D/23-24/00

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

IN THE MATTER OF COMPLAINTS MADE AGAINST THE BROADCASTING, ENTERTAINMENT CINEMATOGRAPH AND THEATRE UNION (BECTU)

APPLICANT MR TD GATES

Date of Decisions: 2 November 2000

DECISIONS

1.1 Under section 55 of the Trade Union and Labour Relations (Consolidation) Act ("the1992 Act") any person having sufficient interest who claims that a trade union has failed to comply with any of the requirements of Chapter IV of Part I of the 1992 Act concerning the need for, and conduct of, elections to certain positions may apply to me for a declaration to that effect. Similarly under section 108A of the 1992 Act 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 108A (2) may also apply to me for a declaration to that effect.

1.2 Sections 55 and 108B of the Act empower 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. In both sections, I am required, whether I make or refuse the declaration sought, to give reasons for my decision in writing.

1.3 In making a declaration under either of these sections of the 1992 Act I am required to specify

the provisions with which the trade union has failed to comply. Where I make a declaration under either section I am required, unless I consider to do so would be inappropriate, to impose an enforcement order on the union. Under section 55(5A) my enforcement order should imposes one or more of the following requirements on the union-

(a) to secure the holding of an election in accordance with the order;

(b) to take such other steps to remedy the declared failure as may be specified in the order;

(c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.

1.4 Under section 108B (3) my enforcement order should impose on the union one or both of the following requirements -

(b) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

1.5 On the 25 May 2000, I received complaints from Mr Gates a member of the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU). Mr Gates made two complaints. First that the union had held an election for the post of President of the union, on Sunday, 21 May 2000, which breached the 1992 Act (Complaint One) and second that the union had breached its rule 33(d) in the election of its National Executive Committee (NEC) the result of which, Mr Gates stated, were announced on the 6 May 2000 (Complaint Two). Mr Gates' first complaint was accepted as a complaint that the union had, in relation to the election of its President, breached section 46(1) of the 1992 Act. Mr Gates' allegations in

respect of the election of the NEC was accepted as a complaint under section 108A(1) of the 1992 Act.

1.6 I investigated the complaints in correspondence and on 5 September 2000 held a formal hearing, to hear argument on both complaints. The union was represented by Mr S Cavalier of Thompsons Solicitors. Mr Gates, the applicant, attended the hearing and spoke for himself. The union's General Secretary, Mr R Bolton, also attended the hearing and gave evidence. I found this helpful in my determination of the complaints.

Declaration and Order

1.7 After careful consideration of the documents, evidence, arguments put to me and the relevant legislation:

> "I declare that the Broadcasting, Entertainment Cinematograph and Theatre Union was in breach of section46(1) of the 1992 Act in that the union failed to ensure that the President of the union had been elected to that position in an election satisfying the requirements of the Act."

The reasons for my decision are set out below.

1.8 Also for the reasons set out below I refuse to make the declaration sought in respect of Mr Gates breach of union rule 33(d) complaint.

1.9 This is clearly a case in which I should issue an enforcement order. So by agreement with the parties (but such agreement being without prejudice to the right of appeal to the Employment Appeal Tribunal), I issue the following order to the Broadcasting, Entertainment, Cinematograph and Theatre Union;

"To secure by 31 May 2001 that rule changes have been put in place to ensure that the post of President of the union is filled according to the requirements of Chapter IV of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended, and further to secure that the post of President is filled under the new arrangements by 31 May 2002."

The order is worded in this way to give the union an opportunity to consider and adopt one of the various options open to it to satisfy the requirements of the Act.

Requirements of the Legislation and the relevant union rule.

1.10 It may be helpful, at this point, if I set out the relevant statutory requirements of the Act and the union rule to which I have referred to in this decision. The relevant statutory requirements are as follows:

" *46(1) A trade union shall secure-*

(a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and

(b) ... ."

Section 46(2) lists the relevant positions within the union as:

"*(2) The positions to which this Chapter applies (subject as mentioned below) are-*

(a) member of the executive,

(b) any position by virtue of which a person is a member of the executive,

(c) president, and

(d) general secretary:

and the requirement referred to above are those set out in section 47 to 52 below."

1.11 The union's rule 33(d) under the general heading of rule 33 National Executive Committee provides:

"*(d) No paid official or employee of the union shall be eligible for election to the National Executive Committee.*"

1.12 That then is the background, relevant legislation and union rule. I now set out the facts, arguments put by the parties on the two complaints and the reasons for my decisions.

Complaint One: that the union had failed to ensure that its President had been elected to that position in an election satisfying the requirements of section 46(1) of the 1992 Act.

Facts

2.1 The union's rule book (rule 33(b)) stated that the National Executive Committee (NEC) shall elect the President, Vice-President and Treasurer from amongst its members. The NEC was elected by the union's membership every two years and, at the first meeting of the newly elected NEC, the NEC then elected the President from amongst its number. It was this procedure (the election of the President by the NEC from its number) that Mr Gates believed was in conflict with the requirements of the legislation.

