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

IN THE MATTER OF COMPLAINTS AGAINST

THE MUSICIANS' UNION

APPLICANTS MR W READ
MR B JOHNSON
MR N IRVINE

Date of decisions. Complaints 1 and 4 **27 March 2000**

Date of decisions. Complaints 2 and 3 **1 June 2000**

Date Reasons Published **12 July 2000**

DECISIONS

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 his or her trade union has

1 These decisions were issued on 27 March 2000. This note refers to those decisions and gives written reasons.

failed to comply with any of the provisions of section 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 declarations sought, I am required to give, in writing, the reasons for my decisions and, if I make a declaration, I am required to specify the provisions with which the trade union has failed to comply.

1.3 On the 20 October 1999 I received a letter from Mr Read, a member of the Musicians' Union ("MU"), complaining about the election process in the union's election for its post of General Secretary. Under Chapter IV of Part I of the 1992 Act the election for the position of General Secretary of the MU has to satisfy certain specific requirements. The applicant made three complaints in relation to the MU's election of its General Secretary, which was held in September/October 1999, and which was an election covered by the statutory requirements.

1.4 In his letter, the applicant complained that the MU had not complied with the Act for a number of reasons. He commented that the Act states that "all members need to be informed (of the election) individually or including within publications" and that in his opinion this had not been the case. He continued that the bulletin issued (by the union) to its branches stated that the Electoral Reform Ballot Services (ERBS) would conduct the ballot in November (1999). This document, the applicant argued, was for limited internal purposes only, and did not reach all members. The applicant's letter continued, that the only MU publication that went to all members was the quarterly "Musician" (this is the union's journal to its members).

The applicant stated that neither the June edition nor the September edition carried any mention of the election of the General Secretary and that in addition there was no information passed to the members as to who were the independent scrutineers. The letter continued that the General Secretary "… even to the extent of disregarding the legislation, bordering on his involvement as the Scrutineer has conducted the whole of the election procedure."

1.5 On the 15 November 1999, I received a further letter of complaint against the union. The applicant was Mr B Johnson. He made the same complaints as Mr Read and, in addition, complained that he had been unreasonably excluded from standing as a candidate in the election. This complaint was treated as an application that the union had breached section 47 (1) of the 1992 Act.

1.6 The applicants' letters of complaint were treated as four applications that sections of the 1992 Act has been breached:

- First, that the union had unreasonably excluded a member from standing as a candidate in its election for the post of General Secretary in breach of section 47(1) of the Act. (Complaint One);

- Second, that it was alleged that the MU had failed to appoint a qualified independent person (the Scrutineer) for the election. This complaint was treated as an application that the union had breached Section 49 (1) of the 1992 Act. (Complaint Two);

- Third, that the allegation that the General Secretary disregarded the legislation bordering on his appointment as the scrutineer, was treated as an application that the union had breached section 49 (2) of the 1992 Act (Complaint Three) and

- Fourth, that the union had failed, before the election, in accordance with the requirements of the Act to notify members of the name of the scrutineer for the election. This complaint was treated as an application that the Association had breached section 49(5) of the 1992 Act (Complaint Four).

1.7 On the 27 November 1999, I received a faxed letter of complaint against the union from another member of the union. The applicant, Mr N Irvine complained that the union by not informing the membership of the election until one week before branch meetings (which were not all held at the same time and were not widely published) was in breach of the 1992 Act. Mr Irvine's letter was joined with Mr Johnson's complaint that section 47(1) of the Act had been breached (complaint one).

1.8 Following further correspondence with Mr Irvine I also accepted complaints from him that sections 49(1), 49(2) and 49 (5) of the Act had been breached. These complaints were joined with those of Mr Read and Mr Johnson as complaints two, three and four respectively.

1.9 These complaints were made in October and November1999 and were received either side of the date (25 October 1999) when the 1992 Act was amended by the Employment Relations

Act 1999 ("the 1999 Act") which came into effect, for the purposes of my powers, on 25 October 1999. It may be helpful if I therefore set out, at this point, the changes to the 1992 Act, occasioned by the 1999 Act, insofar as they affected my enquiries and determination of these applications.

1.10 The 1999 Act amended the 1992 Act in a number of ways. In relation to my role in determining applications of a breach of the 1992 Act provisions regarding the duty on trade unions, to hold elections for certain positions (section 46), I am now required, by the Act, to make such enquiries as I think fit and, before I make or refuse to make the declaration asked for, to give the applicant and the trade union the opportunity to be heard.

1.11 Where I make the declaration sought, the 1999 Act amendment to the 1992 Act now also requires me, unless I consider to do so would be inappropriate, to make an enforcement order imposing on the union one or more of the following requirements of section 55 (5A) of the Act:-

> " (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."

1.12 In any such order issued under (a) or (b) above, I am required to specify the period within which the union is to comply with the requirements of the order and, if I order a fresh election, I am required to specify that the election be conducted in accordance with Chapter IV of the Act and with any such other provisions as I may make in the order.

