

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

IN THE MATTER OF A COMPLAINT AGAINST THE FIRE BRIGADES UNION

Date of decision

24 May 2000

DECISION

- 1.1 Under section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) any person having sufficient interest who claims that a trade union has failed to comply with any of the requirements of sections 46 to 53 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.
- 1.2 Whether I make or refuse to make the declaration sought I am required to give, in writing, the reasons for my decision.
- 1.3 On 15 October 1999 I received a complaint about the election process allegedly adopted by the Fire Brigades Union (FBU) in the election held in January 1999 for one of the two Region 11 (London Region) seats on the Executive Council. Under Chapter IV of Part I of the 1992 Act, elections to the union’s principle executive committee have to satisfy certain specific requirements. The complaint alleged that, in conducting the ballot in accordance with the union’s rule book, the union had failed to provide for a fully postal ballot. The complaint was treated as an application under section 55 of the Act, in that section 51(4) of the Act requiring a full postal ballot had been breached.

- 1.4 The applicant wrote: “The union failed to comply with Chapter IV Part 1 of the 1992 Act in that the ballot was not a postal ballot. Therefore the union was contravening Section 55 of the Act in that Section 51(4) requires a full postal ballot. The union rule setting out its requirements for ballots is Rule 19(1)(e)(iv) and (v). They do not allow for a postal ballot for the position.”
- 1.5 The applicant also wrote: “I would like to end by expressing my serious concerns as to my well being if my identity does not remain confidential to yourself. I would refer you to Section 256(2).”
- 1.6 As this complaint was made on 15 October 1999 it fell to be dealt with in accordance with the legislation in force at that time. This was prior to any amendments to the 1992 Act occasioned by the Employment Relations Act 1999 which came into effect, for the purposes of my powers, on 25 October 1999. In particular, section 256(2) of the Act then in force allows the Certification Officer to make such provisions as seems appropriate for restricting the circumstances in which the identity of an individual who has made, or proposes to make an application to me is disclosed to any person.
- 1.7 I investigated the complaint in correspondence without disclosing the identity of the applicant. I made enquiries of the applicant, of Hard Dowdy (Chartered Accountants) who acted as scrutineers in this election and of the union. I decided that, in accordance with the provisions then in force, it was not necessary or appropriate in this instance to hold a formal hearing before making my decision.

Declaration

1.8 For the reason which follows:

“I declare that the Fire Brigades Union failed to comply with the provisions of section 51(4) in respect of its election of the Executive Council Member for London Region (Region 11) in February 1999 in that the union failed to conduct a postal ballot.”

Requirements of the Legislation

1.9 The relevant statutory requirements in respect of the complaint are as follows;

“51(4) So far as is reasonably practicable, every person who is entitled to vote at the election must -

(a) have sent to him by post, at his home address or another address which he has requested the trade union in writing to treat as his postal address, a voting paper which either lists the candidates at the election or is accompanied by a separate list of those candidates; and

(b) be given a convenient opportunity to vote by post.

256-(1) Except in relation to matters as to which express provision is made by or under an enactment, the Certification Officer may regulate the procedure to be followed -

(a) on any application or complaint made to him, or

(b) where his approval is sought with respect to any matter.

(2) He shall, in particular, make such provision as he thinks appropriate for restricting the circumstances in which the identity of an individual who has made, or is proposing to make, any such application or complaint is disclosed to any person.”

1.10 For ease I now set out the relevant rule of the FBU concerning ballots. Rule 19(1)(e)(iv)

& (v) of the Fire Brigades Union provide as follows: -

“(iv) The General Secretary shall supply ballot papers to the Brigade Secretary for the electoral territory concerned who shall distribute or cause to be distributed the ballot papers to the

Branches whose members are entitled to vote. If the Brigade Secretary is involved in the election, another Official appointed by the Brigade Committee shall fulfil this function.