2.2 Mr Gates had made a similar complaint on the 17 November 1999 in respect of the election

of the union's President the result of which was announced by the union on the 30 May 1998. Without hearing the substantive issues, on the 10 March this year I determined that that complaint was made outwith the time limits specified by section 54(3) of the Act and that therefore I did not have the jurisdiction to hear and determine the complaint (Decision D/9/00).

2.3 Mr Gates now made the same complaint in respect of the union's election of its President which was held on the 21 May 2000.

The Applicant's Case

2.4 In correspondence with my office Mr Gates complained that the union had, on the 21 May 2000, held an election for the post of President which he alleged "... breached the 1992 Act and was not in keeping with the ruling made by the Certification Office in the case of Equity, 1999. ...". He stated that BECTU had failed to ensure that the election had satisfied the requirements of sections 46 - 54 of the Act.

2.5 In reply to a written submission made on behalf of the union by its solicitors Thompsons, Mr Gates commented that section 46 of the Act clearly requires direct elections for the post of President and that there was no requirement for the President to be a member of the union's executive. The rule book, he stated, should provide for the elected President to serve on the Executive by virtue of his position.

2.6 Mr Gates argued that BECTU's present system required two elections and one of these elections was not a direct election as required by the Act. He felt that had the President been directly elected as required by the Act, the President by virtue of his or her position would be a member of the executive.

2.7 At the hearing Mr Gates explained that he had been a trade union member all his life and had been an active member of BECTU for more than thirty years. He stated his belief that there should be a consistent and equal set of laws for all trade unions and that it was after seeing a copy of the Equity decision (British Actors' Equity Association (Equity) (D/1 -2/99)) - Mr Gates explained he was a member of both unions - that it had demonstrated quite clearly that this was not the case. He commented that, as a member of both unions he now sought clarification (of the law).

2.8 He stated his belief that the posts of President and General Secretary were the most important posts in the union and that all members should be allowed to vote for the President as they did for the post of General Secretary and that it should not just be voted on by an electoral college as was the case in BECTU.

2.9 He explained that BECTU members were allocated to one of a number of divisions and that each division was allowed an NEC representative based on the membership figures of the division. The representation allowed was one member (of the NEC)for each 2000 members or part thereof (of the division). He explained that the BBC division of the union was the largest and the most influential with a membership of between 20 to 25 percent of the whole and that this section was the most powerful on the executive.

2.10 He argued that the voting by the NEC for the position of President could therefore be swayed by an electoral college or slate of voting and that less that 20 votes (ie the NEC) electing the President in a union with 25,000 members could not be truly democratic.

2.11 Mr Gates stated that he felt there was a need to clear up ambiguities (between unions) and that he passionately believed the President should be elected by the whole membership.

2.12 In answer to the union's comment that this was the first time the union's system of electing its President had been queried, Mr Gates stated that this was not true as he had queried it on many occasions. He added that he had gone along with the union's view until the Equity decision of 1999 when he realised he had been right all along and that BECTU was not conforming with the law in the election of its President.

2.13 He argued that if the general membership votes for an honorary President, then that President can serve as long as he does not vote. The present holder of the post, Mr Gates explained, was able to vote and therefore should be elected, by the whole membership. As the President of the union and once elected as such, he or she should then automatically become a member of the NEC. He felt the Act was designed to prevent the union's present system of the President being elected by the NEC from amongst its members and that whatever applies to the election of the General Secretary must apply to the President.

2.14 To sum up Mr Gates' case he felt that as a member of both Equity and BECTU and since becoming aware of the Equity decision he argued that he had brought the complaint to tighten and close any loopholes. He felt the posts of President and General Secretary were the most important offices in unions and that the legislation relating to the election of both positions should be clear and consistent for all trade unions. The Equity decision he stated put BECTU and Equity in different positions and he wanted clarification and a position where all members of the union were able to vote for the position of President and that the President should not be elected by an electoral college within the NEC.

The Union's Response

2.15 In response to this complaint Mr Cavalier for the union explained that the union was formed on 2 January 1991 by the merger of the Association of Cinematograph Television and Allied

Technicians (ACTT) and the Broadcasting and Entertainment Trades Alliance (BETA) and that the rules of the merged union provided, on an interim basis, for the continuation in office of the existing Presidents until common rules of membership were established under the joint rules.

2.16 The sectional rules of the ACTT, Mr Cavalier explained, provided for the election of the President by ballot of the membership while those for BETA provided that the NEC elected a President from among its members. The Instrument of Amalgamation and rules for the new union were, Mr Cavalier stated, submitted to, and approved by, the Certification Officer.

2.17 The interim rules of the newly merged union, I was told, remained in place until the first rules revision conference of BECTU (on 28 October 1991) when Conference voted in favour of a rule which provided that:-

> "the NEC shall elect the President, Vice- President and Treasurer from amongst its members"

This rule, it was explained, was rule 33(b) of the union's rule book and has remained unchanged since that date.