1.13 Prior to the 1999 Act amendment to the 1992 Act, I was required by section 256(2) of the 1992 Act to make such provision as seemed appropriate for restricting the circumstances in which the identity of the applicant was disclosed to any person. Until the introduction of the 1999 Act, on the 25 October 1999, it was my practice only to disclose the applicants name where he or she had no objection to my doing so, and not to name the applicant in my decision. However the 1999 Act amendment now requires me to disclose the applicants identity to the union, unless I think the circumstances are such that it should not be so disclosed. Since the 25 October 1999 therefore, it has become my normal practice to disclose the identity of the applicant to the trade union (and to such other persons (if any) as I think fit), to name the applicant in my decision and to name the applicant in any enforcement order issued.

1.14 The complaint, from Mr Read was determined using the legislation as it existed before the 1999 Act amendment to the 1992 Act and, in the case of Mr Johnson and Mr Irvine, the complaints were determined using the 1992 Act as amended by the 1999 Act. The only difference from this principle being that before October 1999 I would not have named Mr Read in my decision.

1.15 I investigated the complaints in correspondence with the parties and their representatives and decided that a formal hearing should be held to hear argument on each of the four complaints. The first hearing was held on the 23 March 2000. The union was represented by Mr Edward Cooper of Russell Jones and Walker solicitors. The three applicants were represented by Mr D Kay (a member of the MU). Mr Johnson and Mr Irvine attended the hearing.

1.16 Shortly before the hearing Mr Cooper wrote to me on behalf of the MU conceding that the union's election for the post of General Secretary was not conducted in accordance with the requirements of the 1992 Act. The letter stated that:

> "*...the Election for General Secretary held in 1999, though conducted in accordance with past practice for elections of General Secretary/Executive Committee members, was not conducted in compliance with the statutory requirements to the extent that:*
>
> *A. Notice of the name of the scrutineer was not given in compliance with section 49(5); and*
>
> *B. The process of advertising the General Secretary election (the same as advertising the name of the scrutineer) may inadvertently have, in practice, unreasonably excluded some members from the opportunity of standing as a candidate.*"

1.17 Mr Cooper's letter added that, in the circumstances, the MU were prepared to concede complaints that there were breaches of sections 49(5) (Complaint 4) and 47(1) (Complaint 1). He stated however, that the MU intended to defend the complaints that there were breaches

of sections 49(1) (Complaint 2) and 49(2) (Complaint 3). The letter continued by stating that as a result of the concession made in respect of the complaints that there had been breaches of section 49(5) and 47(1), the MU were prepared to undertake to re-run the election for General Secretary in accordance with a timetable which was attached to the letter. The union also undertook to carry out a full review of the procedures adopted for future elections held to comply with Chapter IV of the 1992 Act and to ensure that revised procedures were introduced forthwith for forthcoming statutory elections.

1.18 Mr Cooper's letter was copied to Mr Kay and they met privately, at my office, on the morning of the hearing in an effort to resolve all the outstanding matters between them. I agreed to delay the start of the hearing and also saw them jointly, following their private discussions, to ascertain what progress they had made in resolving the four complaints before me. They were unable to reach agreement, and I therefore proceeded with the formal hearing.

1.19 At the hearing Mr Cooper confirmed that the union had conceded complaints 1 and 4 and were prepared to re-run the election. Mr Cooper added that the union were not prepared to concede the other two complaints and that, in view of a fresh bundle of documents received from Mr Kay on the morning of the hearing, he was seeking an adjournment of complaints 2 and 3 to consider the new documents and to seek further instructions from his clients.

1.20 Mr Kay, on behalf of the applicants, indicated that he sought the election to be re-run on a timetable that he had submitted but raised no objections to complaints 2 and 3 being adjourned.

1.21 After careful scrutiny of the documents and evidence submitted, I concluded that the union was correct in conceding breaches of section 47(1) and 49(5) of the 1992 Act and, after consideration of the statements by Mr Kay and Mr Cooper at the hearing I informed the parties, on the 23 March, that I would issue an order within the next few days requiring the union to re-run the election in question and for the members to be informed of the result by the 1 January 2001. Further, I informed the parties that I would not then hear evidence and decide the other two complaints (complaints 2 and 3) but that I would adjourn those complaints for four weeks from the date of my enforcement order, after which, unless the parties had reached agreement to resolve the complaints, I would hold a further formal hearing to decide complaints 2 and 3.