- (v) *Each member shall record his/her vote by marking an "X" in the box opposite the name of the candidate he/she desires to be elected and shall then return the completed voting paper in the envelope provided for this purpose to the Branch Official conducting the ballot by the date and time of close of voting."*

The Applicant's Case

- 2.1 The applicant's case was quite straightforward. It was claimed that the ballot in question was not a postal ballot as the ballot was conducted in accordance with the union rule book, namely Rule 19 (1)(e) (iv)&(v). This did not provide for a full postal ballot as required by the 1992 Act.

The Union's Responses

- 2.2 The union's first response was to seek confirmation from the applicant as to whether, in light of developments since the complaint had been lodged, the applicant wished to proceed with the complaint. It was suggested that it was possible that the complaint had been lodged, not to deal with the London Election but, rather, to ensure full compliance in relation to the forthcoming election of a new General Secretary. It was stated that the union was fully aware of the legislative requirements and that steps had been taken to ensure that the forthcoming election for the General Secretary fully complied with the 1992 Act. It was possible therefore that because of this the applicant might wish to withdraw the complaint.

- 2.3 The union's response was put to the applicant. In reply the applicant stated that there was the prospect of a number of elections to be held in the future. The union's response only dealt with the forthcoming election for the General Secretary and there was concern that in all other elections the FBU would revert to the previous procedures which had given rise to the complaint. What was needed was a positive assurance that all future elections would follow the format being adopted for the General Secretary's position.
- 2.4 In reply to the applicant's response the union made a number of comments. It was first argued that the complaint should be struck out as an abuse of process. The applicant's reply made it clear that the purpose of the complaint was not to deal with the 1999 London Elections but rather to use that as a vehicle to secure undertakings in relation to future elections. It was submitted that section 55 was designed to deal with complaints about the conduct of elections already held. It was argued that, where, as in this case, the applicant was simply seeking to use this as a means to secure the future position, this constituted an abuse of process established by section 55 and that the complaint should accordingly be struck out.
- 2.5 The union further argued that this complaint was a duplication of a previous complaint which had already been investigated and determined by the Certification Officer. Both the substance and the subject matter of that complaint were identical to the current complaint. The issue had already been considered and the Certification Officer had issued a formal reasoned determination (D/3/99). Accordingly there appeared to be no exceptional reasons or unusual circumstances applicable which would justify reopening the matter. The complaint should therefore be dismissed on this basis.

2.6 The union then argued that the evidence of membership of the FBU sought by the Certification Officer from the applicant was not sufficient to enable the Certification Officer to satisfy himself that he had received a proper complaint. The union stated that, in order for the Certification Officer to have jurisdiction to deal with a complaint, the applicant had to be a member both at the time the disputed election was held as well as at the time the complaint was made. Relying on a copy of an FBU membership card to confirm membership at the relevant times was not remotely adequate. Membership cards were issued enjoining the union, there was no expiry date thereon, no provision to show whether subscription rates were up-to-date and no formal arrangements for the card to be returned when a member fell into arrears of subscriptions or left the union. It was therefore argued that there was no evidence before the Certification Officer to confirm that the applicant was indeed a member of the FBU both at the time the complaint was made and at the time the election was held. The union then went on to suggest a number of options the Certification Officer could have taken in order to satisfy himself that the applicant was a member at the appropriate times. This included an inspection of the union's membership register.

2.7 Finally the union raised the question of preserving the anonymity of the applicant. It accepted that section 256(2) of the 1992 Act permitted anonymous complaints but submitted that any request for anonymity should be weighed against the union's right to a fair procedure and, if necessary, a hearing to determine the complaint. The union had been deprived of the right to check that the applicant was a member both at the date of complaint and at the date the election was held. It was argued that the applicant should be asked to provide valid grounds and evidence in support of the request to remain

anonymous and that evidence tested, at the very least, by an ex-parte hearing before the Certification Officer. By accepting the request for anonymity based on the applicant's concerns for their well being, the Certification Officer cast doubt on the good name and proud tradition of the Fire Brigades Union.

