

**DECISION OF THE CERTIFICATION OFFICER ON COMPLAINTS
MADE UNDER SECTION 103 OF THE TRADE UNION AND
LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

**IN THE MATTER OF COMPLAINTS AGAINST
THE PUBLIC SERVICES TAX AND COMMERCE UNION**

Date of First Complaint	1 October 1997
Date of Hearing	11/12 December 1997
Date of Decision	13 December 1997
Date Reasons Published	19 December 1997

DECISION

1. Between 1st and 23rd October 1997 I received a series of letters from a total of 10 members of the Public Services Tax and Commerce Union (“PTC”) complaining about the conduct of the ballot which had approved the instrument of amalgamation between the PTC and the Civil and Public Services Association. All the complaints were made in similar terms. I held a hearing on 18 November 1997 to determine whether I had jurisdiction to hear one of the two complaints made in the original letters. I decided that I did not (Decision CO/I 964/14). At that hearing one member made an additional complaint and in subsequent correspondence made a further complaint. During the course

of my enquiries into one of the complaints two of the complainants withdrew in order to preserve their anonymity.

2. Under section 103(l)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the Act”) or (“the 1992 Act”) a member of a trade union who claims that the union has failed to comply with any of the requirements of section 99 to 100E of the Act may complain to me. The complaint by all the complainants was:-

that the union failed to notify members of the name of the scrutineer responsible for the ballot on the resolution to approve the instrument of amalgamation before the scrutineer began to carry out his functions in breach of section 100A(8) of the 1992 Act (complaint A).

The additional complaints made by one member were:-

- a) that the union failed to appoint a qualified independent person as scrutineer in the ballot on the resolution to approve the instrument of amalgamation in breach of section 100A(1) and (2) of the 1992 Act (complaint B);
- b) that the union failed to send to members a copy of the scrutineer’s report on the merger ballot or had failed to take all such other steps for notifying the contents of the scrutineer’s report to the members of the union as it is the practise of the union thus breaching section 100E(6) of the 1992 Act (complaint C).

3. In order to determine the complaints I held a hearing on 10 and 11 December 1997. In respect of complaint A, Mr Alan England represented three of the complainants and one other complainant represented himself. In respect of the other two complaints the complainant represented himself. Professor Jack Beatson of counsel represented the PTC. On behalf of the union, evidence was given by Mr Eddie Reilly, Deputy General Secretary, and Mr Hugh Lanning, Assistant General Secretary. Mr Nick Goodman, Ballot Adviser, Electoral Reform Ballot Services, also gave evidence.

4. At the end of the hearing I reserved my decision. After careful consideration of the documents, evidence and arguments put to me I upheld the complaints that the union failed to notify members of the name of the scrutineer responsible for the ballot before the scrutineer began to carry out his functions (Complaint A). I decided to dismiss the complaint that the union had failed to appoint a qualified independent person as scrutineer in the ballot, (Complaint B) and the complaint that the union had failed properly to inform members about the scrutineer's report on the ballot (Complaint C). In respect of the upheld complaint A I also decided not to make an order specifying steps which must be taken before I will entertain an application to register the instrument of amalgamation. The parties were notified in writing accordingly on 13 December 1997. I now set out my reasons for these decisions.

Legislative Provision

5. Section 100(1) of the 1992 Act makes the following provision relating to the manner in which the ballot approving the instrument of amalgamation must be conducted. It reads:-
“A resolution approving the instrument of amalgamation or transfer must be passed on a ballot of the members of the trade union held in accordance with section 100A to 100E.”
6. Section 100A(1) and (2) of the Act provides the following in respect of the appointment of a scrutineer in the ballot. It reads:-
- “(1) *The trade union shall, before the ballot is held, appoint a qualified independent person (“the scrutineer”) to carry out -*
- (a) *the functions in relation to the ballot which are required under this section to be contained in his appointment; and*
- (b) *such additional functions in relation to the ballot as may be specified in his appointment.*
- (2) *A person is a qualified independent person in relation to a ballot 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 ballot otherwise than competently or that his independence in relation to the union, or in relation to the ballot, 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.”*
7. Section 100(8) of the 1992 Act makes the following provision in respect of action that the trade union is required to take before the scrutineer appointed in respect of the ballot begins to carry out his functions. It reads:-