1.22 My decision and enforcement order were issued on the 27 March 2000. I notified the parties of my decision in the following terms:

> "*I declare that the Musicians' Union failed to comply with the provisions of section 47(1) of the 1992 Act in relation to the election of the General Secretary of the union in October 1999, in that Mr Brian Johnson was unreasonably excluded from standing as a candidate in the election.*
>
> *I further declare that the Musicians' Union failed to comply with the provisions of section 49(5) of the 1992 Act in relation to the election of the General Secretary of the union in October 1999 in that the union failed either to send a notice stating the name of the qualified independent person appointed as scrutineer in relation to the*

election to every member of the union to whom it was reasonably practicable to send such a notice, or to take all such steps for notifying members of the name of the scrutineer as it was the practice of the union to take when matters of general interest to all its members need to be brought to their attention, before the scrutineer began to carry out his functions under Chapter IV of Part I of the 1992 Act."

1.23 My enforcement order stated:

"*I order that the Musicians' Union must hold a fresh election for the post of General Secretary, which must be conducted in accordance with the requirements of Chapter IV of Part I of the 1992 Act, and must publish the result of the election before 1st January 2001*."

1.24 Following the hearing, I was contacted by the parties and informed that agreement could not be reached in respect of the two outstanding complaints. I therefore held a further formal hearing on the 31 May 2000 to hear argument in respect of Complaints 2 and 3. At the hearing Mr Cooper again represented the MU and Mr Kay the three applicants. The MU also called, as a witness, Mr S Hearne the Head of the Ballot Department at the Electoral Reform Ballot Services (ERBS). On the 1 June 2000 I notified the parties verbally of my decisions in respect of the two outstanding complaints. I now set out my formal decisions.

Declaration

1.25 For the reasons which follow:

" I declare that the Musicians Union failed to comply with the provisions of section 49(1) of the 1992 Act in relation to the election of the General Secretary of the union in October 1999, in that the trade union failed, before the election was held, to appoint a qualified independent person ("the scrutineer") to carry out the functions in relation to the election which were required by this section of the Act."

1.26 Also for the reasons which follow I decline to make the declaration sought in respect of Complaint 3.

1.27 In exercise of my powers under section 55(5A) of the 1992 Act, in view of the enforcement order made in respect of Complaint 1 (see paragraph 1.23), I notified the parties (on the 1 June 2000) that I felt it would be inappropriate to make a further enforcement order.

Requirements of the Legislation

1.28 The relevant statutory requirements in respect of the complaints are as follows:

" *47.-(1) No member of the trade union shall be unreasonably excluded from standing as a candidate.*

(2) ..

49.-(1) The trade union shall, before the election is held, appoint a qualified independent person ("the scrutineer") to carry out -

(a) the functions in relation to the election which are required under this section to be contained in his appointment; and

(b) such additional functions in relation to the election as may be specified in his appointment.

(2) A person is a qualified independent person in relation to an election if -

(a) he satisfies such conditions as may be specified for the purposes of this section by order of the Secretary of State or is himself so specified; and

(b) the trade union has no grounds for believing either that he will carry out any functions conferred on him in relation to the election otherwise than competently or that his independence in relation to the

union, or in relation to the election, might reasonably be called into question.

An order under paragraph (a) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) The trade union shall, before the scrutineer begins to carry out his functions, either -

(a) send a notice stating the name of the scrutineer to every member of the union to whom it is reasonably practicable to send such a notice, or

(b) take all such other steps for notifying members of the name of the scrutineer as it is the practice of the union to take when matters of general interest to all its members need to be brought to their attention."

1.29 That then is the background and relevant legislation. I now set out the facts, arguments put by the parties on each of the four complaints and the reasons for my decisions.

Complaint 1: that the union had unreasonably excluded a member from standing as a candidate in its election for the post of General Secretary in breach of section 47(1) of the Act

Facts

2.1 The union issued its "Bulletin to Branches No. 474" on the 9 July 1999. In that issue the union gave notice that there were to be elections within the union for the posts of General Secretary (from 1 April 2000), Executive Committee Members (EC) for a two-year term of office 2000/2001 and for branch officers for 2000.

2.2 The bulletin stated that all branches were required to hold a nomination meeting during the month of September in accordance with the stated union rule and that all nominations must be received at the National Office (of the union) by Wednesday 6 October 1999.

2.3 The bulletin continued by stating that candidates for election for General Secretary or the EC must be nominated and accepted in writing at or before the nomination meeting of one or more branches. It then went on to describe who could make nominations, how to notify valid nominations to the National Office and stated the nomination form was to be completed by the Branch Secretary and returned to reach the National Office by Wednesday 6 October 1999 together with the written nominations and acceptances of candidates received at or before the nomination meetings.

2.4 The bulletin went on to provide an explanation of the election address and, under the heading "Ballot Procedure", stated that "If a ballot is necessary in your District you will be notified after the closing date for nominations. The ballot will be conducted by the Electoral Reform Ballot Services during November. As required under the Trade Union and Labour Relations

(Consolidation) Act 1992 (as amended) members are to be informed that this organisation will act as the Union's independent scrutineer."

2.5 The bulletin, which in total consisted of 9 Pages, went on to deal with a range of other union business or information and was issued with a considerable number of additional enclosures.

