2007 (*Finlay v Unite the Union (TGWU Section)*) (**D/28-30/07**) and to which I shall refer as **Finlay (No1)**.

2. By a subsequent application signed by him on 7 May 2008, Mr Finlay made further allegations against his Union relating to branch 1/944. Following correspondence with Mr Finlay, five complaints were identified within this application. The five complaints were confirmed by him in the following terms:-

Complaint 1

“that on or around 18 December 2006 Unite the Union, Transport and General Workers Section, breached rule 4(2) of the Rules of the Union, by its failure to ensure that Branch 1/944 held a meeting at which it could participate in the nomination of delegates to the Biennial Delegate Conference held in December 2007”

Complaint 2

“that on or around December 2006 Unite the Union, Transport and General Workers Section, breached rule 4(6) of the Rules of the Union by its failure to ensure that Branch 1/944 held a meeting to debate and respond appropriately to the General Secretary’s invitation to forward general motions for inclusion on the agenda of the Biennial Delegate Conference held in 2007”

Complaint 3

“that during the period 12 December 2006 until 10 May 2007 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures by failing to ensure that Branch 1/944 convened regular meetings in accordance with rule 10(2) of the Rules of the Union”

Complaint 4

“that on or around 12 December 2006 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures

by its failure to ensure that Branch 1/944 held a meeting at which it could make nominations (for subsequent election) for lay officials in accordance with rule 10(4)(a) of the Rules of the Union”

Complaint 5

“that on or around 12 December 2006 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures by its failure to ensure that Branch 1/944 held a meeting at which it could conduct an election for lay officials in accordance with rule 10(4)(b) of the Rules of the Union”

I shall refer to this application as **Finlay (No3)**.

3. I investigated the alleged breaches in correspondence. A hearing took place on 27 November 2008. At the hearing Mr Finlay represented himself. Mr A Erlam and Mr K Flynn attended and gave evidence on the Claimant’s behalf. The Union was represented by Mr S Pinder of EAD solicitors. A 230 page bundle of papers was prepared for the hearing by my office containing documents submitted by the parties. At the hearing this was supplemented by one more page. The Union submitted written skeleton arguments on both applications.

Findings of Fact

4. Having considered the oral and documentary evidence and the submissions of the parties I find the facts to be as follows:-
5. On 27 April 2007, the Transport and General Worker’s Union and Amicus merged to form Unite the Union. At that point Mr Woodley, General Secretary of The Transport and General Workers’ Union and Mr Simpson, General Secretary of Amicus became Joint-General Secretaries of Unite the Union (TGWU Section and Amicus Section respectively), positions they still hold.
6. Branch 1/944 was formed in the early 1990s. It covered manual and clerical workers within Aer Lingus, based predominantly at Heathrow Airport. There were around 1,000 members in the branch when it was formed.
7. In November 1999, these Aer Lingus operations were transferred to Swissport. 850 workers based at Heathrow were affected.
8. On 16 November 2004, Swissport went into voluntary administration. 750 workers, including the Claimant, lost their jobs. At that time there were still some 850 members in branch 1/944.
9. Although the Union’s rules do not specify the frequency of branch meetings, custom and practice until 2005, in accordance with standing orders, was for branch 1/944 to meet monthly.
10. On 5 December 2005, the AGM of branch 1/944 elected two people to act as Chair and Secretary of the Branch to take up office on 1 January 2006 for two years. When these elections were reported to the Union’s Regional Office the two individuals were held not to have the necessary contribution history to be eligible to hold the posts in question.

11. On 14 February 2006, the Union's Acting Regional Secretary appointed Mr K Hall to act as pro-tem Branch Secretary for branch 1/944 until a new Branch Secretary had been elected.
12. On 11 April 2006, the Acting Regional Secretary wrote to all members of branch 1/944 explaining the background to the ineligibility of the Chair and Secretary but made adjustments that meant all members of branch 1/944 were free to attend, vote and stand for office in the new elections to be held at a branch meeting on 25 April 2006.
13. In April 2006, a Union spokesman was reported as denying that the Union had any intention of closing branch 1/944.
14. On 25 April 2006, a meeting of branch 1/944 was held. Among the items on the agenda was the summarisation of the accounts and election of a Branch Committee. There appear to have been no minutes of that or of the previous branch meeting. However, it seems that some important issues were raised about financial propriety. Fresh elections were not held because the members wished to retain the officers previously elected.
15. A further branch meeting was called by the pro-tem Branch Secretary for 17 May 2006. This was cancelled at the very last minute. A notice to this effect was posted on the door of the meeting room. It said the cancellation was on account of illness.
16. Since 25 April 2006, there has been no meeting of branch 1/944.
17. On 8 August 2007, Mr O'Keeffe, the Regional Organiser, wrote to individual members of branch 1/944, including the Claimant, giving notice that the branch would be closing shortly and advising them that in line with rule 11 and acting on the authority of the Regional Committee, members were being transferred to branch 1/1186. The final paragraph of that letter read "*Your current branch operates a voluntary branch fund of 04p a week whereas the 1/1186 branch has 25p per week, this will mean an increase in your Union contributions of 21p per week. If you have any objections please contact me within the next 14 days*".
18. On 21 December 2007, Mr Collins, the Assistant General Secretary for Administration and Services, wrote to Mr Finlay saying that he had "*been advised that the branch is now formally closed*".
19. Between June 2005 and the end of 2007, Mr Finlay approached by letter and email various Officers of the Union at Regional and National level on over 25 occasions. Many of these communications were about the Union's handling of the transfer of the Aer Lingus business to Swissport, the consequences of the branch closure and allegations of financial irregularity. He received many holding replies but few of substance.
20. On 13 December 2006, the Claimant lodged his first application with the Certification Officer (**Finlay (No1)**). In this application he made three complaints against the Union, two of which he confirmed in the following terms:-