2.18 Mr Cavalier explained that the statutory requirements for elections to certain trade union positions were first introduced in the Trade Union Act 1984. The positions to which the requirements applied were:-

- every voting member of the Executive
- every person who is a voting member of the Executive by virtue of holding another position in the union

and, Mr Cavalier stated, meant that non-voting members of the Executive were not subject to the requirements. He argued that a President, General Secretary or other official was only subject to the requirements if "by virtue of holding [that] position" he was a member of the Executive.

2.19 Where, as in the present case Mr Cavalier stated, the Executive was elected by the members in a ballot complying with the statutory provisions and the President was then elected by the Executive from amongst its number, there was not a requirement for a separate ballot of members for the election of President.

2.20 In 1988, Mr Cavalier explained, the provisions of the 1984 Act were amended by the Employment Act 1988. The relevant section was section 12 of the 1988 Act which was headed "*extension to non-voting positions of duty to hold elections*". After the amendment, the statutory election requirements, Mr Cavalier informed me, applied to:-

- every member of the Executive
- every person who is a member of the Executive by virtue of holding another position in the union.

2.21 Mr Cavalier stated these categories were extended so that "member of the Executive" included voting members and those who were not entitled to vote, but were entitled to attend and speak(other than merely to give factual information or advice). He explained that there was a further extension so that those holding the position of President or General Secretary (or nearest equivalent position) were deemed to be members of the Executive "*if the rules of the union did not otherwise provide for them to be members of the union's principal executive committee*". Only in these circumstances, he argued, did the provision of sub section 1(6B) of the amended 1984 Act require that they be elected in a statutory ballot to

the position of President or General Secretary.

2.22 Mr Cavalier felt the position adopted by BECTU in its rules in 1991 was lawful and was consistent with the provisions of the Trade Union Act 1984 as amended by the Employment Act 1988. The President of BECTU was an elected member of the Executive, through an election which complied with the statutory requirements. The President did not (and, he stated, does not) hold office by virtue of which he becomes a member of the Executive. It is not the case, he argued, that the holding of the Office of President entitles the holder to be a member of the Executive but that the reverse is true: the President has to be a member of the Executive in order to be eligible to hold the office.

2.23 Mr Cavalier stated that the provisions of the Trade Union Act 1984 as amended by the Employment Act 1988 were consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992 which came into force on 16 October 1992. He stated its long title is described as "*an Act to consolidate the enactments relating to collective labour relations, that is to say, to trade unions, employers' associations, industrial relations and industrial action*". A consolidation act, he argued does not and should not be interpreted as having changed the law.

2.24 He argued that the 1992 Act does appear incorrectly to reflect the pre-existing legislative position. Section 46(1), he stated, requires a trade union to ensure that every person who holds a position in the union to which the Chapter applies does so "*by virtue of having been elected to it at an election satisfying the requirements of this Chapter*". Section 46(2) he said provides "*the positions to which this Chapter applies (subject as mentioned below) are -*

(a) member of the executive,

(b) any position by virtue of which a person is a member of the executive,

(c) president, and

(d) general secretary

and the requirements referred to above are those set out in sections 47 to 52 below."

2.25 This, Mr Cavalier argued, should not be interpreted as requiring a further ballot of members for the position of President when the President is already (and can only be) a member of the Executive by virtue of an election complying with the statutory provisions. A direct election of President, he felt, is only required if the President was a member by virtue of his position as President (either by rule or because of the deeming provision in statute) and was not already a member of the Executive by direct election.

2.26 Mr Cavalier argued that, in interpreting the statutory position of the consolidating legislation, in this case it is permissible for me to look to the predecessor legislation. I was referred to two authorities of the House of Lords, **Farrell v Alexander [1976] 2 ALL ER 721** and **Associated Newspapers v Wilson [1995] IRLR 258.** The circumstances in which such an approach should be taken, he said, are set out in the decision of the House of Lords in **Farrell v Alexander**. Their Lordships in this case were considering the interpretation of the Rent Act 1968, a consolidation Act. He referred me to the headnote of that decision which summarised the conclusion of the majority of their Lordships on this point as follows:-

> "*where a court is called upon to consider a consolidation Act it should interpret the Act in accordance with the usual canons of statutory construction and without recourse to the Act's antecedents. Only where there is a real or substantial difficulty or ambiguity should the court attempt to resolve the difficulty or ambiguity by reference to the legislation which has been repealed and re-enacted in the consolidation Act*".

