

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION
MADE UNDER SECTION 108A (2) OF THE TRADE UNION AND
LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

Mr R Kruger

V

Unite the Union

Date of Decision

18 January 2011

DECISION

Upon application by Mr Kruger ("the claimant") under section 108A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

I refuse the application by Mr Kruger for a declaration that Unite the Union breached rule 18.1 of its rules in or about April 2010 by declaring him ineligible to be nominated by its 1/344 branch to stand for election to the London Advisory Committee as an Operating Convenor.

REASONS

1. The claimant is a member of Unite the Union ("Unite" or "the Union"). By an application dated 24 May 2010, the claimant complained to me that his Union had breached its rules in relation to the election of an Operating Convenor to the London Advisory Committee, a body composed of members employed in the bus industry in and around London. Following correspondence, with Mr Kruger, the following complaint was identified and confirmed by him:

"In ruling Mr Kruger ineligible to be nominated by the 1/344 Branch to stand for the post of delegate to the London Advisory Committee, the union breached rule 18.1. The election held on 16 April did not therefore allow for an election at that workplace by the members from amongst themselves."

2. I investigated the alleged breach in correspondence. A hearing took place on 21 December 2010. At the hearing, the claimant represented himself. Written witness statements were submitted on his behalf by Mr Kruger, Mr Fuat Senses, Mr Victor Martinez, Michael Jampaisy, Mr Abdul Syed and Mr Malcolm Bruce. Messrs Senses, Martinez and Bruce were present at the hearing. Their witness statements were taken as read and they were not cross examined. The Union was represented by Mr Peter Edwards of counsel, instructed by Mr Evans of Thompsons Solicitors. The Union called Mr Peter Kavanagh, Regional Co-ordinating Officer of Unite as a

witness. Mr Kavanagh produced a written witness statement. The rules of the Union and the rules of the TGWU were before me, together with a 138 page bundle of documents. Both parties provided written skeleton arguments.

Findings of Fact

1. Mr Kruger entered the employment of Metroline Limited ("Metroline") as a driver in 1994, shortly before the privatisation of London Buses was complete. In the same year he joined the Union. In 1995, he became both a garage representative and the Sports & Social Secretary at the garage at which he was then based, North Wembley. A garage representative is the equivalent of a shop steward. Employees of Metroline were able to join and enjoy the benefits of membership of a Sports and Social Club.
2. According to a Memorandum of Understanding between Metroline and the Sports and Social Coordinator dated 26 March 2007, the Sports & Social Club is an organisation which is independent of both Metroline and the Union. It is run by a management committee formed of representatives from each Metroline garage and from head office and is chaired by a company representative. Metroline was to pay it £8,000 a year with the remainder of its income derived from voluntary deductions from the wages of participating Metroline employees. A full time Sports & Social Coordinator was to be appointed for a period of two years, who was to be elected by the Committee. The salary of the Sports & Social Coordinator was to be funded by the company but an annual bonus of 5% was to be paid out of Sports & Social Club funds if the coordinator met certain targets. The coordinator was also to be paid a fuel allowance from Sports & Social Club funds. Membership of the Sports & Social Club was open to all Metroline employees, be they members of Unite, members of other unions or members of no union.
3. Mr Kruger ceased his garage responsibilities in 2005 when he became the full time Coordinator of the Sports & Social Club, which position he still holds. Nevertheless, Mr Kruger remains an employee of Metroline with the substantive grade of driver. Should he cease to be the Sports & Social Coordinator, he would revert to driving duties. Mr Kruger maintained that he was regarded by Metroline as being one of their spare drivers who could be called upon if required. I find, however, that Mr Kruger was seldom called upon and the duties he performed were almost exclusively those of the Sports & Social Coordinator. I further find that, whilst Mr Kruger's pay was aligned to that of bus drivers, he was not rostered for work as were drivers, and did not receive overtime or enhanced weekend rates, as did drivers. He was also not required to wear a bus driver's uniform and he worked frequently from the Head Office of Metroline. In summary, I find that, as the Sports & Social Coordinator, Mr Kruger was not part of the Metroline cadre of regular bus drivers. I find that his normal duties did not involve driving buses and his role was altogether different from that of bus drivers.
4. This case concerns an election held by the Union in April 2010 for the position of Operating Convenor to the London Advisory Committee of the Union ("LAC"). Mr Kruger was nominated as a candidate in this election by his branch but he was

declared ineligible to stand by the Union. The background to this election requires some explanation.