2.6 Under the union's rule VIII nominations for the post of General Secretary of the union had to be made in writing by another member and such nominations and written consent of the nominee had to be received at or before a branch meeting held for the purpose. Candidates had to receive nominations at a minimum of ten branches.

2.7 On the 7 October 1999 the union wrote to ERBS enclosing a copy of "Bulletin to Branches No. 474", copies of all the nomination certificates received (there were in fact two candidates Mr B Johnson and Mr D Scard) and a copy of the union's rule book and referred ERBS to union rule VIII. The letter continued by explaining the number of nominations received by Mr Scard (67) and by Mr Johnson(9) and stated " As Mr Johnson has failed to obtain nominations at the minimum number of Branches required, an election is not required and therefore Mr Scard has been re-elected as General Secretary without the need for a ballot."

2.8 The letter requested ERBS "... as the Union's independent scrutineers ..." to verify the position and to issue a formal statement to this effect so that it could be reported to the candidates and circulated to the membership.

2.9 On the 11 October 1999, ERBS provided its report on the election to the union. In it, it stated that Mr Scard was the sole nominee and was therefore elected. The report then continued by providing additional information as required by the current legislation.

2.10 In a separate letter to the union of the same date, ERBS stated (under the heading "ELECTION OF GENERAL SECRETARY -NOMINATION PAPERS") that:

> "The Musicians' Union sent the nomination papers submitted for the election to Electoral Reform Ballot Services for inspection. We found that 67 branches had nominated Mr D Scard and 9 branches had nominated Mr B Johnson. As Mr Johnson failed to obtain the minimum number of nominations under the rules of the Union to stand for election, Mr Scard was elected unopposed. Our formal scrutineer's report confirms this."

The Applicants' Case

2.11 The applicants argued, that notice of the election and the nomination procedure had not been provided to all members of the union.

2.12 They argued that the document "Bulletin to Branches No.474" was sent by the union to branch secretaries and would, initially only reach a membership of 200, out of a possible 30,000, because it was issued to branch secretaries, for limited internal purposes only, and did not reach all members.

2.13 The applicants explained that the "Bulletin to Branches" was used by branch secretaries when providing information to branch members in the form of branch newsletters. The applicants stated that branches were free to arrange annual (branch) elections at any time in September 1999 and this resulted in many members not being aware of the General Secretary election because it was mixed up with the branch annual elections. Also the applicants argued that branch meetings may not have taken place until late September and that this resulted in a possible candidate not being able to enter the election (for General Secretary) because the nomination for General Secretary required ten nominations from different branches and there was insufficient time for such nominations to be obtained.

2.14 It was also stated that branch newsletters were sent out by branch secretaries on different dates and that therefore some branches held nomination meetings while other members were not aware of the election or the nomination process. It was also alleged that mention in branch newsletters, of the election, had been patchy.

2.15 They informed me that the union had held its biennial conference from the 26 to the 29 July 1999 and that no mention of the election for the General Secretary was made during the conference. They added that conference was attended by delegates and therefore the members of the union were not aware of what was discussed as they did not receive details of discussions held.

2.16 The applicants also referred to the union's comment, in a letter to me, that the bulletin was made available to members (shortly after its issue to branch secretaries) on the union's

website. The applicants stated that not all members had access to the site and that this could not be regarded as a method of communication with all members.

2.17 The applicants argued that notice of the election should have been sent, well in advance of branch meetings, to all members of the union. They explained that the union's magazine the "Musician" was published quarterly and was sent directly to all members and that this should have been used to give notice of the election. They added that neither the June nor September 1999 editions carried any mention of the pending General Secretary election.

The Union's Response

2.18 The union initially argued that the "Bulletin to Branches No.474" was circulated to branches eight weeks in advance of nomination meetings taking place in September 1999 and that branches were free to make their own arrangements for informing members of September nomination meetings. The union explained that it was for branch committees to decide the date of publication of a branch newsletter giving notice of a nomination meeting. The union could not therefore accept the applicants view that sufficient notice was not given by the union's National Office for the purpose of the election.

2.19 The union stated that the notice of the election of General Secretary was issued (by the bulletin) on the 9 July 1999 and that this preceded the union's bi-annual conference, which took place from the 27 -29 July that year. They agreed that no official announcement was made at conference of the fact of the election but stated that reference was made to it in the

closing remarks of the Chairman and was the subject of much discussion outside of conference.

2.20 The union reminded me that, I had previously confirmed (in a previous decision) that there is no direct obligation imposed on the union to tell members that an election is to be held or to inform members of the nomination procedures. As it was, the union contended that the issue of the MU bulletin to branches on 9 July 1999 was sufficient notice of the election and that Mr Johnson should have had access to that in good enough time to seek to secure the appropriate number of nominations to stand as a candidate.