2.27 In the same case, Mr Cavalier specifically referred me to the speeches of Lords Wilberforce, Simon of Gaisdale and Edmund-Davies where the issues were discussed in more detail. [**Farrell v Alexander** page 725f to page 726c, page 733f to page 736b and page 743f to page 746d]. I repeat here the passages regarded as most pertinent as they appear to me to offer both clear and helpful guidance. Lord Wilberforce stated "*... that self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve. ...*"

2.28 Lord Simon, in the same case, discussed the construction of consolidation Acts and said "*All consolidation Acts are designed to bring together in a more convenient, lucid and economical form a number of enactments related in subject-matter (and often by cross-reference) previously scattered over the statute book. All such previous enactments are repealed in the repeal schedule of the consolidation Act. It follows that, once a consolidation Act as been passed which is relevant to a factual situation before a court, the "intention" of Parliament as to the legal consequences of that factual situation is to be collected from the consolidation Act, and not from the repealed enactments. It is the relevant provision of the consolidation Act, and not the corresponding provision of the repealed Act, which falls for interpretation. It is not legitimate to construe the provision of the consolidation Act as if it were still contained in the repealed Act - first, because Parliament has provided for the latter's abrogation; and, secondly, because so to do would nullify much of the purpose of passing a consolidation Act.*

2.29 Lord Simon then continued, *"The long title of the statute shows whether it is a consolidation Act: if it is merely "to consolidate ...", it is a pure consolidation Act; while if it is under the*

1949 or 1965 procedures this specifically indicated in the long title (see, eg the Juries Act 1974, the Friendly Societies Act 1974). Special Parliamentary practice governs consolidation under the 1949 and 1965 procedures respectively; and, should a consolidation Act passed under either of these procedures fall for interpretation, I would hope that a court of construction would not make heavy weather of discovering how much of the Act in question represents amendment and would in interpretation discriminate between 1949 - and 1965 - type amendments. But no such questions arise on the instant appeal; the Rent Act 1968 is "pure" consolidation.

In the case of such a statute it is the primary task of the joint committee to ensure that the bill when it passes into law does not depart from the pre-existing statutory enactments which are to be consolidated. That does not involve a literal transcription. The language will be modernised. Contemporary drafting techniques will be adopted, so long as they do not change the sense. The lay-out will if possible be improved to promote perpicuousness. Obvious slips in the pre-existing legislation will be corrected. Sometimes, through inadvertence, there are overlapping provisions or varying terminology dealing with the same subject- matter: the joint committee will then choose the one which most felicitously accords with the obvious parliamentary intention (though doubts or ambiguities must be dealt with by the 1949 procedure). Thus, in a "pure" consolidation Act it must be assumed that it was not necessary to have recourse to the 1949 procedure, ie that the consolidation Act reproduces pre-existing statute law without even "corrections" or "minor improvements" as defined in the 1949 Act.

This does not mean that the initial approach to the construction of a "pure" consolidation Act must be via the statutes it has replaced. On the contrary it is the consolidation Act itself which falls for interpretation. The initial judicial approach is the same as with the interpretation of any other statute."

2.30 Lord Simon concluded this part of his judgement by stating "*The primary approaches to statutory interpretation (which I have tried to summarise earlier) are therefore as appropriate for construction of a consolidation Act as for any other type of statute. It is only on failure of the primary aids to construction that the fact that the statute to be construed is a consolidation Act permits any special approach: what it does then is to provide an additional secondary canon of construction which will sometimes be of service, namely a presumption that a consolidation Act (insofar as it merely re-enacts) does not change the law.*"

2.31 Mr Cavalier then referred me to the comments of Lord Edmund - Davies in his judgement on the same case. Lord Edmund - Davies commented "*Although it effected amendments to ss32 and 34 of the Rent Act 1965, the 1968 Act was, and was described as, a consolidation enactment. As such, there is a presumption that it was not intended to alter the law and accordingly, if the need arises, regard may be had to decisions on the construction of the earlier enactments which are consolidated, even if the words used are not identical, though this presumption must yield to plain words to the contrary: see Halsbury's Law of England*[2] *and the cases there cited. But where earlier legislation has been substantially altered by amending legislation before consolidation, decisions on the earlier provision cannot affect the construction of the later*[1]*. It is legitimate to refer to an earlier statute in pari materia, even if it has expired or has been repealed, but "only where there is ambiguity": R v Titterton*[2]*, per Lord Russell of Killowen CJ.*". Lord Edmund - Davies then referred to the words of Lord Simon of Glaisdale in Maunsell v Olins when he said "*It has been generally accepted in the past that there is a presumption that Parliament does not intend by a consolidation Act to alter the pre-existing law (see Maxwell: Beswick v Beswick) ... But ... such a presumption has no scope for operation where the actual words of the consolidation Act are not, as a matter of legal language, capable of bearing more than one meaning. The*

docked tail must not be allowed to wag the dog."

2.32 Mr Cavalier submitted that, here there was a real and substantial difficulty with the interpretation of a consolidation Act and that I was entitled to go behind the consolidation Act to resolve the issue. He further referred me to the House of Lord's decision in **Associated Newspapers v Wilson** again concerning the interpretation of a consolidation Act, the Employment Protection (Consolidation) Act 1978 and the leading judgement of Lord Bridge of Harwich. "*To put it no higher, the question whether s23(1) should be rewritten in some way so as to spell out expressly the meaning of "action" as including omission, or whether the context requires that the definition be not applied, gives rise to a "real and substantial difficulty" in the interpretation of the statute "which classical methods of construction cannot resolve" and thus entitles us to go behind the consolidation Act of 1978 to derive whatever assistance we can in resolving the difficulty from the legislative history."* Mr Cavalier considered there was as much ambiguity and difficulty in this case as that referred to by Lord Bridge and, as such, this would entitle me to go behind the provisions of the 1992 Consolidation Act to resolve that difficulty.