5. The name of the LAC does not appear in the rules of the Union. It has its origins in the days before the privatisation of London Buses. At that time the garages in the London area elected representatives to the Central Bus Committee. After privatisation, there was no longer a single employer with whom to negotiate but it was considered desirable to retain a central coordinating body at which issues of common interest could be discussed. The Central Bus Committee evolved into what is now the LAC. The LAC exists outside the Union's formal structure for the bus industry. Unite is organised into a number of Industrial Sectors. The Passenger Transport Sector has committees at national and regional level. Branches and workplaces feed into the Regional Passenger Services Industrial Sector Committee. The LAC exists outside this structure.
6. Membership of the LAC is by election. The members of the Union at each employer which has more than one garage are entitled to be represented on the LAC by an "Operating Convenor" and an "Engineering Convenor". These equate to what were once known as "platform staff" and "inside staff". There is much history to these positions but for present purposes, it is sufficient to note that the Operating Convenor is elected by drivers and the few conductors that remain on so-called heritage routes. Accordingly, one Operating Convenor is elected to represent Metroline drivers on the LAC. This is a significant role which involves negotiating with the company and representing members as well as attending meetings of the LAC. Most employers permit the Operating Convenor elected by their employees to be on full time paid release. Metroline has about 2,500 bus drivers based at ten garages.
7. Each bus garage is also a separate branch of the Union. In August 2009, the North Wembley Garage closed and its staff transferred to the Perivale Garage, the branch for which is branch 1/344. Mr Kruger is a member of the 1/344 branch.
8. The facts in relation to the election in question are as follows. In or about January 2010 Mr Kavanagh, a Regional Coordinating Officer of the Union and a person with great experience of the bus industry in London, wrote to all relevant branches seeking nominations for the elections to the LAC. On 18 February, branch 1/344 nominated Mr Kruger. Shortly thereafter, Mr Kavanagh received two letters from members querying whether Mr Kruger was eligible for nomination. Their basic point was that Mr Kruger was not working as a bus driver and that the position of Operating Convenor was restricted to working bus drivers. Nominations for this election closed on 10 March and on 12 March Mr Kavanagh wrote to Mr Kruger for clarification of his position. In his response, Mr Kruger suggested that Mr Kavanagh might write to the company. Mr Kavanagh delegated this task to the Regional Officer with direct responsibility for members in Metroline, Mr Buckley. In the company's response to Mr Buckley of 24 March, its Chief Operating Officer, Mr O'Shea, confirmed that Mr Kruger performed the role of Sports & Social Coordinator, that he was appointed by the Sports & Social Committee and that he was paid for jointly by the company and the Sports & Social Club. On that information, Mr Kavanagh wrote to Mr Kruger on 12 April informing him that he was not eligible to stand for the position of Operating Convenor as he was not currently

employed as a bus driver within the bargaining unit nor even solely employed by the company itself.

9. The election was due to have taken place by way of a work place ballot on the 16 April 2010. With the removal of Mr Kruger as a candidate, there was only one remaining candidate. He was the incumbent, Mr Steve O'Rourke, and he was declared elected, without there having to be a ballot.
10. Mr Kruger protested about being declared ineligible as a candidate, both to his Regional Secretary and to the General Secretary. He also contacted Mr O'Shea at Metroline who wrote to him on 4 May 2010 to confirm the position. Mr O'Shea confirmed that Mr Kruger was employed by Metroline Travel Limited, that his substantive grade was that of driver and that he would revert to the driver grade should he cease to be the Sports & Social Coordinator, in the same way as a secondment.
11. Mr Kruger commenced this application by a registration of complaint form received at my office on 24 May 2010.

The Relevant Statutory Provisions

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

(a) Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

(a) the appointment or election of a person to, or the removal of a person from, any office;

(b)-(d)

The Relevant Union Rules and Guidance

13. The rules of the Union and the guidance of the Executive Council which are relevant for the purposes of this application are as follows:

Rule 6. Lay Office

Rule 6.2 In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and or/ any committee, council, or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers.

Rule 7. Industrial/Occupational/Professional Sectors

Rule 7.9.3 Any group or association or other body or organisation of members existing immediately before these rules came into force which had its own constitution, byelaws, regulations or rules shall treat that constitution those byelaws, regulations or rules as being byelaws for the purposes of these rules. Accordingly, in the event of a conflict between these

rules and the constitution, byelaws, regulations or rules of a group or association or other body or organisation of members, these rules shall prevail.