First:

“that in 2006 by the failure of Mr K Hall, Pro-tem Secretary of Branch 1/944 to call Branch meetings to organise elections for the casual vacancies occurring on the relevant Trade Group, in accordance with directions from the General Executive Council, the Union breached rule 9.2 of the rules of the Union”

Secondly, that:

“following the appointment of a Full Time Officer, Mr Hall, as Pro-tem Secretary of Branch 1/944 on 14 February 2006 the Branch, in breach of rule 10.2 of the rules of the Union, has failed to call regular Branch meetings in that only one such meeting, on 25 April 2006, has been held”

On 30 October 2007, subsequent to a hearing of the complaints on 9 October 2007, I issued my written decision in **Finlay (No1)**, refusing to make the declaration sought about the frequency of meetings and found the complaint relating to the filling of vacancies to have been brought out of time.

21. At the hearing of **Finlay (No1)**, the Union referred to its letter of 8 August 2007 informing members of branch 1/944 that they were being transferred to another branch. At the same time, the Union stated that membership of branch 1/944 had fallen to 424 in March 2006 and to 125 in February 2007. However, 42 members remained after the transfer as the Union had been unable to determine their current employer.
22. On 10 May 2007, the Claimant wrote to Mr Hall *“in accordance with stage one of the above procedures that were designed to deal with membership complaints.”* The procedure referred to is headed *“Procedure for Complaint By Member”*. The substance of his complaint was the failure to hold any branch 1/944 branch meetings in 2007 contrary to rule 10(2) of the Union’s rules.
23. On 1 October 2007, the Claimant wrote to the Union’s General Secretary on several matters. These included first, that he had received no answer at Regional level to his complaint about the failure of the Union to call an AGM of branch 1/944 in December 2006 and second, that he had received no answer from the Regional Organiser to his queries about the closure of branch 1/944.
24. On 14 December 2007, the Claimant wrote to the Union’s General Secretary stating that his letter of 1 October 2007 had been as the final stage of the Union’s internal grievance procedure, but that he had received no response to it. The letter of 14 December stated that the Regional Committee had failed to ensure that branch 1/944 had met at regular monthly intervals from December 2006 to May 2007. The letter also stated that as a result, rules 10(2), 10(4) (a), 10(4) (b), 4(2), 4(6), 2(d) of the Union’s rules had been breached.
25. On 6 December 2007, the Claimant lodged an application (**Finlay (No2)**), with the Certification Officer to the effect that the Regional Committee had not provided any valid reason for closing branch 1/944 and the right of branch members to appeal against this decision had been denied because of the failure of the pro-tem Branch Secretary to call any branch meetings.

26. On 9 May 2008, the Claimant lodged a further application (**Finlay (No3)**), with the Certification Officer to the effect that the failure of the Union to ensure that branch meetings were held precluded branch 1/944 from nominating delegates, or putting forward motions to the Biennial Delegate Conference and had therefore breached the Union's rules. He also alleged other consequences of that failure.

The Relevant Statutory Provisions

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

Section 108A Right to apply to Certification Officer

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) -*
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting*
- (e) -*

- (6) *An application must be made -*

- (a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or*
- (b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).*

- (7) *Those days are -*

- (a) the day on which the procedure is concluded, and*
- (b) the last day of the period of one year beginning with the day on which the procedure is invoked.*

- (10) *For the purposes of subsection (2)(d) a committee is an executive committee if -*

- (a) it is a committee of the union concerned and has power to make executive decisions on behalf of the union or on behalf of a constituent body,*
- (b) it is a committee of a major constituent body and has power to make executive decisions on behalf of that body, or*
- (c) it is a sub-committee of a committee falling within paragraph (a) or (b).*

- (11) *For the purposes of subsection (2)(d) a decision-making meeting is -*

- (a) a meeting of members of the union concerned (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union, is final as regards the union or which, under the rules of the union or a constituent body, is final as regards that body, or*
- (b) a meeting of members of a major constituent body (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union or the body, is final as regards that body.*

- (12) *For the purposes of subsections (10) and (11), in relation to the trade union concerned -*

(a) a constituent body is any body which forms part of the union, including a branch, group, section or region;

(b) a major constituent body is such a body which has more than 1,000 members.