2.33 Mr Cavalier, on behalf of the union, submitted that a proper interpretation, of the Act, in this case was that a person who is already a directly elected member of the Executive and is required to be so in order to be President is not also required to be directly elected to an office of President which does not of itself entitle him to membership of the Executive. He argued that the union's method of, first a direct election of the Executive by a membership ballot followed by the election, by the Executive, of a President from amongst its number complied with the requirements of the legislation.

2.34 He argued the problem arises with the construction of the 1992 Act where a person (the president of BECTU in this case) holds more than one position as referred to in section 46(2)

of the Act. He submitted that if the person is a member of the Executive, it is not necessary for them to submit to a second and separate election under the statute for a position which they hold as a member of the Executive.

2.35 Mr Cavalier felt that there was an overlap between the categories in section 46(2) and gave the example of a union where the rules provide that the executive consists of the President (other officers) plus ordinary members, that the President is a member of the executive and that, consequently, the person elected as President becomes a member of the executive. That person, he felt, was apparently covered by sub-section (a), (b) and (c) yet it cannot be suggested that two or even three separate elections are required.

2.36 He felt this reinforced the interpretation that the legislation is directed at actual or deemed membership of the Executive and that it was not necessary in those circumstances for a President who is an elected member of that Executive to submit to a further ballot of the full membership in order to hold that office. He argued that the requirements of the Act are satisfied by the President being elected by the Executive from amongst its number.

2.37 This, Mr Cavalier argued, was the proper interpretation of section 46 of the Act and that it ensures that the President of BECTU is a valid elected member of the Executive and holds the position of President by virtue of an election which satisfies the requirements of the Act.

2.38 Mr Cavalier for the union argued that this case was a situation where I should have regard to the predecessor legislation when interpreting section 46 as section 46 gives rise to a real and substantial difficulty in the construction of the statute. First, where an individual holds two positions listed in section 46 and secondly where it is a requirement of rule that the individual first be elected a member of the executive to be eligible for election by the executive to another position.

2.39 He argued for the union that, the legislative history makes it clear that the requirement for direct election was directed to membership of the principle executive or to those positions which confer membership of that committee. The amendment in 1988, he argued, was to extend coverage to those who held senior positions in the union which either made them de facto members of the principle executive committee or deemed them so to be. The express reference to the positions of President and General Secretary, in the Act, was to cover, he argued, the situation where one or more of those positions did not confer membership of the principle executive committee. This was, he stated, in the context of individuals in those positions who were perceived to be exercising considerable power or influence within unions yet were not covered by the statutory requirements for elections. Were it not for the amendment, he argued, those individuals would not have been subject to any requirement for election to any position. This, he stated was a completely different situation from the office of President in BECTU.

2.40 The operation of the legislation he commented, could be illustrated by contrasting the positions of the President, General Secretary and Assistant General Secretary under BECTU's rules and under statute. Under BECTU's rules the General Secretary and the Assistant General Secretaries are not elected members of the Executive but are entitled to attend the meeting and speak, but not to vote. This means, he said, they are not elected to the executive. They are, however, subject to direct election because they hold positions under which they are deemed to be members of the executive by virtue of sections 46(2) and (3). This arises he felt only because unlike the President, they are not elected as members of the executive and, but for the provisions of section 46(2) and (3) (as reflected in the union's rules), would not face any requirement for election.

2.41 It was the union's submission, he said, that section 46(2) lists the positions to which the Act

applies. This must be interpreted, he argued, as not requiring a further election ballot for the position of President when the President was already, and could only be, a member of the executive by virtue of an election complying with the statutory provisions. This is directed to membership or deemed membership of the executive and the direct election of President is only required if the President was a member by virtue of his position as President either by rule (of the union) or because of the deeming provisions in the statute and was not already a member of the NEC by direct election.

Reasons for my Decision

2.42 I am grateful both to Mr Gates for the succinctness of his submissions and to Mr Cavalier for his assistance in guiding me to the relevant authorities on the interpretation of a consolidation Act.

2.43 I find I have no difficulty with Mr Cavalier's view that the 1992 Act was a pure consolidation Act and as such it is assumed that the law as represented by the 1992 Act has not departed from the pre-existing statutory enactments which have been consolidated. Whilst accepting this as my starting point I turned to the leading judgements in **Farrell v Alexander** and **Associated Newspapers v Wilson** which provide authoritative guidance on the interpretation of a consolidation Act. Having read these judgements carefully it seems to me it is really quite clear that there has to be a "real or substantial ambiguity or difficulty" in the interpretation of the consolidation Act before it is necessary or even proper to look to that Act's antecedents.