Rule 18. Workplace Representation

18.1 At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every 2 years, 1 or more of the following representatives:

- 18.1.1 Shop stewards/workplace representatives
- 18.1.2 Safety representatives
- 18.1.3 Learning representatives
- 18.1.4 Equality representatives

Rule 18.3 The method of election shall be by such means as authorised by relevant guidance which shall be issued by the Executive Council from time to time.

Guidance of the Executive Council

Rule 6 Lay Office

6.5.2 They [lay representatives] will be elected to hold office for two years, unless one of the following occurs, in which case an election will be held for a replacement as soon as is practicable:

6.5.2.1 The elected representative changes job so that they no longer work in the workplace (or department, or role,) that they were elected to represent.

6.5.5 In the event of nominations having been invited from the relevant workplace, and only one candidate having been nominated, or volunteered, that candidate may be declared elected unopposed.

Summary of submissions

14. Mr Kruger submitted that Mr Kavanagh had acted in breach of rule 18.1 of the rules of the Union by declaring him to be ineligible as a candidate in the 2010 election for the position on the LAC as Operating Convenor for Metroline. Mr Kruger maintained that he was eligible to stand as he was employed by Metroline as a driver, irrespective of whether his current duties as the Sports & Social Coordinator were not those of a Metroline bus driver. He maintained that the essential factor was that he was on drivers' terms and conditions. Mr Kruger further argued that rule 18.1 applied to the facts of his case as the "workplace" to which the rule refers is the whole of Metroline and not just individual garages.
15. Mr Edwards, for the Union, provided a detailed and cogent Skeleton Argument. He advanced two main propositions. First, he argued that rule 18.1 did not apply to an election for membership of the LEC as an Operating Convenor. He submitted that rule 18.1 applies only to representation at a "workplace" and that, on the facts of this case, the workplace of each member was the garage at which he or she was based. Mr Edwards observed that the constituency for this election was quite different, being the entire membership of Metroline across each of its 10 garages. He further submitted that rule 18.1 only applies to the types of representative named in sub-paragraphs 18.1.1 to 18.1.4 and that the position of Operating Convenor is not comprehended within any of those named positions. Secondly, if that argument did not succeed, Mr Edwards submitted that Mr Kruger was correctly found not to be eligible to be a candidate in the election in question as he was not

working as a bus driver at the relevant time. Mr Edwards observed that there are no written rules governing such elections but submitted that there was a clear custom and practice that candidates had to be working as bus drivers. He suggested that the custom and practice established the following implied rules of the Union.

Suggested Custom and Practice of the London Advisory Committee

1. the term of office of a delegate to the LAC is two years;
2. the members of the Union at each London bus service employer with two or more garages may elect two delegates to the LAC;
3. one of those two delegates will be the Operating Convenor, who will be elected by and from members of the Union who are Operating Staff at that employer;
4. the other of those two delegates will be the Engineering Convenor, who will be elected by and from the Inside Staff Shop Stewards at that employer;
5. subject to 6 below, in order to be a candidate for election a member must be working as:
 - o Operating Staff, if they are standing for the delegate position which will mean that they become Operating Convenor if elected;
 - o Inside Staff, if they are standing for the delegate position which will mean that they become Engineering Convenor if elected;
6. if a delegate to the LAC has during their term of office been released by their employer from performing their normal duties, and has as such been working full-time on their duties as delegate/convenor, they may nevertheless stand for re-election. However any such delegate will of course have been working as Operating Staff/Inside Staff immediately prior to their initial election.

The provision which Mr Edwards relied upon for the purposes of this case was that in his suggested clause five above, namely that candidates for election must be 'working as' operating staff or bus drivers. In establishing such an implied rule, Mr Edwards relied upon the evidence that all previous Operating Convenors had been working drivers or had been Union lay representatives on full time release. He further relied upon the rationale for such an implied rule, namely that only someone working as a driver can be said to properly understand the details of their jobs and share their concerns. Further, only a working driver would have a clear interest in effective representation and would have credibility amongst other working drivers. Mr Edwards also noted that by rule 18.3, the Executive Council ("EC") may give binding guidance as to the method of election and that such guidance had been given. He referred to the guidance given by the EC as to the application of rule 6 which relates to "Lay Office". In particular, Mr Edwards referred to paragraph 6.5.2.1 of the guidance document which provides that an early election of a lay representative may be necessary if the elected representative "changes job so they no longer work in the workplace".

Conclusion

16. Mr Kruger's complaint is as follows:

"In ruling Mr Kruger ineligible to be nominated by the 1/344 Branch to stand for the post of delegate to the London Advisory Committee, the union breached rule 18.1. The election held on 16 April did not therefore allow for an election at that workplace by the members from amongst themselves."