2.21 The union stated that, whereas the applicants suggested that the facts of the election and its nomination period could have been advertised in "The Musician" there is no obligation on the part of the union to advertise the election or nomination period to all members. The union contended that there was no unreasonable exclusion of Mr Johnson as a candidate, but that he was excluded because he failed to obtain sufficient nominations, at branches, to stand as a candidate.

2.22 As reported in paragraph 1.16 - 1.17 above, on the 21 March 2000, two days before the hearing of this complaint, the union's solicitors wrote to me on behalf of the MU conceding that the union's election for the post of General Secretary was not conducted in accordance with the requirements of the 1992 Act. The letter stated that the process of advertising the General Secretary election may inadvertently have, in practice, unreasonably excluded some members from the opportunity of standing as a candidate.

Reasons for my Decision

2.23 The union conceded that the process used to advertise the General Secretary election may inadvertently have, in practice, unreasonably excluded some members of the union from the opportunity to stand as a candidate in breach of section 47(1) of the 1992 Act.

2.24 As stated (para 1.21), I believe the union were right to concede this complaint. Section 47(1) of the Act provides that no member of the trade union shall be unreasonably excluded from standing as a candidate. The union's method of notifying members of the nomination process (the bulletin issued to branch secretaries) did not go to all members and the union could not ensure that by using this method all members would, in sufficient time, become aware of the election and the nomination procedure to be followed. These procedures clearly worked to reduce Mr Johnson's chances of securing sufficient nominations and hence effectively excluded him as a candidate.

2.25 Information about the election and the nomination process to be followed should have been sent directly to all members of the union and it would have been sensible for the union to do this either by a direct mailing to all members, or by full notice being given, in sufficient time, in the union's magazine "The Musician" which, I was told, is sent quarterly to all members.

2.26 It was for these reasons that I issued my declaration on the 27 March 2000.

Complaint 2: that the union had failed to appoint a qualified independent person (the scrutineer) for the election in breach of section 49(1) of the Act

The Applicants' Case

2.27 The applicants argued that the union failed to appoint an independent person (the scrutineer) before the election of the General Secretary was held. They argued that the General Secretary of the union, who was himself a candidate in the election, was involved in all the arrangements (for the election) to the extent of his disregarding the legislation bordering on his involvement as the scrutineer to conduct the election.

2.28 It was argued, by the applicants, that the mention in bulletin 474 that "If a ballot is necessary in your District you will be notified after the closing date for nominations. The ballot will be conducted by the Electoral Reform Ballot Services during November. As required under the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) members are to be informed that this organisation will act as the Union's independent scrutineer." was not an appointment as required by the Act but was rather general information to be provided to members.

2.29 The applicants argued that the nomination procedure was part of the election and that it was only on the 7 October 1999, when the nomination period had closed that the union wrote to ERBS seeking their involvement as the independent scrutineer. They argued that the union had told ERBS, in its letter of the 7 October, what to do, how to interpret the result and asked

them to report on an event (the election) that had already happened. In effect they argued that the only letter of appointment, the letter of the 7 October, was sent to ERBS after the election had finished.

2.30 It was argued by the applicants (in response to the union's argument that the appointment can be a general appointment) that a formal appointment by the union, of a scrutineer, should be made at the start of each election that requires such an appointment. On behalf of the applicants it was argued that the appointment of a scrutineer was not general, like a dentist, that you then go to as and when required, rather the Act requires a formal appointment to be made before an election is held.

2.31 The union's comment that ERBS were retained generally as the union's scrutineer and that evidence of this was to be seen in the union's biennial conference reports, was dismissed by the applicants because, they argued, an appointment needed to be made for each election and, they argued, the biennial conference reports were no more than reporting what had happened in the union in the preceding two years.

2.32 The applicants argued that to have a scrutineer on a long term appointment or call off contract, was to have a scrutineer of convenience whose independence was also in doubt.

The Union's Response

2.33 The union argued that the statutory requirements of the 1992 Act does not provide for the appointment of a scrutineer to be in a prescribed form (as it does for the appointment of a

union's auditor) rather, it was submitted that the appointment of a scrutineer can be both a general appointment (for example to conduct such statutory ballots in a particular period or until further notice) or a specific appointment for a particular election.

2.34 The union conceded that, if section 49(1) of the Act requires a separate appointment for each and every election required by the Act, the union had not complied with the requirements of section 49(1) of the Act. However it was the union's contention that there was a general appointment of ERBS as the union's scrutineer and that such an appointment satisfies the requirements of the 1992 Act.

2.35 In support of its argument the union contended that the absence of statutory requirements as to the nature of the appointment of a scrutineer allows such an interpretation and that the interests of members are protected by the provisions of section 49(5) of the Act which requires notice of the name of the scrutineer to be provided (to the members) before the scrutineer begins to carry out his functions.

2.36 A general appointment, the union argued would not preclude the union from terminating that appointment if the union believed there were grounds for doing so.