2.44 Their Lordships were quite clear about this in the case of **Farrell v Alexander**. In addition to the passages referred to earlier in this decision one of the passages I was directed to by Mr Cavalier, I feel, summarises the conclusion of the majority of their Lordships on this point in

that case. Lord Wilberforce stated:-

> "*where a court is called upon to consider a consolidation Act it should interpret the Act in accordance with the usual canons of statutory construction and without recourse to the Act's antecedents. Only where there is a real or substantial difficulty or ambiguity should the court attempt to resolve the difficulty or ambiguity by reference to the legislation which has been repealed and re-enacted in the consolidation Act*".

2.45 The Courts have demonstrated caution in referring to pre consolidation legislation to illuminate the interpretation of consolidation Acts. They are conscious that if consolidation is to serve a purpose the usual canons of statutory interpretation should apply to a consolidation Act unless there is real or substantial ambiguity in that Act. Therefore, the first question I have to ask myself is, "is there a substantial difficulty or ambiguity in the interpretation of the consolidated Act?"

2.46 In reading section 46(1) of the Act, I cannot see that there is a real or substantial difficulty. I do not find the 1992 Act to be ambiguous. Problems may seem to occur in application of the legislation where someone holds more than one post. However, the legislation, on the face of it, is so clear that I did not think it proper or necessary, as invited by Mr Cavalier, to consider the pre-consolidation legislation. The wording of sections 46(1) and 46(2) is clear, that every person who holds the position of President must be elected to <u>it</u> by virtue of an election satisfying the provisions of the Act. There are exceptions (section 46(4)) in cases where the President performs a limited 'ceremonial' role but they do not apply in this case.

2.47 The union's approach to the interpretation of the 1992 Consolidation Act does I think demonstrate the danger of treating from the outset the interpretation of consolidation Acts

in a manner different from any other Act. Mr Cavalier started by setting out his interpretation of the 1984 and 1988 Acts and sought to demonstrate by way of comparison that the 1992 Act was ambiguous. I reject this approach as departing from that of the House of Lords in the **Farrell v Alexander** and **Associated Newspapers v Wilson** decisions. Mr Cavalier's interpretation of the 1984 Act as amended by the 1988 Act was not supported by authoritative case law. It seems to me a possible explanation of the clear and unambiguous wording of the 1992 Act is that Parliament put it there to remove any question of ambiguity in the 1984 Act as amended by the 1988 Act. I say this without taking a view on whether or not the 1984 Act as amended was ambiguous but only to stress the difficulties of statutory interpretation of a consolidation Act if one does not start with the consolidation Act itself.

2.48 In assistance of the union's arguments it was claimed that problems appear in the application of the 1992 Act, but I believe these can be overestimated, are largely administrative, certainly not insuperable and do not amount to a substantial difficulty in the operation of the 1992 Act. To my mind the key point is that the legislation is absolutely clear.

2.49 The President and General Secretary have to be elected, as does the Executive or anyone else holding a post entitling them to a seat on the Executive. The union argued that a vote, by the membership, for the executive is a vote for the President [and could be for the General Secretary]. It is not. When members vote directly for either of these two positions they know for what position and for whom they are voting. Members decide (a) whether a person is to be President (or General Secretary) and (b) whether that person will also be on the executive. The way this union does it, the members elect the executive but do not know, at the time of voting, who will be elected to the executive or who the President will be. This approach was also adopted by Equity in the case mentioned by Mr Gates (see para 2.7 above) but that union conceded that the process did not satisfy the 1992 Act. I concurred with that view then and while Mr Cavalier's arguments have caused me to reconsider the matter they

have not changed my conclusion.

2.50 I find that the legislation recognises there are two particular posts that are of prime importance in the union. These are the President and the General Secretary and Parliament has decreed that the members should have direct involvement in the election of these officials.

2.51 Mr Cavalier's alternative argument, was that even on the face of the legislation (forgetting the consolidation aspect) the union's system satisfies the legislation because the officials were elected to the executive and another group (the executive) then elected the President. I find this argument falls foul of section 46(1)(a) which states:-

> " *that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and ...*"

Running the two elections together by first electing the NEC by full ballot of the members and the newly elected executive then elects the President from amongst its members is not an election satisfying the Act. These are two elections with the union members at large not having a vote in the second and decisive one.

2.52 Mr Cavalier also made a passing reference to an argument that the executive was in itself a section or class of the union and that the union had not unreasonably excluded the membership from having a vote for President. Section 47(3) of the 1992 Act provides:-

> "*(3) A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the grounds that he belongs to a class of which all the members are excluded by the rules of the union.*

But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded."

2.53 I do not consider this argument has weight. Section 47 is about candidates for election. In this case I do not have to consider whether or not a rule which says only members of the executive may be candidates for President satisfies that section. The key question of fact in this case is whether the membership were given a chance to vote in an election for the post of President. On that point there is no dispute. Only members of the Executive were eligible to vote in the election to the post of President. The key question of law is whether the members at large should have been given a chance to vote for the President and on that I have found that section 46 of the Act required them to be given such a chance.