17. Rule 18.1 of the rules of the Union provide as follows:

Rule 18. Workplace Representation

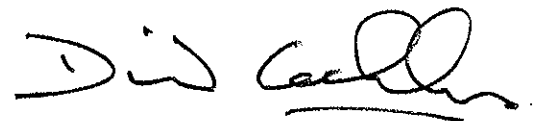
18.1 At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every 2 years, 1 or more of the following representatives:

- 18.1.1 Shop stewards/workplace representatives
- 18.1.2 Safety representatives
- 18.1.3 Learning representatives
- 18.1.4 Equality representatives

18. Rule 18.1 is headed "Workplace Representation" and contains three references to "workplace". The natural meaning of workplace is the place at which a person works. In the case of a large employer, this may be at a particular site or plant or it may be an area within a particular site or plant. This will be a question of fact in each case. In my judgement, however, a workplace is unlikely to be the whole of an employer's multi-site or multi-plant operation. On the facts of this case, I find that the workplaces to which rule 18.1 is directed are the individual garages of Metroline and that rule 18.1 has its natural application on the present facts in the election of garage representatives at each such garage. Accordingly, I find that the election of the Operating Convenor by all the Unite members employed by Metroline is not an election at a workplace. It is an election across the entire membership employed by an employer across ten different sites. I further find that it is not an election of a representative "from amongst" the members employed at each workplace. In any event, rule 18.1 only has an application in relation to the positions named in sub-paragraphs 18.1.1 to 18.1.4. Mr Kruger maintained that he falls within paragraph 18.1.1 as the position of Operating Convenor comes within the words "shop stewards/workplace representatives". I disagree. On the facts of this case, rule 18.1.1 describes the position of a garage representative, not the position of Operating Convenor. Accordingly, I also find that rule 18.1 has no application to the position of Operating Convenor.
19. For the above reasons, I find that Mr Kruger's complaint of a breach of rule 18.1 of the rules of the Union is misconceived. Accordingly, I refuse his application for a declaration that Unite the Union breached rule 18.1 of its rules by declaring him ineligible to be nominated by the 1/344 branch to stand for election to the LAC as an Operating Convenor.
20. In the light of my above conclusion, it is not necessary for me to consider the Union's second submission. However, I will do so in brief having regard in particular to the careful skeleton argument prepared by counsel and to the evidence prepared by the Union's solicitors. It is always unfortunate when a long established practice of a Union affecting the rights of members is not reduced to writing, either in the rules themselves or in a document which may be incorporated into the rules. This is one such case. It is nevertheless established that custom and practice may operate either by modifying a union's rules as they operate in practice or by compensating for the absence of formal rules (**Heatons Transport (St Helens) Limited v TGWU (1972) IRLR 25**). I make no findings as to the generality of the custom and practice which the Union asserts in relation to this election. I note,

however, that Mr Kruger did not dissent from the Union's formulation of the custom and practice apart from in one respect. He considered that the reference in paragraph five to the requirement that a member must be '*working as*' operating staff was wrong and that the correct requirement is that the member must be '*employed as*' operating staff or driver. On that single issue I prefer the evidence and argument of the Union. I find that the custom and practice to be implied as a rule of the Union in relation to the election in question is that, in order to be a candidate in an LAC election, a member must be working in the relevant capacity, subject to the exception that the member may instead be a Union lay representative on full time release, as was Mr O'Rourke, the incumbent Operating Convenor. There may be other exceptions that have not been examined in the present case. I find that Mr Kruger did not fall within any of the exceptions. He was neither working as a driver at the relevant time nor was he engaged as a full time Union lay representative on paid release. Mr Kruger was engaged in a full time capacity on a body which was expressed to be independent of both the Union and the company. Furthermore, in the capacity of Sports & Social Coordinator, Mr Kruger was not engaged to represent members, but to administer the sports and social club for the benefit of all its members, be they members of Unite, the members of other unions or members of no union.

21. For the above reason, I would also have found that Mr Kruger was correctly found ineligible to be a candidate in the 2010 election for the position of Operating Convenor on the LAC and, if necessary, I would have refused Mr Kruger's application on this ground also.
22. Finally, as Mr Kruger was correctly declared ineligible as a candidate in the election in question and as there was only one other candidate, there was no breach of rule by the Union not holding an actual election on 16 April 2010.



David Cockburn
The Certification Officer