Section 108B Declarations and orders

(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.

The Relevant Union Rules

28. The Rules of the Union which are relevant for the purpose of this application are as follows:-

Rule 4 Biennial Delegate Conference

2 The Biennial Delegate Conference shall be constituted as follows:-

Every Branch of the Union shall have power to nominate a member of two years standing, who is in benefit, as a candidate or delegate in its trade group to the Biennial Delegate Conference. The election of such nominees shall take place at the Branch meeting, and shall be by show of hands or by ballot, if so decided by the meeting. Every Regional Trade Group, within a National Industrial sector, shall be entitled to one delegate at the Biennial Delegate Conference for every 1,000 members of that Regional Trade Group up to 5,000 members, or one delegate where the membership is 1,000 or less; and where the membership exceeds 5,000 members one additional delegate for every, 2,000 members. The number of delegates to which each Regional Trade Group shall be entitled shall be calculated on the basis of the financial membership as at the close of the June quarter in the year preceding the year in which the Biennial Delegate Conference is due to be held. The members of every Regional Trade Group shall elect from among the candidates, who are members of the Regional Trade Group, as many delegates as they are entitled to under this rule. Such last-mentioned election shall be by ballot vote. If after the election anything shall happen to prevent a delegate from attending the Biennial Delegate Conference, their place shall be filled by the candidate obtaining the next highest number of votes in the election. Invitations for the nomination of delegates shall be sent to every Branch by the third Monday in December in the year preceding that in which the Biennial Delegate Conference is held.

6 General motions may be moved at the instance of branches, regional trade groups or districts, or national trade groups or sectors, regional committees or the General Executive Council. The General Secretary shall send not later than December in the year preceding each Biennial Delegate Conference to each Branch an invitation to forward general motions for the agenda of such Conference. No general motion shall be placed upon the agenda unless despatched to reach the General Secretary within a period of six weeks of the date of the circular issued by the General Secretary inviting the submission of general motions.

The agenda, subject to such grouping or verbal revision as the General Executive Council may deem advisable, shall be issued to the delegates, to the branches, and to all national and regional authorities at least three weeks before the Biennial Delegate Conference meets, and no subject not included therein shall be discussed without the permission of the Biennial Delegate Conference, or unless the Standing Orders Committee report it to be a matter of urgency.

Amendments to general motions on the agenda may be moved at the instance of branches, regional trade groups or districts, or national trade groups or sectors, regional committees or the General Executive Council.

The General Secretary shall circulate any such amendments received to the delegates prior to the Biennial Delegate Conference.

Rule 10 Branches

1 The Union shall be divided into Branches, each of which shall consist of not less than fifty members, except by special permission of the General Executive Council. Should the membership of a Branch fall below the minimum number of fifty, the members shall be attached to such Branch as the General Executive Council, after consultation with the Regional Trade Group or District Committee concerned, may direct.

2 The Regional Committee shall be required to ensure that each branch meets at regular intervals and fulfils its obligations under Rule. Where a branch fails to convene an Annual General Meeting of all members that branch will be suspended and members of the branch shall be allocated to a branch which meets the requirements of rule subject to the right of the branch to appeal to the General Executive Council.

3 Where deemed desirable for organisational and/or administrative reasons the Regional Committee shall be empowered, after consultation with the appropriate Regional Trade Group or District Committee, to merge branches, subject to the right of the branches concerned to appeal to the General Executive Council whose decision shall be final.

4(a) Each Branch subject as hereinafter mentioned shall have for its management a Chair and Secretary, and a committee. Branches requiring additional officers shall submit their requests to the Regional and/or Trade Group or District Committee, which shall make recommendations to the General Executive Council for authorisation. Except in the case of a new Branch, or with the consent of the Regional Committee, the Chair, Secretary and committee members respectively, shall have been financial members of the Union for a period of not less than two years immediately preceding the date of nomination, and each of them shall be nominated at least four weeks before the date of election. Every officer must at all times be a financial member.

If, in the case of any Branch, the General Executive Council shall arrange for the secretarial duties of such Branch to be performed by a permanent or full-time officer, the Branch shall not, so long as such arrangement continues, be entitled to elect a Branch Secretary.

4(b) Branch officers (other than permanent or full-time officers, who shall be appointed by the General Executive Council only, and who shall hold office in accordance with the terms of such appointment) and committees shall hold office for two years. They, (other than such permanent or full-time officers as aforesaid) shall be elected at a Branch meeting by show of hands, or by ballot, if so decided by the meeting. The election shall take place and be completed not later than December 31 in each alternate year, and the elected candidates shall take office the following January for two years. Casual vacancies may be filled at an ordinary Branch meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting.