2.37 As evidence that ERBS were retained generally by the union, reference was made to conference reports of the union for 1995,1997 and 1999 which referred to ERBS being retained by the union to conduct ballots for the union's Executive Committee(EC), Conference Delegates elections and rule change ballots.

2.38 The union also argued that the letter of the 7 October 1999 from the union to ERBS commented that ERBS "is the independent scrutineer" and referred to ERBS "as the union's independent scrutineer." Further the union referred me to a letter from ERBS to the union's General Secretary of the 7 December 1999 which confirmed that ERBS considered the relationship to be on going.

2.39 In support of its argument the union relied on the ERBS report (on the election) of the 11 October 1999 in which ERBS stated that they were satisfied as to each of the matters specified in sub-section 52(2) of the 1992 Act. This would mean, the union argued that the scrutineer was satisfied that there were no reasonable grounds for believing there was any contravention of a requirement of the Act in relation to the election, including whether or not they (the scrutineer) had been appointed before the election was held.

2.40 Mr Cooper, for the union, argued that the applicant's submission suggests that they misunderstood the functions of an independent scrutineer as set out in section 49(3) of the 1992 Act, and that in an uncontested election the functions were limited to "taking such steps as appears to him to be appropriate for the purpose of enabling him to make his report" (section 49(3)(b)), and "to making his report to the trade union as soon as reasonably practicable" (section 49(3)(c)).

2.41 Mr Cooper further submitted that as from October 2000, the Human Rights Act 1998 will require me to interpret Chapter IV of the 1992 Act in accordance with Article 11 of the European Convention of Human Rights(ECHR). Mr Cooper submitted that Chapter IV was

a restriction on the freedom to associate and therefore that I am required to interpret Chapter IV in a manner consistent with being necessary "in a democratic society for the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedom of others". He submitted that such an approach supported an interpretation of the term "appoint" as general in nature.

2.42 Finally, the union argued, it was not for ERBS, as an independent scrutineer, to receive the nomination forms and that there was no statutory duty imposed on the union to ensure that this occurs.

Reasons for my Decision

2.43 Mr Cooper's submission failed to convince me of the relevance of the Human Rights Act. This is not yet in force, and in order to look at the ECHR at this time I have to be convinced that it would assist me in interpreting an ambiguity in the intention of the legislation. I do not think Mr Cooper's interpretation of Article 11 of the ECHR, which did not go so far as to submit that Chapter IV of the 1992 Act was in breach of the ECHR, assists me to identify either a general or restricted interpretation of the term "appointment" as the correct interpretation. Even on Mr Cooper's interpretation of Article 11 and its compatibility with Chapter IV, which would have required authority of the European Court of Human Rights to convince me as correct, it seems to me that it would not be the definition of appointment that would be at issue but whether any such appointment was compatible with the ECHR.

2.44 In this case the first question I have to answer is whether an arrangement whereby a union nominates an organisation as its scrutineer or develops an on-going relationship with such an organisation constitutes an "appointment" satisfying section 49(1) of the 1992 Act. On this I can see operational merit in having such an arrangement and do not accept that it would automatically call into question the scrutineer's independence. However I share the applicants view that an appointment must be a specific event and relate to a specific election. There is no need for this event to be a letter, a telephone call might be sufficient, but in relation to each election there must be an event which can be pointed to as the appointment. I am reinforced in this view by the fact that the legislation makes provision for the union to add to the statutory functions of the scrutineer and also to appoint an independent person to carry out some of the functions of the scrutineer. In each election it is important that both the union and the scrutineer are clear as to precisely what is required of the scrutineer in that election. This suggests that Parliament intended section 49(1) to require a clear act of appointment in relation to each election.

2.45 In this case the next question is whether any such clear act of appointment occurred in relation to the 1999 election of the union's General Secretary. The union produced no evidence that such an appointment was ever made.

2.46 I agree with the applicants view that the conference reports referring to ERBS as the union's independent scrutineers cannot be regarded as an appointment. The conference reports are reports on the union's business during the previous two years and none of the conference reports (including the 1999 report) make any reference to ERBS being the union's scrutineer

for the election of its General Secretary and certainly not to the 1999 General Secretary election.

2.47 Although the union did not argue this, the one document in the present complaint that could point to a specific appointment of ERBS as the independent scrutineer for the union's election of its General Secretary, is the union's letter to ERBS of the 7 October 1999. However it is also clear from the documentation that the union, having received the nominations by the 6 October and finding that only Mr Scard had received more than the required number of nominations, then on the 7 October, wrote to ERBS stating that "...therefore Mr Scard has been re-elected as General Secretary without the need for a ballot." The letter then requested ERBS to verify this position. ERBS did this in a letter which was deliberately separate from their scrutineer's report on the election. The letter of 7 October cannot be regarded as a specific letter of appointment.