“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.”*

8. Section 100E(6) of the Act provides the following in respect of the distribution of the scrutineer’s report on the ballot to members. It reads:-

“The trade union shall within the period of three months after it receives the report -

- (a) send a copy of the report to every member of the union to whom it is reasonably practicable to send such a copy; or*
- (b) take all such other steps for notifying the contents of the report to the members of the union (whether by publishing the report or otherwise) as it is the practise of the union to take when matters of general interest to all its members need to be brought to their attention.”*

Complaint A: Notification of name of scrutineer

9. In their initial letters all the complainants stated that the union had failed to send a notice stating the name of the scrutineer or otherwise notified his name before the scrutineer began to carry out his functions. In response to correspondence on the matter the complainants were unable to indicate precisely when the scrutineer had began his functions but stated that “it must have been some time before the start of the ballot on 17 September 1997.” Regardless of this it was asserted by some of the complainants that the union had failed to issue any notification of the name of the scrutineer.

10. When the PTC later produced evidence that a notice had been sent to members using the union's "distribution point" system it was argued by the complainants that notices had not been sent direct to every member. Failing this, a notice should have been placed in the journal which was said to be the usual method of notifying all members of matters of general interest. It was further argued that, by using the "distribution point" system, the union had failed to notify retired and associate members of the name of the scrutineer.

11. It was argued on behalf of the complainants that the two unions involved in the amalgamation had imposed a rigid timetable for the merger which meant that they had had no opportunity to follow the normal practise that the PTC adopted to notify all members. The fact that publication dates for the PTC journal did not allow for the notice of the scrutineer to be placed in the journal and, if the self-imposed timetable for the merger was to be kept, that meant that the only acceptable method of notifying members of the scrutineer was a direct mailing to all individual members. In failing to do this, and in using the method of distribution points which did not ensure that all members received notification, the union was in breach of section 100A(8).

12. It was conceded by some of the complainants that they had received the notice (A/3/97) which named Electoral Reform Ballot Services as the scrutineer but they stated that, because it was not in the usual format for publishing important information, the notice had been taken to be a leaflet containing propaganda or information that was published in a more direct format elsewhere. For this reason the leaflet had been overlooked.

The Union's Response

13. In response to the complaint the PTC indicated that the scrutineer most probably had began his functions by supervising the production of the voting papers on Friday 5 September 1997. The union produced a notice (A/3/97) stating the name of the scrutineer and explained that these notices were despatched to the union's distribution points from PTC HQ between Thursday 4th and Monday 8 September 1997. The union accepted that, for some members, the notice of the scrutineer was not sent out until after the scrutineer had begun to supervise the production of the voting papers.

14. The union stated that it adopted two main methods of distributing information to members. One was the journal which was distributed to all individual members. Use of the journal was constrained by publication dates which were fixed sometime in advance. A timetable for the proposed mergers had been adopted after taking into account the needs of the various parties involved in the amalgamation, not just the wishes of the two unions involved. The next available issue of the journal was 29 September 1997 which was after the planned date for the ballot which was due to commence on 17 September 1997.

15. Where the journal is not used PTC practise is to send out the relevant material to the 7,000 distribution points throughout the United Kingdom for onward distribution to members. Material can be distributed on a one for one basis with sufficient copies of the material being provided to distribution points so that one copy can be provided to each member for whom the distribution point is responsible. Alternatively material might be provided on a 1:5 basis or, depending on the nature of the material, on 1:10 basis, to the distribution points for circulation amongst the member covered by that distribution point.

The notice of the identity of the scrutineer contained in leaflet A/3/97 was issued on 1:1 basis to the PTC's distribution points.