2.54 It is for these reasons, I found the union had breached section 46(1) of the Act.

Complaint Two: that the union had breached its rule 33(d) in the election of its National Executive Committee (NEC) the result of which, Mr Gates stated were announced on the 6 May 2000.

The Applicant's Case

2.55 In correspondence with my Office Mr Gates stated that in the election for the National Executive Committee (of the union), the results of which were announced at conference on 6 May of this year, he believed members were elected (without opposition) in contravention of BECTU Rule 33(d) which states that no paid official or employee of the union shall be eligible for election to the NEC.

2.56 He argued that a number of members of the NEC were full-time paid officials of BECTU

(paid by the BBC) and that all officials paid by BECTU are employees and as such cannot be elected to the NEC. The rules, he said, stated "no paid official or employee of the union shall be eligible for election to the National Executive Committee". He argued that his construction of this rule was that "No paid official ... of the union" and "no employee of the union ..." shall be eligible for election to the NEC and that if the rule had meant "no official employed by the union" it would have said so and that the rule need not have used the word "or" making a clear distinction between "paid official" and "employee".

2.57 A "paid official" he argued, is someone who has full time union duties and is paid for them irrespective of who pays. He commented that he objected to an executive which has two classes of members, those who are paid full-time for their duties, and those who undertake such duties part-time or voluntarily. The issue he argued was whether those paid full time for their union duties, and thus had a vested interest, should be able to vote at the NEC. He argued that he did not believe they should.

2.58 At the hearing of this complaint, Mr Gates stated he felt there were two ways to approach the complaint, legalistically and literally. Legalistically, he argued the rule is what you say, not what you may have meant to say. Literally the rule, he commented, deconstructs quite clearly, no paid official shall be eligible for election to the NEC and no employee of the union may be elected to the NEC. It was quite clear, he stated, that the members of whom he complained were paid officials and that this disqualified them from the NEC. He added that the union may argue that there is a distinction between those paid by BECTU and those paid by the BBC and that commonsense must mean that the rule refers to paid by BECTU. However Mr Gates stated that the rule makes no such distinction.

2.59 He argued that paid officials on the union's NEC could have their own agenda and that the NEC was intended to be the principle lay body of the union, and full time officials, regardless

of who pays them, naturally have an agenda of their own which is why they do not have a vote.

2.60 Mr Gates explained how the union was formed, by the merger of the Association of Cinematograph Television and Allied Technicians (ACTT) and the Broadcasting and Entertainment Trades Alliance (BETA) and that when the unions merged the rule book was framed. He argued that it was irrelevant who pays the official. The intent of the rule, he said, is that it excludes full time paid officials from what must be a lay body (the NEC), a democratic body run by the members themselves for the benefit of members as a whole. He argued that, as a member of the committee that framed the rule book of the new union the intent was quite clear, it was he said, to keep paid officials out of the NEC which was to be the principle lay body. He felt the reasons for this were obvious, the NEC, he said discussed pay, conditions and other matters effecting staff, in short, he said, paid officials would have a vested interest in the outcome of any such discussion and may have a different agenda from lay members.

2.61 The issue he argued was not who paid them but whether they are or are not officials of the union. He referred to three people named in the NEC minutes, all were, he said paid officials of the union. One of the three named he stated was a lay member of the NEC but was paid by the BBC for union duties. Clearly, Mr Gates argued, such people were seen as members of the NEC and yet they were part of management.

2.62 The intent of the rule, he argued was to safeguard lay members of the committee and restrict the intrusion of paid officials of any kind other than for the giving of advice when required. He argued that if the rule is given a literal interpretation no paid full time official should serve. The intent, he argued, was to exclude employees and paid members from serving as full time officials of the union to exclude such classes from attending the NEC and from having any

voting powers.

2.63 To sum up, Mr Gates said, if you take a literal interpretation of the rules, paid officials shall not be eligible for election to the NEC. He said these people are paid officials in every sense and that if I did not believe this to be the case it was certainly the intent of the rule which was to exclude all those with a legitimate vested interest of being an official of the union. That was he said, someone who is paid full time for their union duties.

The Union's Response

2.64 The union's response to this complaint was that the rule states "*no paid official or employee of the union shall be eligible for election to the National Executive Committee",* and, Mr Cavalier for the union stated, that no paid official or employee of the union is elected to the National Executive Committee.

2.65 The complaint, the union argued, related to members elected to the NEC from the BBC Division who were employed by the BBC. These members, the union stated were members of the executive but were not paid officials or employees of the union. They were, I was told, employed by the BBC who allowed four of its employees to be on full- time paid release for trade union duties, but not for trade union activities.

2.66 The union told me it would be wrong to state that the members concerned are paid by the BBC for their role as members of the NEC or for attendance at the NEC. They were also not, I was told, on paid release as members of the NEC.

2.67 The rule, Mr Cavalier argued was not aimed at such individuals, but was aimed at officials who are employed by the union and other staff who are also employed by it. The reference

in the rule, I was told, is directed to individuals who are paid and employed by BECTU.

