

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 October 2014
Judgment handed down on 2 February 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MARTIN A THOMPSON

APPELLANT

NATIONAL UNION OF MINeworkERS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ARTHUR SCARGILL
(Representative)

For the Respondent

MR DAMIAN BROWN
(One of Her Majesty's Counsel)
Instructed by:
National Union of Mineworkers
Legal Department
Miners Offices
2 Huddersfield Road
Barnsley
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SUMMARY

TRADE UNION MEMBERSHIP

The Certification Officer did not err in dismissing all but one Complaint of breach of the Rules of the National Union of Mineworkers ('NUM Rules') and in some Complaints of Section 47(1) of the **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA) made by a member of the National Union of Mineworkers arising out of the election of another member as Yorkshire Area Agent and the Complainant's exclusion from candidacy for the post of National Secretary. Whilst the CO erred in his construction of Rule 5A(iii) of the NUM Rules by holding that lay National Officials were entitled to full membership even if they were not employed by the Union or an Area, he did not err in law or come to a perverse conclusion in deciding that the National Secretary whose election was challenged was employed under an express or implied contract to carry out administrative duties for the Yorkshire Area and so was entitled to full membership of the Union. The Certification office erred in including in the Enforcement Order on Complaint 1 text which formed no part of remedying the breach of Rule which he found to have occurred. **TULRCA** Section 108B applied.

THE HONOURABLE MRS. JUSTICE SLADE

1. Mr Thompson appeals under Sections 108C and 56A of the **Trade Union and Labour Relations (Consolidation) Act 1992** ('TULRCA') from the decision of the Certification officer ('CO') on 18 July 2013 to refuse his applications for declarations that the National Union of Mineworkers ('NUM') had breached its Rules by matters set out in Complaints 2, 4 and 5 and breached Section 47 (1) of **TULRCA** by those in Complaints 3 and 4. Mr Thompson also contended that the Enforcement Order made by the CO following his declaration of breach of rule on Complaint 1 was itself made in breach of the Rules of the NUM. Mr Thompson was represented before me by Mr Arthur Scargill and the NUM by Mr Damian Brown QC. References to paragraph numbers are to those in the judgment of the CO unless otherwise indicated.

2. At all material times Mr Thompson was a member of the NUM. By an application received at the Certification Office on 15 November 2012 and by further applications received on 20 December 2012, Mr Thompson made complaints against the NUM of breaches of **TULRCA** and breaches of the rules of the Union regarding the elections held in 2012 for the position of NUM (Yorkshire Area) Agent/Secretary and the position of National Secretary. At the hearing before me, Mr Thompson was represented by Mr Arthur Scargill and the NUM by Damian Brown QC. Mr Thompson made the following complaints to the CO:

"Complaint 1

On or around 17 July 2012 the union breached National Rules 20A and 20B by acting beyond its powers when having agreed an election for the position of NUM (Yorkshire Area) Agent/Secretary on or around 22 June it:

- a) postponed the election indefinitely, so preventing Mr Thompson from standing in that election and /or
- b) postponed the election until after Mr Thompson appeared before the NEC

Complaint 2

On or around 17 July 2012 the union breached National Rule 20A when the NEC accepted a nomination from Mr. C. Kitchen despite him not qualifying to stand for the election for the position of NUM (Yorkshire Area) Agent/Secretary under National Rule 5A (i) to (viii).

Complaint 3

On or around 22 June 2012 the union breached section 47(1) of the 1992 Act by unreasonably excluding Mr. Thompson from being eligible for nomination and standing as a candidate in the 2012 National Secretary election.

Complaint 4

On or around 22 June 2012 the union breached National Rules 14A and 14F(i) by the 2012 National Secretary election not having been conducted in line with legislation in that Mr. Thompson was unreasonably excluded from being eligible for nomination and standing as a candidate in breach of section 47(1) of the 1992 Act.

Complaint 5

On or around 22 June 2012 the union breached rule 14C by accepting the nomination from Mr Chris Kitchen who was not eligible for full membership of the union under rule 5A.”

Background to the complaints

3. Mr Thompson joined the NUM in 1986 when he first started work at a colliery. He ceased membership in 1994 or 1995 and was re-admitted in 2006. In June and July 2012, the period relevant to the complaints made by Mr Thompson, the NUM had a total of about 1,800 members; 1,080 of whom were in its Yorkshire Area. The Yorkshire Area consisted of three working collieries: Maltby with 350 members, Kellingley with 452 members and Hatfield with 270. The Union had a branch based in each of the three collieries.