Discussion and Conclusions

The Complaints

Finlay (No2)

“that on or around 8 August 2007 Unite the Union (Transport and General Workers Section) breached rule 10(2) of the Rules of the Union by the decision of the Regional Committee (Region One) to suspend Branch 1/944 and re-allocate its members, full in the knowledge that those members would be denied their right, through their Branch, to appeal that decision to the General Executive Council. This was because of the fact that all members of the Regional

Committee were fully aware, at the time of their decision, that no 1/944 Branch meetings had been called by the Pro-tem Secretary since 26 April 2006”

29. In view of the Union’s arguments in respect of both the jurisdiction of the Certification Officer and the proscribed time-limits as set out under section 108A of the 1992 Act, in considering all the complaints before me, I shall set out the Union’s submissions first and then those of the Claimant.

The Union’s Submission

30. For the Union, Mr Pinder argued that the present application had been made after the mandatory time-limits set out in section 108A(6)(a) of the 1992 Act. He asked that I take into account that the suspension of branch 1/944 was considered in **Finlay (No1)** (lodged with the Certification Officer on 13 December 2006 after having been put into the Union’s internal procedures in August 2006). The complaint lodged in December 2007 was therefore made more than six months after the event complained of.
31. The Union also contended that the closure of branch 1/944 in December 2007 was not a decision of the Regional Committee but an administrative process because the branch was no longer functional, having fallen below the threshold of 50 as set out in Union Rule 10(1).
32. In any event, even if it was a decision of the Regional Committee, the Certification Officer, following *Fradley v TSSA (D/28-30/03)*, would not have jurisdiction as it was not an alleged breach of a rule relating to the constitution or proceedings of any executive committee or of any decision-making meeting as provided by section 108A(2)(d) of the 1992 Act.

The Claimant’s Submission

33. The Claimant argued that his application was not outwith time. In his view it related to the proceedings of the Regional Committee of the Union on or about 8 August 2007 in respect of its decision to close branch 1/944 and re-allocate its members. His complaint was lodged on 6 December 2007, within the statutory six months of the event about which he complains.
34. The Claimant did not accept that the decision to close the branch and re-allocate its members was an administrative process rather than a decision of the Regional Committee. On 23 April 2008, Mr Collins, the Union’s Assistant General Secretary, had written “...*the decision of the Regional Committee to suspend the branch...*”, but the Union was now arguing that it was an administrative process.
35. Mr Finlay argued that if it was an administrative process he would have expected the Union to produce some documentation authorising that process and to provide follow-up. On the strength of the testimony of his witnesses, the Claimant contended that none of the Union’s processes that would be expected to give effect to the transfer of members to another branch had been followed. Nor had any internal procedures operated in a way to resolve members’ queries and objections to the transfer of members, suspension and closure of branch 1/944.

36. The Claimant accepted that following the Certification Officer's decision in *Fradley v TSSA*, an application could be considered by the Certification Officer only if it related to a breach of rule governing the way a decision was made, not the decision itself. In Mr Finlay's view, the Regional Committee was a relevant body so far as the application of section 108A(2)(d) of the 1992 Act is concerned.
37. Mr Finlay argued that the Regional Committee had not followed proper Union procedures in closing branch 1/944. Given the intensity and disquiet surrounding the closure of Swissport and its impact on branch 1/944, the Regional Committee would have been well aware that branch 1/944 was not meeting and therefore could not exercise its right of appeal against closure to the General Executive Council of the Union.

Finlay (No2): Conclusion

38. There are three main issues I have to consider. First, who took the decision to suspend/close branch 1/944 and under what powers? Second, was the Claimant's application made within the statutory time-limits? Third, is the rule allegedly breached within my jurisdiction to consider under section 108A(2)(d) of the 1992 Act?
39. On the first of these issues there is a mass of conflicting evidence. On one hand the Union seems to argue that the suspension started when it took a decision in mid-2006 that no further meetings of branch 1/944 should take place. Alternatively, that the suspension occurred at about the time that the Regional Organiser told members the branch was to close and that they were to be transferred to another branch. At some points, the Union seems to argue that the decisions were taken by the Regional Committee, at others, that they were taken on the authority of the Regional Committee. The Union's final position appears to be that no decision was needed as the branch had fallen below the usual minimum level of viability of 50 members as set out in rule 10(1). The rule under which suspension/closure action was taken was quoted as rule 11, although the Union accepted that citing this rule was an error. However, no clarification was presented to me to establish if the rule used was 10(1) which deals with minimum branch size, or rule 10(2) which deals with suspension for failing to hold an AGM. Against this background, I can appreciate the difficulties members of branch 1/944 had in understanding what was happening and it is evident that the Union took no steps to address complaints from members of branch 1/944 about these issues. I am not prepared to dismiss this application on the grounds argued by the Union that the Regional Committee and rule 10(2) were not engaged.
40. I accept that the Claimant is correct when he argues that the event complained of occurred on, or around, 8 August 2007 and that his complaint, lodged on 6 December 2007, is within the six month time-limit provided by section 108A(6)(a) of the 1992 Act.
41. As has been made known on frequent occasions, the jurisdiction of the Certification Officer is a limited one. In this case, that means it is crucial to determine whether rule 10(2) is a rule covered by section 108A(2)(d) of the 1992