16. The PTC accepted that the normal practise of the union in distributing material by means of the 7,000 distribution points meant that retired, associate and retained members might not have received a copy of leaflet A/3/97. There was no direct mailing to these three categories of members and there was no express direction given centrally that distribution points should include members of these categories on their distribution list.
17. The PTC stated that its normal practise of communication of matters of general interest within the union was based on the ordinary, and therefore active, membership rather than categories of members such as retired, associate and retained members.

Reasons for Decision

18. On this complaint I have to consider three questions.
 - 1) Did the union inform members of the name of the scrutineer before the scrutineer began his functions? (the timing question)
 - 2) Did the method of informing members satisfy the statutory requirements? (the method question)
 - 3) If the answer to either 1 or 2 is 'no' what steps if any should I require the union to take before I entertain an application for registration? (the remedy question)

The timing question

19. The union accept that the distribution of its notice of the scrutineer's name, A/3/97, was not completed until 8 September 1997. The union further accept that, at the latest, the scrutineer began to carry out his functions in connection with the ballot on Friday 5 September. It is not necessary for me to decide, in light of the PTC's admissions, when the scrutineer began his duties in connection with the ballot to determine that there has been a breach of section 100A(8). Some notices were not sent out until 8 September, 3 days after it is agreed that the scrutineer had carried out certain functions. This means that section 100A(8) was breached in respect of timing.

The method question

20. Section 100A(8) (see para 7) provides two ways for the union to inform members of the scrutineer's name. Clearly the union did not send a notice stating the name of the scrutineer to every member of the union to whom it was reasonably practicable to send such a notice. Did they though satisfy the alternative provision in 100A(8)(b)? I accept the union's argument that, the alternative provision, to take all such steps for notifying members of the name of the scrutineer as it is the practise of the union to take when matters of general interest to all its members need to be brought to their attention, does not impose a higher or even equivalent standard as that set out in section 100A(8)(a). If 8(a) requires direct notification to every member, to whom it is reasonably practicable to send such a notice, the alternative 8(b) cannot have been intended to require the same but without the "reasonably practicable" qualification.

21. I am satisfied that section 100A(8)(b) requires a union to use whatever system it normally adopts for advising members of matters of general interest to all its members. In my view this provision does not require the union to notify all members but rather to adopt the practise it normally uses when disseminating information of interest to all its members. For many unions this will be the journal or a similar notification to individual members. But there are alternatives.
22. The PTC has two methods for distributing information of general interest to all its members:- i) the journal or direct mailing to individual members; ii) despatch of material to 7,000 distribution points for onward distribution/circulation to members on a 1:1 or 1:5 or more basis. The system of using distribution points adopted by the PTC does have a weakness. As the union have admitted retired, associate and retained members are not normally covered by distribution points and would not therefore receive information sent out by such a system. The number of members who fall into the categories which were not covered by “distribution points” amount to some 6,500 out of a membership of some 150,000. It is a matter of regret that the needs of these groups were not considered when the distribution method was decided upon. Were it a bigger group and had there been any evidence of detriment to its members this would have been a matter of more than passing concern. However, I am satisfied that as a matter of fact in sending out the notice A/3/97, the PTC used the normal practise it takes to notify members when matters of general interest to all its members need to be brought to their attention. On the “method” question therefore it satisfied 100A(8).

Declaration

23. As the union did breach 100A(8) on the timing question I make the following declaration:-

“In the ballot of members of the Public Services Tax and Commerce Union for approval of a resolution proposing an amalgamation with the Civil and Public Services Association, the union failed to notify members of the name of the scrutineer responsible for the ballot before the scrutineer began to carry out his functions as required by section 100A(8) of the Trade Union and Labour Relations (Consolidation) Act 1992.”