4. From 2001 until its closure on 2 April 2013 Mr Thompson worked at the Maltby Colliery and was a member of the Maltby branch of the NUM. In 2007 Mr Kitchen was elected to the position of Yorkshire Area Agent/Secretary (‘Area Agent’) and to that of National Secretary. His position as Area Agent was to terminate on 31 May 2012 and as National Secretary on 30 September 2012. In accordance with the Rules Mr Kitchen was employed by the NUM and paid out of the Yorkshire Area funds as Area Agent whilst also serving as National Secretary. He was reimbursed by the NUM his expenses incurred as National Secretary but did not receive a salary for his work for the national union. The NUM reimbursed

the Yorkshire Area one third of the salary paid to him in recognition of the fact that Mr Kitchen spent some time working for the NUM rather than for the Yorkshire Area.

5. On 21 March 2012 the National Disciplinary Committee of NUM upheld complaints against four officials of the Maltby branch and suspended them for 12 months.

6. On 26 March 2012 Mr Kitchen circulated the branch secretaries in the Yorkshire Area seeking nominations for election to the position of Area Agent which he was due to vacate on 31 May.

7. On 27 March 2012 Mr Thompson sent a letter by email to the Barnsley Chronicle headed 'From a Disgruntled Barnsley Miner'. The letter referred to the leadership of the Yorkshire Area as being 'like rats scurrying to find refuge on a sinking ship' and contained other unflattering comments. The letter was not published by the Barnsley Chronicle but it was published by the Rotherham Advertiser in April 2012.

8. At that time Mr Kitchen decided to take no action on Mr Thompson's letter.

9. Nominations for the position of Area Agent closed on 13 April 2012. There were two nominations: Mr Kitchen and Mr Whitehead. The result of the election declared on 14 May was that Mr Whitehead secured 410 votes and Mr Kitchen 293. Mr Whitehead's election was confirmed by the Yorkshire Area Council on 21 May 2012.

10. Mr Whitehead decided not to accept the position of Area Agent for reasons which included that he was being offered a significantly lower salary than his predecessor, Mr

Kitchen. The election was to be re-run with the duties of Area Agent carried out by the Area Chairman in the meantime.

11. On 31 May 2012 Mr Kitchen ceased to be Area Agent but continued in office as the National Secretary. A contract for the employment of Mr Kitchen as National Secretary from 1 June 2012 was produced to the CO for the first time on the day of the hearing before him.

12. In the meantime the Union had begun the process for selection of National Secretary. On 18 June 2012 the Maltby branch declined to support Mr Kitchen, who was seeking re-election as National Secretary. Mr Thompson indicated an interest in standing but did not pursue the matter when he was told that it was a requirement for nomination that the person be an existing member of the current National Executive Committee ('NEC'). Area Agents were members of the NEC.

13. The process for the second election for the position of Area Agent began on 22 June 2012. On 3 July 2012 the Maltby branch nominated Mr Thompson for the position of Area Agent. Mr Kitchen was nominated by the Kellingley and Hatfield branches. There were the only two nominations for the post.

14. Concerns were expressed by other branch officials as to whether, in the light of his letter to the Barnsley Chronicle, Mr Thompson was a fit and proper person to be Area Agent. Mr Kitchen considered that the situation had changed from the time of his decision not to take action and that he would take the matter up with the Union President, Mr Wilson. The matter was referred to the NEC.

15. The NEC met on 17 July 2012. The President submitted a report which stated that both nominees for the position of Yorkshire Area Agent satisfied the requirements of Rule 20A to be candidates. He stated that they were both in full financial membership. On a separate Agenda item the President said that the Union would await the outcome of a meeting about his letter to the Barnsley Chronicle between Mr Thompson and National Officials. Mr Wilson stated that 'if the letter is not withdrawn the Union would be defended by taking him to court but that would be a decision for the NEC'. The CO held:

"24. ... The minute of this meeting does not record that any decision was made to stay or postpone the Area Agent election. Mr Kitchen gave evidence that the feeling at the meeting was that there would be no need for this as there would be an early meeting with Mr Thompson and the election would proceed."

16. On 17 July 2012 Mr Kitchen wrote to Mr Thompson inviting him to a meeting with National Officials on 26 July to discuss his letter to the Barnsley Chronicle.