Follow up of these responses from the union

- 2.8 In response to the union's submission arrangements were made to inspect the union's membership register at the offices of the union's solicitor to confirm the applicant's membership at the relevant times. Unfortunately those arrangements came to nothing when the disc supplied by the union containing the union's membership records could not be accessed by the union's solicitors for technical reasons. In the meantime evidence in the form of the applicant's payslips covering the date of the election and the date of complaint had been provided and both showed deductions of FBU subscriptions.
- 2.9 I indicated my intention to determine the issues on the basis of the information available but before proceeding I again invited the union to provide a substantive response to the complaint.
- 2.10 In its final response the union again returned to the issues of abuse of process, duplication, evidence of membership and anonymity. On the issue of abuse of process the union accepted that the original letter of complaint was solely concerned with the relevant Region 11 election and the question of withdrawing the complaint following the General Secretary's election was raised by the union. However that did not detract from the applicant's clear confirmation that the purpose of pursuing this complaint was as a vehicle

to secure undertakings in relation to future elections. This was not the purpose of section 55 which was designed to deal with complaints about the conduct of elections already held.

2.11 With regards to duplication the union argued that the question was not whether the current complaint was a separate complaint but whether the subject matter of the complaint is identical to that of a previous complaint. It was submitted that section 256 permitted the Certification Officer to determine procedural matters and that appropriate procedural regulation should ensure that duplication is avoided. In support reference was made to the Court of Appeal summary in Divine-Bortey -v- London Borough of Brent [1998] IRLR 525 which cited the basis of the Rule in Henderson -v- Henderson.

2.12 It was noted by the union that the applicant's pay slips together with an assertion of membership had been taken as acceptable evidence of membership of the FBU. Nevertheless it was submitted that the union should be given the opportunity to investigate the applicant's membership and independently confirm whether the requirements of section 54(2) had been satisfied. It was accepted by the union that such action may conflict with provisions designed to secure anonymity, where appropriate, hence the need to ensure that anonymous complaints were permitted only in "exceptional circumstances".

2.13 The union again argued, in relation to the issue of anonymity, that an applicant should be asked to provide valid grounds and evidence in support of a request to remain anonymous and for that evidence to be tested. In this instance the Certification Officer had only a bald

assertion that the applicant had serious concerns as to their well being and needed to protect themselves from intimidation and possible violence. This would imply, it was argued, that mere assertion was sufficient and investigation thereof not necessary. Thus effectively the Certification Officer's decision appeared to be that anonymity is a matter of right and will be granted on request. The union drew my attention to Harvey on Industrial Relations and Employment Law, Division M, Section 4.J(3)[1242] which dealt with the earlier decision (D/3/99) in respect of this election. In particular to the comment which read: -

“On the whole, it is thought the Certification Officer was right to conclude, that in a wholly exceptional case, he might properly entertain an anonymous complaint.”

It was submitted that the correct approach was to investigate the matter thoroughly and to permit anonymity only when wholly exceptional circumstances arose. A mere unsubstantiated assertion, without evidence in support, investigation or corroboration, does not amount to adequate grounds to grant anonymity.

2.14 In the only reference which had any relevance to the procedures adopted in respect of the election which formed the basis of the complaint the union stated: -

“In your letter of 18th November 1999 you referred to Rules 19(l)(e)(iv) and (v) and suggested that these rules provided for a workplace ballot. This is not the case. These Rules simply deal with the distribution and return of the ballot papers and do not require distribution and return by way of workplace ballots. They neither require nor preclude a postal ballot in accordance with the legislation. In any event, section 46(6) of the 1992 Act makes it clear that the relevant legislative provisions apply “notwithstanding anything in the Rules...”.”

2.15 As part of my enquiries under section 55(2) I sought and obtained from Hard Dowdy, Chartered Accountants, the scrutineers appointed by the union for the election in question, a copy of the scrutineer's report in respect of that election.