Act. That is, a rule “relating to the constitution or proceedings of any executive committee or of any decision-making meeting”. In my decision in **Finlay (No1)**, I found that I was in little doubt that rule 10(2) is a rule about the constitution and proceedings of a committee. I was, and remain, of that view because the reference to the regularity of meetings relates to “constitution or proceedings” as interpreted in *Fradley v TSSA*. However, the rule relates to the regularity of meetings of branches and in this case to a branch that, because it comprised less than 1000 members and therefore was not a major constituent body, does not satisfy the definition of an executive committee or decision-making meeting as provided in section 108A(10)-(12) of the 1992 Act. It is for this reason that I find that this complaint does not fall within my jurisdiction and I dismiss the complaint.

Finlay (No3)

Complaint 1

“that on or around 18 December 2006 Unite the Union, Transport and General Workers Section, breached rule 4(2) of the Rules of the Union, by its failure to ensure that Branch 1/944 held a meeting at which it could participate in the nomination of delegates to the Biennial Delegate Conference held in December 2007”

Complaint 2

“that on or around December 2006 Unite the Union, Transport and General Workers Section, breached rule 4(6) of the Rules of the Union by its failure to ensure that Branch 1/944 held a meeting to debate and respond appropriately to the General Secretary’s invitation to forward general motions for inclusion on the agenda of the Biennial Delegate Conference held in 2007”

Complaint 3

“that during the period 12 December 2006 until 10 May 2007 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures by failing to ensure that Branch 1/944 convened regular meetings in accordance with rule 10(2) of the Rules of the Union”

Complaint 4

“that on or around 12 December 2006 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures by its failure to ensure that Branch 1/944 held a meeting at which it could make nominations (for subsequent election) for lay officials in accordance with rule 10(4)(a) of the Rules of the Union”

Complaint 5

“that on or around 12 December 2006 the Regional Committee of Unite the Union, Transport and General Workers Section, breached its own constitution and procedures by its failure to ensure that Branch 1/944 held a meeting at which it could conduct an election for lay officials in accordance with rule 10(4)(b) of the Rules of the Union”

The Union’s Submissions

42. The Union argued that all the complaints in this application had been made after the mandatory time-limits as provided by section 108A(6)(a) of the 1992 Act. The events complained of all referred to December 2006. The application was lodged with the Certification Officer on 9 May 2008. The Claimant had not specified these matters using the Union’s internal complaints procedure until he wrote to the General Secretary on 14 December 2007. As neither the application to the Certification Officer nor the letter to the General Secretary occurred within six months of the events complained of, the action was outwith time and the

saving provisions of section 108A(6)(b) and section 108A(7) of the 1992 Act did not apply.

43. The Union further argued that all these complaints in terms and substance closely related to the same matter that the Claimant had raised in his first application to the Certification Officer (**Finlay (No1)**) lodged on 13 December 2006 and which I had dealt with in my decision of 30 October 2007. In this context, the Union referred me to the principles in *Henderson v Henderson* ((1843) 3 Hare 100), and argued that the current complaints could and should have been included within **Finlay (No1)**. The Union contended that I should refuse to hear the current five complaints.
44. The Union further contended that even if I rejected these arguments, none of the rules cited in any of the complaints were within the jurisdiction of the Certification Officer as provided by section 108A(2) of the 1992 Act.
45. On matters of substance, the Union stated that there was no Biennial Delegate Conference in December 2007 and argued that a delegate to a Biennial Delegate Conference was not an office of the Union within the scope of section 108A(2)(a) of the 1992 Act.