Remedies

24. In considering what if any steps to require the union to take to rectify its breach I have taken into account the following facts. Each of the complainants referred to this as a technical breach. The admitted lapse was only a matter of days. At the time of voting every member (including the retired etc group) were told of the name of the scrutineer. The balloting period was approximately four weeks - giving ample time for any representation to be made to the scrutineer. In addition I noted that one of the reasons for notifying members of the identity of the scrutineer is in order that members might request the scrutineer to inspect or examine the register of members names and addresses. I heard from ERBS, the independent scrutineer, that at their own instance they had examined the register of voters. I also heard that, on all the occasions that they had acted as scrutineers in PTC ballots they had never received a request from any member to examine the register. I do not believe that in failing to complete the despatch of the notice A/3/97 to all distribution points before the scrutineer started his functions in this instance prejudiced the ballot or the interests of members.
25. It is for these reasons that I refrain from making any order in respect of the declared breach.

Complaint B: The independence of the scrutineer

26. The complainant stated that PTC and its predecessor, NUCPS, had employed the Electoral Reform Ballot Services continuously since 1989, if not earlier. The procedure for appointing ERBS had not been disclosed and it was reasonable to assume that a “cosy relationship between senior officers of the union and ERBS” had developed which might reasonably call into question the independence of the scrutineer.
27. During the hearing evidence was given that, whilst ERBS had been appointed by PTC to carry out the functions in relation to the ballot which were required under statute, no written contract had been entered into. Moreover it was stated that members normally notified PTC HQ when they had not received a voting paper and PTC HQ would then notify ERBS of those members requiring the issue of duplicate ballot papers. The complainant alleged that by giving PTC a role in the issue of duplicate ballot papers ERBS had knowingly permitted an officer or employee of the trade union to assist it in carrying out its functions as a scrutineer. This was in breach of Article 5 of the Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 SI 1993/1909 and ERBS had effectively disqualified itself from acting as an independent scrutineer.

Union’s Response

28. The union stated that, as ERBS were specified, by Article 7 of the Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 (SI 1993 No 1909), as a qualified independent person by the Secretary of State, the scrutineer satisfied section 100A(2)(a) of the 1992 Act. PTC had had at no time any grounds for believing either that ERBS would carry out any functions conferred on them in relation to the ballot otherwise

than competently or that their independence in relation to the PTC or in relation to the ballot could reasonably be called into question. Thus it was felt that section 100A(2)(b) of the 1992 Act had been satisfied. The union refuted the bald assertion that ERBS may not be independent because it had provided a good service to PTC since its inception in 1996.

Reasons for Decision

29. This was essentially an unsubstantiated allegation for which no evidence was produced. It is though necessary for me to consider Article 5 of SI 1993/1909, on which some evidence was produced. The relevant section provides:-

“5(1) An individual potentially qualified to be a scrutineer does not satisfy the condition if he or any existing parties of his has (b) 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 section 100A(3) of the 1992 Act.”

Section 100A(3) of the 1992 Act provides:-

“The scrutineer’s appointment shall require him - (a) to be the person who supervises the production of the voting papers and their distribution and to whom the voting papers are returned by those voting.”

Under questioning the complainant was unable to produce any evidence to show that any member, officer or employee of PTC had assisted ERBS in the supervision of the production of the voting papers and their distribution. Nor was the complainant able to produce any evidence to show that grounds existed for believing that scrutineer had not carried out his functions independently of the union and competently. Moreover on closer reading it is clear that Article 5 of the 1993 order does not apply in the case of bodies,

such as ERBS, which are specified in article 7 of that order. I therefore dismiss complaint B.