Reasons for my Decision

3.1 Before I deal with the substance of the complaint it is appropriate that I should deal with the procedural matters raised by the union.

3.2 First was this complaint an abuse of process? As the union accepted, the suggestion that the applicant withdraw the complaint on the assurance that the forthcoming election for the General Secretary would be conducted in full compliance with the statutory requirements, originated from the union itself. It was only in response to this proposal that the applicant stated that the assurance sought was for all future elections to be conducted in the same format as that for the General Secretary. It seems to me that what happened here was that one party made an offer in the form of an assurance which was declined. In return the other party made clear what sort of assurance would be acceptable. In my view that is not an abuse of process. It is an attempt to secure an assurance that the union would obey the law in future elections.

3.3 There is no provision for me to determine the motivation of an applicant in making a complaint to me. Section 55. -(1) provides: -

“A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.”

I had before me a claim that a union had failed to comply with certain requirements of the 1992 Act. As that complaint was a valid one I had a duty to proceed with it in accordance with the statutory provisions. In determining that complaint I am not required to ascertain or take into account the reasons why it has been made. Neither am I required to ascertain nor take into account why the union felt able only to give an assurance of compliance with the statutory provisions in respect of the election of the General Secretary or choose not to respond fully to the substance of the applicant. For these reasons I am not prepared to strike out this complaint as an abuse of process.

3.4 Secondly does this complaint reopen an issue I had already determined? As the union has observed, this complaint is in respect of the same election which was the subject of a complaint received a year ago. That complaint, which essentially covered the same issues as the current one, was eventually withdrawn and consequently dismissed. My investigations into that complaint were, as I recorded in my decision (D/3/99) at the time, severely restricted by the approach of the both the union and the scrutineer. In the event the complaint was withdrawn before my investigations were completed. I had to dismiss it on those grounds without any consideration of the substance of the issue. In my view the current complaint is not a duplicate case, neither is it a case involving a different court nor is it a “second bite of the cherry”. It is a separate complaint involving a different applicant exercising a right provided under section 55 of the 1992 Act. There is no provision in the legislation, nor is there any suggestion, that for whatever reason this member should be denied the right to make a complaint to me or for me not to investigate the matter in accordance with the legislation. Indeed if the union was right it would open the way for the avoidance of all valid complaints. The union would merely need to find

someone willing to lodge a complaint with me and then to withdraw it. It might be a different matter if the issue had been determined on substantive grounds.

3.5 The union's third procedural argument was that it should have been given an opportunity to investigate the applicant's membership of the union and independently confirm whether the applicant satisfied the requirements of section 54(2). I have to balance the applicant's request for anonymity against the union's desire to satisfy itself that the applicant had the proper status to make the complaint to me. I am satisfied that the evidence of membership provided by the applicant in the form of pay slips showing deductions made in respect of subscriptions to the FBU at the time of the election and at the time of complaint were sufficient proof of that individual's right to make a complaint to me. It is indeed unfortunate that the efforts made to check the applicant's name against the union's membership register were unsuccessful. In the event that it had proved possible to check the membership register I doubt whether the union would have been satisfied with the confirmation by a member of my staff that the applicant's name appeared on the membership register. This still would not have allowed the union to confirm for itself that the individual concerned had been a member at the appropriate time. I should perhaps stress, in view of the union's concerns regarding membership cards, that at no time did I rely on the applicant's membership card as proof of membership of the FBU.