The Claimant's Submissions

46. The Claimant argued that as the Union had failed to provide any substantive response to any of the complaints he had made to it in the past, the Union, in effect, did not have any meaningful grievance procedures. Despite this, he had endeavoured to give the Union the opportunity to resolve issues internally, but it had shown no willingness to answer any of his complaints until he lodged them with the Certification Officer.
47. Mr Finlay contended that all his grievances stemmed from the initial breach of the requirement on the Union to ensure regular branch meetings and that failure to do so breached numerous rules of the Union, many outwith the jurisdiction of the Certification Officer. It seemed to the Claimant to be an extraordinary requirement to list all the alleged breaches in an initial grievance letter to the Union. There was no authority for the alleged requirement that any, or all, rule breaches should be listed in correspondence with the Union. Furthermore, he argued, it was reasonable of him to expect full-time Officers of the Union to be fully aware that the failure to convene regular branch meetings would lead to a breach of more than one rule in the Union's rule book.
48. The Claimant rejected the suggestion that he should have raised these five complaints in his initial application to the Certification Officer lodged on 13 December 2006. Most of the alleged breaches occurred during that month and he was trying to ensure that his claim was not disallowed if there was subsequent argument that he had failed to use the Union's internal procedures.
49. The Claimant argued that each of his five complaints were within the jurisdiction of the Certification Officer as provided by section 108A(2)(b) of the 1992 Act as complaints relating to disciplinary proceedings by the Union. In each case he felt

that the actions of the Union excluded him, a fully paid up member of the Union, from participating in the democratic structures of the Union. Whether or not this was the intention, he considered it to be a case of disciplinary action.

50. Mr Finlay contended that complaint 1, (rule 4(2)), was also within the jurisdiction of the Certification Officer as provided by section 108A(2)(a) of the 1992 Act as a complaint relating to the appointment or election of a person to any office. He pointed out that rule 4(5), relating to the Biennial Delegate Conference provided that each delegate should hold office until the next such Conference. Similarly, complaint 2 (rule 4(6)) also related to the appointment or election of a person to any office because the elected delegate would be expected to propose and speak on any resolution/motion that the branch sought to pursue at Conference.
51. In regard to complaint 3, (rule 10(2)), Mr Finlay argued that in addition to being within the jurisdiction of the Certification Officer as provided by section 108A(2)(b) of the 1992 Act, it was also within the jurisdiction of the Certification Officer as provided by section 108A(2)(d) of the 1992 Act as a complaint relating to the Union's constitution and proceedings. He contended that, unlike the complaint I dismissed in **Finlay (No1)**, this complaint related to the Regional Committee's constitution and proceedings. In his view, the unconstitutionally formulated Regional Committee acted ultra vires and in contravention of its own rule book procedures when it suspended branch 1/944 and that it continued to do so in its regular reviews of the branch's affairs.
52. In respect of complaints 4 and 5, (rules 10(4)(a), and 10(4)(b)), the Claimant argued that in addition to being within the jurisdiction of the Certification Officer as provided by section 108A(2)(b) of the 1992 Act, they were also within the jurisdiction of the Certification Officer as provided by section 108A(2)(d) of the 1992 Act as complaints relating to the Union's constitution and proceedings as the unconstitutionally formulated Regional Committee contravened rule book procedures when it took the decision to debar branch 1/944 from making nominations for, and from electing, lay officials.

Finlay (No3): Conclusions

53. I will deal first with two issues pertinent to my decisions on all five complaints.
54. The Union asked me to refuse to consider the complaints as, under the principles established in *Henderson v Henderson*, making complaints which could and should have been made at the same time as an earlier complaint relating to the same facts constituted an abuse of process.
55. The rule in *Henderson v Henderson* requires the parties, when a matter becomes the subject of litigation between them, to bring their whole case before the court so that all aspects of it may be finally decided (subject to any appeal). In the absence of special circumstances the parties cannot return to court to advance arguments, claims or defences which could have been put forward for decision on the first occasion but which were not raised. This is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves,

that litigation should not be never-ending and that a defendant should not be oppressed by successive suits when one would do.

56. In a more recent case touching on the same matters (*Johnson v Gore Wood & Co (a firm)*) ([2001] 1 All ER 481), Lord Bingham commented that the principle that there should be finality in litigation was reinforced by the current emphasis on efficiency and economy in the conduct of litigation. He also stated that it would be wrong to hold that, because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That would be to adopt too dogmatic an approach to what should, in his opinion, be a broad merits based judgment. The focus should be, in his opinion, on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised in earlier proceedings. The question Lord Bingham considered should be asked is whether in all the circumstances a party's conduct is an abuse.
57. The *Henderson v Henderson* principles have been adopted in Employment Tribunals as well as in the Civil Courts. Having regard to the statutory jurisdiction of the Certification Officer, I agree with the Union that it is appropriate for me to apply the principles of *Henderson v Henderson* in considering this application.
58. In this context, the questions for me are threefold. First, could the five complaints in **Finlay (No3)** have been made at the same time as **Finlay (No1)**? Secondly, should they have been so made? Thirdly, in all the circumstances did bringing the five complaints after **Finlay (No1)** had been decided constitute an abuse of process?
59. Mr Finlay argued that he could not have brought the five complaints on 13 December 2006 because many of the events complained of had not occurred at that time. He also argued that he did not bring them earlier because he was endeavouring to resolve the issues through the Union's internal procedures. He claimed he did this in the knowledge that the Certification Officer could refuse an application under section 108B(1) of the 1992 Act unless he was satisfied that the applicant had taken all reasonable steps to resolve the claim through the internal complaints procedure of the union.
60. In my view there is no doubt that the five complaints of alleged breach of rule stem from the same facts as set out in **Finlay (No1)** and relate very closely to two of the complaints (see paragraph 20 above) covered by my decision in that case. All seven of the complaints relate to the alleged consequences of there being no meetings of branch 1/944 after 25 April 2006. Moreover, the complaints take a similar form in that they link the failure to hold regular branch meetings to a possible disadvantage under another rule.
61. Some of the specific events cited in complaints 1 to 5 in **Finlay (No3)** may not have occurred at the time **Finlay (No1)** was lodged on 13 December 2006, but the rules cited in the present complaints were long established in the Union's rule book. Also, at that time it would have been clear that there was to be no Annual