17. On 19 July 2012 Mr Thompson wrote two letters to Mr Kitchen. One enclosed a statement to the NEC in which he profusely apologised if any member had taken offence at the nature of his letter to the Barnsley Chronicle.

18. On 30 July 2012 the President wrote to members in the Yorkshire Area stating that the NEC had agreed that Mr Thompson should meet with National Officials so that they could report back to the NEC to decide how the matter was to be dealt with.

19. Mr Thompson wrote to Mr Wilson on 6 August 2012 that he saw his letter as an undisguised election address for Mr Kitchen. He stated that he was not prepared to meet Mr Wilson or Mr Kitchen.

"33. On 22 August 2012, Mr Wilson wrote to Mr Thompson informing him that, as he was not willing to meet National Officials, the matter would be put to the NEC meeting on 4

September along with the legal advice the Union had taken in regard to his letter to the Barnsley Chronicle.

34. On 28 August 2012, Mr Thompson wrote to Mr Wilson responding to what he considered to be a threat of legal action against him. He stated that he would happily meet with the NEC or National Officials but only after the Area Agent election had taken place and after all threats of legal action had been dropped.”

20. The meeting of the NEC on 4 September 2012 noted that Mr Kitchen’s was the only valid nomination for the position of National Secretary. They approved his uncontested election.

21. On 25 September 2012 Mr Thompson wrote to Mr Kitchen stating that he would not meet the NEC until the threat of legal action was withdrawn and the Area Agent election had taken place.

22. On 1 October 2012 Mr Kitchen took office as National Secretary.

23. At a meeting of the NEC on 14 November 2012 it was agreed that Mr Kitchen’s duties as National Secretary should include the administrative function of the Yorkshire Area.

24. By application dated 12 November 2012 received on 15 November 2012 Mr Thompson made his complaint to the CO.

25. Following a meeting with NEC on 4 February 2013 Mr Thompson’s membership of the NUM was terminated with effect from 12 November 2012, the date of the complaint to the CO, for failure to comply with the Union’s disputes procedure.

26. The CO observed in paragraph 8 that:

“This case has demonstrated conflicting factions within the Union. Some of those in elected positions consider that there are elements that seek to destabilise the Union. On the other hand, there are others who consider that the leadership is involved in unacceptable manoeuvres to retain power.”

Mr Kitchen was a member of the leadership of the Union and Mr Thompson, a critic.

The Judgment of the Certification Officer

Complaint 1

27. The CO held that on the evidence before him, on the balance of probabilities, no decision was taken by the NEC on 17 July 2012 to postpone the Area Agent election from the published timetable. He found that the decision to postpone the election for Area Agent was taken by the National Officials after the NEC meeting of 17 July and before Mr Kitchen’s letter to Mr Thompson of 24 July when the first written reference to a stay of the election appears.

28. The CO held that the decision to postpone the timetable for the election of the Yorkshire Area Agent was not made by the NEC. Accordingly he found that it was in breach of Rule 20B.

29. In paragraph 70 the CO ordered that:

“... unless the National Executive Committee determines that there shall be no Area Agent/ Secretary of the Yorkshire Area of the Union, the Union shall proceed with the election for the Yorkshire Area Agent/Secretary which it commenced on 22 February 2012 and in which nominations closed on 13 May 2012. ...”

The election was to proceed on condition that Mr Thompson paid any outstanding membership subscriptions from 12 November 2012 and on the basis that at the end of nominations the valid candidates were Mr Thompson and Mr Kitchen. The election was to be conducted in accordance with Rules 20A and 20B so that the result was to be declared no later than 18 November 2013.

Complaints 2 and 5

30. The issue on Complaints 2 and 5 was whether on or around 17 July 2012, the date of acceptance of his nomination for election as Yorkshire Area Agent, Mr Kitchen was in full financial membership of the Union and so eligible to stand. The CO recorded that Mr Scargill for Mr Thompson and Mr Eyre for the NUM relied on the same submissions on Complaint 5 as had been advanced on Complaint 2. His reasoning therefore applied to both Complaints.

31. As his term of office as Area Agent came to an end before the second nomination for that post after his defeat by Mr Whitehead in the first election, the CO held that Mr Kitchen was not able to take advantage of Rule 20C in the second election as an incumbent eligible for re-election. Accordingly, to qualify for nomination, Mr Kitchen had to establish that he was a full member of the NUM within the meaning of Rule 5A.