3.6 The union "accepted that the legislation permits anonymous complaints". However it also drew my attention to Harvey on Industrial Relations and Employment Law which dealt with my previous decision concerning the FBU. There is a significant difference between the two cases. In the previous case (D/3/99) I took the decision to deal with an

anonymous complaint. That was a complaint from an individual whose identity was not revealed to me or to anyone else. I treated that anonymous complaint as an exceptional case and Harvey does not disagree with that line. The case now before me is different. It is not an anonymous complaint. I know the identity of the individual and adequate proof of membership has been provided. The legislation, in section 256(2), at the time of complaint, provided for me to “... *make such provision as he thinks appropriate for restricting the circumstances in which the identity of an individual who has made, or is proposing to make, any such application or complaint is disclosed to any person.*” It is therefore for me to take such steps as I think appropriate to preserve the identity of the applicant. I am not required to consult with anyone before I decide to take such steps and, in the case in question, the identity of the applicant had no bearing on the substance of the complaint, which was about the balloting process and not the applicant’s part in it. I mentioned in the previous decision, the provision to preserve the identity of an applicant was introduced by the 1988 Employment Act and it has been the Certification Officer’s practise not to disclose the identity of any applicant without the consent of that person. This has not previously been a problem. Indeed, a significant number of complaints have been determined without the identity of the applicant being disclosed. There was no compelling reason to treat this case any differently as the union would not have been disadvantaged in mounting its case on the substantive issue by not knowing the applicant’s identity. In this case I also bore in mind that the previous applicant had expressed similar fears in requesting to remain anonymous and had subsequently withdrawn his complaint. Preserving the applicant’s anonymity was not intended to cast doubt on the good name and proud tradition of the Fire Brigades Union.

- 3.7 I turn now to the substantive issue. The complaint's case was quite straightforward. The ballot was conducted according to the rules of the union which did not provide for a full postal ballot.
- 3.8 The first substantive issue for me to consider is the election in question one to a post covered by the requirements of Chapter IV of the 1992 Act? This was an election to the Union's National Executive Council and as such should have been conducted in compliance with Chapter IV.
- 3.9 As part of my enquiries of the union it had been suggested that a ballot conducted in accordance with the rules of the union would indicate that a workplace ballot had taken place. The union denied this. It claimed that the rules dealt simply with the distribution and return of the ballot papers and did not require distribution and return by way of workplace ballots. It was also stated that the rules neither required nor precluded a postal ballot in accordance with the legislation. The term, "workplace ballot", can apply to a variety of different methods used to conduct a ballot. Whether or not the ballot used by the FBU in the election of the Executive Council Member for London Region (Region 11) in February 1999 was a workplace ballot is not material to this case.
- 3.10 The main issue remaining is whether or not the ballot complied with the requirements of section 51(4) of the 1992 Act. If the ballot was conducted in accordance with FBU Rule 19(1)(e)(iv) and (v) then it fell short of the requirements of section 51(4) of the 1992 Act. The applicant alleges that the ballot was conducted in accordance with union Rule

19(l)(e)(iv) and (v) and, despite repeated requests the union have failed to address this allegation.

3.11 I have seen two pieces of evidence supporting the applicant's allegation. First an FBU circular to Branch Secretaries (Ref. 99HOC011KC). This is a return for completion by branch secretaries showing among other things the total number of ballot papers issued to members, their serial numbers, the number completed and returned to Hard Dowdy and the number not issued. The Branch Secretary is required to sign this return. Such a return could only be made by the person responsible for distributing the balloting papers - which under union rules is the Branch Secretary but which under statute is the Independent Scrutineer or an independent person. The same circular makes reference to union rules governing the return of ballot papers.

3.12 The second piece of evidence is a letter dated 8 February 1999 from Hard Dowdy to the union's General Secretary in which they describe themselves as "the independent scrutineers appointed in accordance with union rules". Moreover the union has never disputed that the election was carried out in accordance with its rules. I am convinced on the overwhelming balance of probability that the election in question was carried out in accordance with union rules. As a consequence ballot papers were not distributed by post to members' home or other authorised addresses and were returned not directly by post but via branch secretaries. These constitute clear breaches of the statutory requirements set out in Chapter IV of the 1992 Act. For these reasons I make the declaration set out in paragraph 1.8 above.

E G WHYBREW
Certification Officer