General Meeting of branch 1/944 in December 2006 (a matter at the heart of complaints 4 and 5 of **Finlay (No3)**). Moreover, at that time there had been no branch meetings for seven months and this fact could be argued to threaten the sort of consequences under the rules cited in the current application. In these circumstances it would have been possible to bring the current complaints with **Finlay (No1)**, lodged on 13 December 2006, either as breaches of rules, or threatened breaches of rules as provided in section 108A(1) of the 1992 Act.

62. Mr Finlay certainly made strenuous efforts to obtain answers from his Union about the affairs of branch 1/944 and received very little response. However, I do not accept that in December 2006 he was using the Union's internal complaints procedure to resolve the issues covered in **Finlay (No3)**. His first mention of the rules which these complaints allege were broken came in his letters of 1 October 2007 and of 14 December 2007 to the Union's Joint-General Secretary. In my view there are no special circumstances justifying Mr Finlay's failure to bring the current application at the time of **Finlay (No1)**.
63. I accept that it is important that union members should not be deprived of the right to bring legitimate complaints before the Certification Officer. However, bringing complaints in a piecemeal way carries the danger of leaving the impression that once one application against a union has failed, lessons will be learned from that and a new or slightly modified approach can and will be adopted by the Claimant. I cannot state that that happened in this case, but there is a possibility that it might have done. I do take the view, however, that the manner in which the current claims were conducted, their repetitious nature and the drawn-out time over which they were pursued is capable of being interpreted as unjust harassment of the Union.
64. It is against this background that I have concluded that the complaints in **Finlay (No3)** could and should have been made at the same time as those in **Finlay (No1)** and that in all the circumstances not doing so constitutes an abuse of process. Therefore, I dismiss all five complaints. However, should I be wrong in this, I will consider my position on the five complaints as brought before me.
65. The second issue pertinent to all five complaints is the Claimant's contention that they are all within my jurisdiction by virtue of section 108A(2)(b) of the 1992 Act which refers to rules relating to disciplinary proceedings by the Union. The fact that the failure to hold branch meetings had a deleterious impact on the Claimant's ability to participate in the democratic processes of the Union does not automatically make the rules cited into rules relating to "*disciplinary proceedings by the union...*". In *UNISON v Gallagher* (EAT/0280/05/MAA), the Employment Appeal Tribunal expressly found that while the application of a particular rule may have a deleterious impact on an individual it should only be regarded as a rule relating to disciplinary proceedings if the rule can be shown to have been applied for disciplinary reasons. In none of the five complaints under consideration was there any evidence that the rules were being applied with any disciplinary intent. None of the complaints are therefore within the jurisdiction provided by section 108A(2)(b) of the 1992 Act and accordingly, I would dismiss all five complaints made under this provision.