2.48 It is for these reasons that I find the union to be in breach of section 49(1) of the 1992 Act.

Complaint 3: that the union by appointing ERBS as the independent scrutineer for the election failed to ensure the independence of ERBS in relation to the union in breach of section 49(2) of the Act

The Applicants' Case

2.49 The applicants argued first that the General Secretary conducted the election in which he himself was a candidate and secondly that the union had failed to ensure the independence of ERBS as the scrutineer for the election. They argued that the permanent retention of any scrutineer could be argued to create dependence rather than independence and that the union should have been alive to this possibility. They argued that the union should have regularly varied the choice of its scrutineer.

2.50 Further it was argued that the familiarity in correspondence between the union and ERBS (ie the use of first names) suggested a close relationship rather than one with a professional distance.

2.51 At the hearing of this complaint Mr Kay for the applicants argued that ERBS did not satisfy the conditions of article 3 or 4 of the provisions of the Statutory Instrument (1993 No.1909) regarding individuals potentially qualified to be a scrutineer.

2.52 Mr Kay argued that Statutory Instrument 1993 No.1909 titled "TRADE UNIONS" "The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) order 1993" stated in article 5 (b) that an individual potentially qualified to be a scrutineer does not satisfy the conditions specified in article 3 or 4 (which refers to an individual's qualification to be a scrutineer) if in acting at any time as a scrutineer for any trade union, knowingly permitted any member, officer or employee of the trade union to assist him in carrying out any of the functions referred to in sections 49(3), 75(3), 100A(3) and 226B(1) of the 1992 Act.

2.53 Mr Kay argued that the relationship between the union and ERBS during the election was such that ERBS did not satisfy the conditions in article 3 and 4 of the Statutory Instrument because Mr Scard acted as the scrutineer by running the election up to the point of the union writing to ERBS with the result of the election and that by doing so the union knowingly assisted ERBS to carry out its functions in relation to the election.

The Union's Response

2.54 In response to this complaint Mr Cooper for the union argued that article 5 of the Statutory Instrument does not and could not apply to ERBS. He stated that ERBS have been specified by Order of the Secretary of State (along with two other bodies) as a person capable of being a qualified independent person and have been so named (by the Secretary of State) in article 7.

2.55 Mr Cooper argued that the applicant's complaint could therefore only be sustainable if there was evidence that the union did not, prior to ERBS carrying out its functions in respect of this election, have grounds for believing either (a) that ERBS would carry out any functions conferred on them in relation to the election otherwise than competently or (b) that ERBS' independence in relation to the union, or in relation to the election, might reasonably be called into question.

2.56 Mr Cooper argued that no grounds had been produced by the applicants for the union to have either of these beliefs and that no such evidence had been submitted.

2.57 He continued that the fact that there was a long-standing relationship between the union and ERBS did not undermine ERBS' independence in relation to the union and nor would it give rise to any grounds for believing that ERBS were otherwise incompetent.

2.58 Mr Cooper produced evidence to show that those conducting the ballot for ERBS had not met either the unions General or Assistant General Secretary or any member of the union's executive.

Reasons for my Decision

2.59 I have already decided, in relation to complaint two, that the union had not appointed a scrutineer for the election of its General Secretary. It would seem to follow that the union had not appointed an independent scrutineer. However even though I have found that no proper appointment was made, I am in no doubt that the only people called upon to perform the functions proper to a scrutineer were ERBS. In those circumstances I feel it is incumbent on me to determine the issue of ERBS's independence in relation to this election.

2.60 The first point I make is that there are no statutory provisions requiring unions to have nomination procedures or to involve independent scrutineers in them. It follows that the way the union conduct its nomination procedures can have no bearing on the independence or otherwise of the scrutineers.

2.61 Secondly Mr Kay cannot rely on articles 3 and 4 of the Statutory Instrument (1993 No 1909). Those provisions do not relate to persons specified by the Secretary of State for the purposes of Section 49(2) of the 1992 Act, and ERBS is so specified in that Statutory Instrument.

2.62 The issue is, as Mr Cooper put it, did the union have any grounds for believing that ERBS would carry out its functions other than competently or that ERBS's independence could be called into question? The only two arguments relating to this issue presented by the complainants were first that there was a long-standing relationship between the union and ERBS and secondly that first name terms were used in correspondence.

2.63 I find neither argument convincing. Had the union changed to a different scrutineer there would probably have been some (possibly among the complainants) who would have presented this as evidence that the new scrutineer must have offered the union additional compliance with its wishes.

2.64 First name terms are a matter of style and culture. Personally in formal correspondence I would avoid such terms but practice in these matters is changing, and I attach no significance whatsoever to the use of first names in the circumstances of this case.

2.65 In my view the union had no grounds for doubting ERBS's competence or independence and for that reason I dismissed this complaint.

Complaint 4: that the union had failed before the scrutineer began to carry out his functions to notify the members of the name of the scrutineer

The Applicants' Case

2.66 The applicants' case was quite simple. It was that section 49(5) of the Act requires the trade union, before the scrutineer begins to carry out his functions, to notify the members of the name of the scrutineer by one of the two methods shown in section 49(5) of the Act and that this had not been done.