Complaint C: The dissemination of the scrutineer's report

30. The complainant stated that he had neither received a copy of the scrutineer's report on the ballot as required by section 100E(6)(a) of the Act, nor was he aware, except incidentally via another member of the union, that PTC had taken any steps for notifying the contents of the report to members of the union as permitted by section 100E(6)(b). Moreover the steps that they had taken, (circulation of a notice on a 1:5 basis through distribution points) were not sufficient to satisfy section 100E(6).
31. He also stated that not only was the method of distribution faulty the notice that was circulated was deficient in content. The full scrutineer's report covered all the issues required by section 100E(1) to (4) but the notice to members excluded all information except that relating to the number of voting papers and votes. On both these grounds the union had failed to satisfy section 100E(6).
32. The complainant was aware that the legislation permitted the union to carry out this action of notifying members within three months of receipt of the scrutineer's report and that that three months would not expire until on or around 17 January 1998. However he understood that an application to register the instrument of amalgamation had been made to the Certification Officer on 20 October 1997. Section 101(3) of the 1992 Act provided that an application for registration of an instrument of amalgamation shall not be made until section 100E(6) had been complied with in relation to the scrutineer's report on the

ballot. He therefore concluded that if, as he alleged, the union had not so far complied with section 100(E)(6) its application for registration of the instrument of amalgamation was invalid. He recognised that statute gave him no course of complaint to me about whether or not the union had made a valid application.

The Union's Response

33. The PTC stated that it first issued an undated notice to members on a 1:5 basis through the "distribution point" system on 17 October 1997. This notice gave details of PTC members voting in favour of the ballot and those voting against. It was realized that this notice was deficient in that it did not carry the statutorily required statement that the union would, on request, supply any member of the trade union with a copy of the scrutineer's report, either free of charge or on payment of a reasonable fee. An amended notice, dated the 17 October was prepared and sent out by 20 October 1997, on a 1:5 basis to the union's distribution points for circulation to members. This amended notice, in addition to the statutory statement also gave details of the number of votes cast for and against the resolution, the number of invalid papers returned and the total ballot papers issued.

34. The union stated that it had not sought to send a copy of the report to every member of the union but had complied with the alternative provided in section 100E(6)(b). The distribution of the notice of the ballot result on a 1:5 basis to distribution points was in accordance with the procedure PTC followed when matters of general interest to all members need to be brought to their attention. In support it put forward the arguments it had advanced in relation to complaint A. (See paras 14-17 above)

35. On the question of the contents of the notice the union contended that it was not under any obligation to notify members (except when a copy was requested) of the entire contents of the scrutineer's report. The requirement was to take steps for notifying the substantive contents and that they had done.
36. On the question of what steps I could take if I found the union had not yet satisfied 100E(6) the union argued that I should exercise my administrative functions in a reasonable way in determining whether or not to register the instrument. That would require me to weigh in the balance the detriment caused to members through any largely technical faults in the process of announcing the ballot results against the detriment caused to two substantial unions which had put in place detailed arrangements with staff, banks, employers, branches, its own employees and members to effect the amalgamation on 1 January 1998. They produced detailed, and effectively unchallenged, evidence on these arrangements.

Reasons for Decision

37. With this complaint there are initially two questions for me to consider.
- (a) Did the method of distributing the notice of the scrutineer's report satisfy the requirements of 100E(6)? (the method question)
 - (b) Did the contents of the notice satisfy 100E(6)? (the contents question)

The method question

38. Apart from the nature of the information that must be made known to members the statutory requirements in respect of notifying members of the name of the scrutineer and of the report of scrutineer on the ballot are identical. The union in the “distribution point” system have a well established and largely effective means of passing information on to its members. Within that system it has different levels of distribution dependent on the material to be distributed, urgency and costs. In respect of complaint A I have accepted that the use of “distribution points” is the normal practise that the union takes when matters of general interest to all its members need to be brought to their attention.
39. A difference in the distribution system adopted by the union in respect of notifying members of the result of the ballot was that the circular was sent out on a 1:5 basis rather than the 1:1 basis used for notifying members of the name of the scrutineer. I note that the circular which PTC sent out clearly carries the message “Please make sure all PTC members see this newsheet.” I accept that section 100E(6)(b) does not require all members actually to receive the notice and similarly that the general practise of the union may exclude some members. In this instance the despatch of material to the distribution points (save in the case of an exceptionally assiduous distributor) would mean that retired, associate and retained members would not receive details of the scrutineer’s report on the ballot. I am satisfied however that the PTC followed its normal practise in sending members, via the distribution points, the scrutineer’s report on the ballot.