66. I now consider each of the complaints in turn. Complaint 1 (rule 4(2)) relates to the nomination of delegates to the Union's Biennial Delegate Conference. I have not formed a view on whether jurisdiction is provided under section 108A(2)(a) of the 1992 Act. For this complaint, the prior question is whether or not the complaint was made in time. The breach is alleged to have occurred on or around 18 December 2006. The application to the Certification Officer was made on 9 May 2008. The first mention of an alleged breach of this rule in the context of the Union's internal grievance procedure was in the Claimant's letter of 14 December 2007 to the Union's Joint-General Secretary. As neither an application to the Certification Officer, nor the invoking of the Union's internal grievance procedures occurred within six months of the alleged event, the complaint was made outwith the time-limits provided by section 108A(6)(b) and section 108A(7) of the 1992 Act. I have no discretion to vary these provisions. I would dismiss this complaint as having been brought out of time.
67. Complaint 2 (rule 4(6)), submitted in May 2008, refers to breaches that are alleged to have occurred on or around December 2006 and relates to branch motions for the Union's Biennial Delegate Conference. I have not formed a view on whether jurisdiction is provided to the Certification Officer under section 108A(2)(a) of the 1992 Act. As with complaint 1, however, neither an application to the Certification Officer nor the invoking of the Union's internal grievance procedures occurred within six months of the alleged event and the complaint was made outwith the time-limits provided by section 108A(6)(b) and section 108A(7) of the 1992 Act. I have no discretion to vary these provisions. I would dismiss this complaint as having been brought out of time.
68. Complaint 3 (rule 10(2)) is made under section 108A(2)(d) of the 1992 Act in relation to the Regional Committee's alleged failure to perform one of its duties under rule. The event complained of was a (continuous) failure to ensure that branch 1/944 met regularly throughout the period December 2006 to May 2007. On 10 May 2007, the Claimant lodged a complaint "*under stage one*" of the Union's "*Procedure for Complaint By Member*". This was done within six months of the event complained of and it is not disputed that this was an appropriate procedure for the purposes of section 108A(6) of the 1992 Act. The Union acknowledged receipt of Mr Finlay's letter and stated that the correspondence had been forwarded to the Regional Secretary. I was shown no evidence that Mr Finlay was told that that procedure was not being followed or that it had concluded. In such circumstances I consider it appropriate to find that Mr Finlay was still endeavouring to resolve the matter within the Union's procedures and in so doing, it is clear that this complaint, lodged with the Certification Officer on 9 May 2008, was well within the time-limits specified in section 108A(6) and section 108A(7) of the 1992 Act.
69. In so far as it related to the Regional Committee, the complaint related to a body which is within the definition of an executive committee in section 108A(10), (11) and (12) of the 1992 Act. Moreover, the Claimant made allegations of breaches of the Regional Committee's own constitution and to it being improperly constituted when it reached decisions affecting branch 1/944. This, and the fact that a rule relating to the regularity of meetings is, on its face, captured by the phrase "constitution and proceedings", might lead to the view

that there were alleged breaches by the Regional Committee to be considered by me under section 108A(2)(d) of the 1992 Act. However, I was presented with no evidence of breaches of proceedings by, or in the composition of, the Regional Committee. Further, and as I have found in **Finlay (No2)**, the alleged breaches of rule 10(2) relate to the regularity of meetings of branches. In this case, branch 1/944 is a branch that, because it comprised less than 1000 members and therefore was not a major constituent body, does not satisfy the definition of an executive committee or a decision-making meeting as provided in section 108A(10)-(12) of the 1992 Act. In my judgment I do not have jurisdiction under section 108A(2)(d) of the 1992 Act and would dismiss the complaint.

70. Complaint 4 (rule 10(4)(a)) relates to nominations of branch officials. I have not formed a view on whether jurisdiction is provided to the Certification Officer under section 108A(2)(a) and/or (d) of the 1992 Act as a matter relating to appointments or elections or the actions of the Regional Committee within its constitution or proceedings in preventing branch 1/944 from electing branch or lay officials. For this complaint, the prior question, as with complaints 1 and 2, is whether or not the complaint was made within proscribed time-limits. The breach is alleged to have occurred on or around 12 December 2006. The application to the Certification Officer was lodged on 9 May 2008. The failure to hold an AGM was mentioned in the Claimant's letter of 1 October 2007 to the General Secretary, but the first specific mention of an alleged breach of this rule in the context of the Union's internal grievance procedure was in the Claimant's letter of 14 December 2007 to the Union's Joint-General Secretary. As neither an application to the Certification Officer nor the invoking of the Union's internal grievance procedures (whether on 1 October 2007 or 14 December 2007) occurred within six months of the alleged breach, the complaint was made outwith the time-limits provided by section 108A(6)(b) and section 108A(7) of the 1992 Act. I have no discretion to vary these provisions. I would dismiss this complaint as having been brought out of time.
71. Complaint 5 (rule 10(4)(b)) relates to elections of branch officials. The same facts and considerations apply as with complaint 4. Accordingly, I would dismiss this complaint as having been brought out of time.

Summary of conclusions

- **Finlay (No2)** does not fall within my jurisdiction as, in the context of this case, rule 10(2) is not a rule relating to the constitution or proceedings of any executive committee or of any decision-making meeting as provided by section 108A(2)(d) of the 1992 Act.
- In **Finlay (No3)**, the five complaints clearly relate to the alleged consequences of the failure to hold meetings of branch 1/944, in exactly the same way as at least one of the complaints in **Finlay (No1)**. Bringing the five complaints about two years later constitutes an abuse of process on the principles in *Henderson v Henderson*.
- If I am wrong about the application of the principles in *Henderson v Henderson*, complaints 1,2,4 and 5 in **Finlay (No3)** fail because

they were made outwith time. Complaint 3 fails as, in the context of this case, rule 10(2) is not a rule relating to the constitution or proceedings of any executive committee or of any decision-making meeting as provided by section 108A(2)(d) of the 1992 Act.

- None of the five complaints engage section 108A(2)(b) of the 1992 Act as they do not relate to disciplinary proceedings.

E G WHYBREW CBE
Assistant Certification Officer