2.67 In noting that the Act requires each member to be notified by one of these two methods, the applicants argued that the only mention of ERBS as the scrutineer was in the union's "Bulletin to Branches No. 474" and that this publication reached, at most only 200 out of a membership of 30,000 (see paras 2.12).

2.68 They argued that the only publication received by all members of the union was the union's quarterly magazine "The Musician" and that neither the June nor the September 1999 editions carried any mention of the name of the scrutineer.

The Union's Response

2.69 The union accepted from the outset that they did not send notice of the name of the scrutineer to every member of the union (section 49(5)(a)). But initially argued that the method it had used, satisfied the alternative requirements of section 49(5)(b).

2.70 It was stated by the union that it communicates with its members in one of three ways:-

1. Through its quarterly journal, "The Musician", sent to the home address of every member.
2. Through the issue of monthly bulletins to senior branch officials and
3. Through the MU website (part of which is only accessible to members).

2.71 The union first argued that every member of the union is attached to a branch and that the branch secretary is obliged (by union rule) to issue notices to members of meetings, summonses and other notices.

2.72 I was referred, by the union, to page 15 of the MU officer's manual which includes provision governing the issue of newsletters by the branch. It read:

> "Newsletters are a vital communication link with members. For many the branch and district newsletter is the most immediate contact with the union, containing a mixture of local and national items of interest and information. One of the purposes of the bulletin to branches is to provide Branch Secretaries and District Officials with news and information from National Office for inclusion in their own newsletter. It should

be borne in mind that although newsletters are produced by local initiative they remain official union publications."

2.73 The union argued that "Bulletin to Branches No. 474" was issued to branch secretaries on the 9 July 1999 (and shortly after was released on the union website). It pointed out that the bulletin contained the name of the scrutineer and on page 2 under "Ballot Procedure" branch Secretaries were told:

> "As required under the Trade Union and labour Relations (Consolidation) Act 1992 (as amended) members <u>are to be informed</u> that this organisation [ERBS] will act as the Union's independent scrutineer" (the union's emphasis added).

2.74 It was quite clear, the union argued, that the requirements under section 49(5)(b) is not that the requirement should reach or be targeted to every member. The MU is organised, I was told, by way of a branch structure and that the traditional practice within the union was for matters of general interest to be brought to the attention of all members through the MU bulletin to branches and that that happened here. Therefore the MU complied with the terms of section 49(5).

2.75 As reported in paragraph 1.16 - 1.17 above, on the 21 March 2000, two days before the hearing of this complaint, the union's solicitors wrote to me on behalf of the MU conceding that notice of the name of the scrutineer was not given in compliance with section 49(5).

Reason for my decision

2.76 The union conceded that the name of the scrutineer was not given in compliance with section 49(5) of the Act.

2.77 As stated (para 1.21), I believe the union were right to concede this complaint. Section 49 (5) of the Act provides that the union shall, before the scrutineer begins to carry out his functions, notify the members (of the name of the scrutineer) by one of the two methods shown in section 49(5) of the Act. As with the unions method of notifying members of the nomination process (the bulletin issued to branch secretaries) this did not go to all members and with this method the union could not reasonably assume that all members would receive the information as to the name of the scrutineer, and certainly not by any particular date.

2.78 Information about the name of the scrutineer should have been sent directly to all members of the union or passed to the members by the union's usual method of communication when they wish to communicate with all members. This could have been done either by a direct mailing to all members, or by the name of the scrutineer being given, at the appropriate time, in the union's magazine "The Musician" which, I was told, is sent quarterly to all members. As noted in paragraph 2.25 the same mechanism could also have been used to convey the election and nomination process and so reduce the chances of a candidate being unreasonably excluded.

2.79 It was for these reasons that I reached the decision covered by my declaration on the 27 March 2000.

Observations

3.1 Section 55(5) of the Act gives me powers to make observations on any matter arising from or connected with the proceedings. I do so in this case.

3.2 Prior to, and during, my investigation of these complaints at least one of the three applicants had correspondence with ERBS as the independent scrutineer for the election. While the scrutineer was able to provide the member with some of the information he had requested, other information was not supplied and there was a considerable delay by the scrutineer in responding to the member's letter. In oral evidence before me I felt ERBS were adopting a rather restrictive view of what they would pass onto members who contacted them.

3.3 In my view scrutineers should endeavour to be as open and responsive as possible to members who contact them particularly, but not only, during the period of the election. This will emphasise the independence of the scrutineer and experience suggests that a more positive approach in dealing with requests from members may save complaints later.

3.4 I recognise that some members may try to exploit a more open stance by the scrutineer and go on fishing expeditions. However my view is that the scrutineer's first reaction should be to help, not to turn away, members seeking readily available factual information.

EG WHYBREW

Certification Officer