The 'contents' question

40. Apart from providing for the method to be adopted in notifying members of the scrutineer's report section 100E(6)(b) also makes provision in respect of the information to be sent out. It requires the union to notify the contents of the scrutineer's report either by publishing the report or otherwise. The notice that was sent out did not contain the full scrutineer's report on the ballot. After the section giving details of the voting the report contained the following six paragraphs.

"The ballot papers will be stored in accordance with the requirements of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by the Trade Union Reform and Employment Rights Act 1993.

As Scrutineers appointed in accordance with Section 4 100A of the Trade Union Reform and Employment Rights Act 1993, we are satisfied as to each of the matters specified in subsection 100E(2) with regard to the ballot. The following points should also be noted:

- 1) The person appointed under section 4100D to carry out the storage and counting of the voting papers was Electoral Reform Ballot Services Limited.*
- 2) The person appointed under section 4100D to carry out the distribution of voting papers was Electoral Reform Mailing Services Limited.*
- 3) A copy of the register of voters (as at the relevant date) was examined in accordance with section 4 100E(3). The examination took place at our own instance and did not reveal any matter that should be brought to the attention of the trade union.*

We would draw your attention to sections 4 100E(4), (5), (6). Section 4 100E(6) requires that a copy of this report be published and made available to all members of the PTC within a three month period from today. This however, does not mean that every member has to be notified individually."

There was no reference to any of these points in the circulated notice.

41. I should make it clear at this point that the inclusion of the statement, that a copy of the scrutineer's report will be supplied on request as required by section 100(E)(7), will not in itself satisfy the requirements of section 100E(6)(b). The statute requires more than this and in this instance the PTC did more than that. The purpose in notifying the contents of the scrutineer's report to members is twofold. First, to advise the members of the outcome of the ballot, second, to enable members to make an informed judgement on whether the ballot has been conducted in accordance with the statutory requirements and whether there are any matters which might lead to the ballot result being questioned. Against that background in my judgement the parts of the scrutineer's report which must be notified to members will very much turn on the material in that report. Without question any notification to members should contain details of the number of voting papers distributed; the number of voting papers returned; the number of valid votes cast in the ballot for and against the resolution; and the number of invalid votes. Additional information ought to be included where the scrutineers report concerns about the state of the register of members, or about the conduct of the ballot.
42. In this instance the scrutineer's report raised no issues that might lead members to question the outcome of the ballot and the notification to members provided the minimum information set out above relating to the ballot result. I am satisfied that the omission of all of the material quoted in para 40 did not work to the detriment of any member; the complainant himself confirmed that there was nothing in these paragraphs to cause him any concern. I therefore find that in taking the action that it did, the union met the requirements of section 100E(6). I dismiss complaint C.

43. As I have dismissed complaint C the issues surrounding the juxtaposition of 101 (3) and 101(6) and of the significance of the 3 month period in section 100E(6) (see paras 32 and 36) do not need to be resolved.

Observations

I have reached my decision in the light of the facts of the case before me. If I am wrong and the union has failed to notify members of the content of the scrutineer's report as required by section 100E(6)(b) and if it had come to a point where I would have had to consider making an order requiring the union to take certain steps before I would entertain an application to register the instrument of amalgamation, I would not have issued such an order in relation to this complaint. Given the result of the ballot showed a substantial majority in favour of the resolution to amalgamate with the Civil and Public Services Association, and the absence of any complaints or concerns about the conduct of the ballot, I am satisfied that the prejudice to the unions involved in making arrangements to effect the amalgamation on 1 January 1998 and the creation of a new single union that would be caused by any such order would far outweigh any prejudice to any other parties caused by the alleged breach.



E G WHYBREW
Certification Officer