2.68 Mr Cavalier informed me the employees of the union are divided into two categories: officials and other employees and that there are separate collective bargaining arrangements for the two groups of staff. In answer to my question of the union I was informed that "officials" referred to the General Secretary, the Assistant General Secretaries and other officers of the union, while "other employees" referred to the secretarial and other administrative staff employed. I was told that rule 6(a) of the union provides that no employee of the union shall be eligible for membership of the union, except at the discretion of the NEC. That discretion, I was informed, has never been exercised.

2.69 The phrase " *paid officials or employees*" which appears in rule 33(d), I was told, also appears in rule 33(q)(ii) where the NEC is required to establish "*superannuation, pension or insurance schemes for the benefit of paid officials and employees*". This rule, I was told, as a whole deals with the staff of the union and their terms and conditions of employment. The phrase, the union argued clearly applies only to those employed by the union and commented to me that the union could not be expected to make pension arrangements for officials employed by another employer. The union also quoted, to me, rules33(s) and (t) which referred to "other paid officials of the union and to rule 33 (x) which they argued showed that "paid officials" were distinct from members. This was also repeated, the union stated, in the Standing Orders for Disciplinary Hearings.

2.70 To sum up, Mr Cavalier for the union argued that the complaint was misconceived. The rule, he said, prevented officials paid and employed by BECTU from being elected members of the NEC. It does not, he argued, prevent the members complained of by Mr Gates from being elected members. Mr Cavalier argued that it was clear from the text of the rules themselves, that it was clear from the context, clear also from the way they have been applied, clear from

the other rules where the phrase occurs and that it was clear from a matter of commonsense and logic why that would be the case.

Reasons of my Decision

2.71 The union's rule 33(d) about which alleged breach of Mr Gates complained stated:-

> "*(d) No paid official or employee of the union shall be eligible for election to the National Executive Committee.*"

This is clearly a complaint by a member of BECTU about a rule relating to the election of a person to an office. As such it is covered by section 108A(2) and falls to be determined by me under section 108A(1).

2.72 In cases like this it is clearly inappropriate to treat union rule books as if they were statutes or subject to all the rules of grammatical construction. Three tests seem more appropriate. First what was the intention of those who framed the rule? Second what does the rule, taken in the context of the whole rule book, seem to mean? Third what would the ordinary member reading the rule take it to mean?

2.73 On the first question Mr Gates said from his own experience that the rule was designed to ensure that the union was governed by lay people who (by implication) obtained their livelihood from their profession. The union's view was that it was to stop anyone paid by the union serving on the executive. These are both perfectly sound reasons for adopting a rule like 33(d). The evidence on which is the correct explanation of why the rule was adopted is conflicting and inconclusive. I have therefore to rely on the other two questions.

2.74 On the second question, even though union rule books are often internally inconsistent and contradictory it is not an unreasonable starting point to assume that words used in different parts of the rule book have the same or similar meaning each time they are used. In that respect it is quite clear to me that the words "paid officials and employees" in 33(q)(ii) relating to the requirement to establish a superannuation scheme can only relate to people be they officials or employees paid by the union. A similar meaning seems clear in several other rules. No case was brought to my attention where Mr Gates' preferred interpretation of the words in 33D would fit the context in which they appear elsewhere in the rule book.

2.75 Thirdly I am confident that the vast majority of lay members of the union would adopt the natural meaning of the words "paid official or employee of union" and would see this rule 33(d) as debarring from the executive only those people paid by the union.

2.76 It is for these reasons that I find that no paid official or employee of the union has stood for election to the executive and I dismiss Mr Gates' second application.

Observations

2.77 I am empowered by section 55(5) of the Act to make written observations on any matter arising from or connected with proceedings in cases I have determined. I do so in this case in relation to Mr Cavalier's statement that, at the time of the merger producing BECTU, the Certification Officer had approved the union rule book containing the provision for the election of the President that was the subject of complaint one. This reflects a common misunderstanding of my role in relation to approving union rule books. I have a role in respect of approving the content of rules in just one situation. That is in relation to rules in respect of political funds and my role is limited to approving the rules only in so far as they satisfy the statutory requirements relating to political funds.

2.78 With regards to my role in respect of mergers I am required to approve the instrument of amalgamation or of transfer. In respect of some amalgamations the instrument may set out the proposed rules of the amalgamated organisation. Apart from political fund rules I am not required to approve those rules. My approval of such instruments of amalgamation or transfer indicate that I am satisfied that the instrument complies with the requirements of any regulations in force under Chapter VII of the 1992 Act. Apart from changes of name that Chapter deals solely with amalgamations and transfers of engagements. I am not required to, nor do I, consider whether such an instrument complies with any of the other provisions of the 1992 Act. Occasionally, in relation to a merger, if my Office spots an area where the rules of the new union may be in conflict with statutory requirements they will give the union "a health warning". Such a warning is not a definitive statement of the law, nor does the absence of a warning imply that I have given my approval to all of the rules of the union.

E G WHYBREW

Certification Officer