32. At all material times Mr Kitchen was National Secretary of the NUM. Rule 10A provides:

“There shall be three National Officials, a President, Vice-President and Secretary. The President, Vice-President and Secretary shall be lay National Officials.”

National Officials were not employees. Area Agents were employees but Mr Kitchen ceased to be Yorkshire Area Agent on 31 May 2012. Pursuant to Rule 5 eligibility for full membership of the Union includes:

“5A(iii) All persons employed by the Union or by an Area including National or Area Officials/Agents.”

In determining whether Mr Kitchen as National Secretary was entitled to membership of the NUM under Rule 5A(iii) the CO referred to the well known dictum of Warner J in **Jacques v Amalgamated Union of Engineering Workers** [1986] ICR 683 at page 692 that:

“... the rules of a Trade Union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court’s view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they were addressed.”

Adopting this approach, the CO held at paragraph 78:

“... I find that the retention of the reference to National Officials in rule 5.A(iii) after the introduction of the word “lay” in the description of National Officials in rule 10.A in 2002 gives support to a construction of rule 5.A(iii) that qualifies National Officials for membership of the Union whether or not they are employees. ... In my judgment, the correct construction of rule 5.A(iii) is that National Officials of the Union retain eligibility for membership whether or not they are employed by it.”

Accordingly the CO held that that Mr Kitchen as National Secretary retained membership of the Union at the material time.

33. At paragraph 79 the CO held that on any construction of Rule 10, the Rules do not provide for the National Union to enter into a contract of employment for the payment of its lay National Officials. Accordingly the NUM could not rely on the contract of 1 June 2012 as the basis of Mr Kitchen’s entitlement to membership. The CO also held that Rules 10B and 10C supported a construction that whilst a lay National Official may not be employed in that capacity by the National Union they may be employed by an Area in an elected or an unelected position. The National Union is to reimburse an Area one third of the National Official’s rate of pay to compensate that Area for work undertaken by that Official on behalf of the Union.

The CO concluded:

“80. Although the National Union may not enter into a contract of employment for the payment of its lay National Officials I was informed that Mr Kitchen had been employed in part to perform the administrative functions that would have been performed by the Yorkshire Area Agent, if one had been in post. The Union at both National and Area level clearly has the authority to enter into contracts of employment where the rules do not provide otherwise and Mr Kitchen’s employment in any capacity other than that of a lay National Official does not appear to be inhibited by the rules. Equally, Mr Kitchen is clearly entitled to payment for the work he performs, other than as a lay National Officer, under an express or implied contract.

81. For the above reasons, I find that the Union did not breach rule 20.A of its rules on or about 17 July 2012 when the NEC accepted a nomination for election to the position of Area Agent from Mr Kitchen as he qualified for full membership of the Union under rule 5.A(iii).”

34. Accordingly the CO held that Mr Kitchen was a full member of the NUM at the material times. The acceptance on 17 July 2012 of his nomination for election as Area Agent and on 22 June 2012 of his nomination for election as National Secretary were not in breach of the Rules of the NUM.

Complaints 3 and 4

35. The CO recorded that it was common ground that the success of Complaint 4 depended on the outcome of Complaint 3.

36. Rule 14C provides that nominations for the post of National Officer, which includes National Secretary, are restricted to current members of the NEC.

37. Rule 9A provides that:

“The National Executive Committee (‘NEC’) shall consist of:

(i) the President

(ii) the Vice President

(iii) the Secretary

(iv) representative members who shall be elected by Areas consisting of more than 29 members from amongst the members thereof to hold office until the conclusion of the next Biennial Conference at which all representative members (wherever elected) will retire

(v) one representative of and elected by the Miners’ Parliamentary Group who shall not be entitled to vote”

Areas (or consolidated groups of areas) with less than 500 members send one representative to the NEC. Areas (or consolidated groups of areas) with more than 500 members are entitled to an additional representative for every additional 250 members.

38. Mr Thompson contended that by application of Rule 14C, on or about 22 June 2012 he had been unreasonably excluded from standing as a candidate for election as National Secretary.

39. Section 47(1) and 47(3) of **TULRCA** provide:

“47 Candidates

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

...

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

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

40. The CO explained that **TULRCA** Section 47 recognises that there may be reasonable restrictions on the right to stand in any statutory union election.

41. The CO held:

“88. Unfettered by section 47(3) of the 1992 Act, I would have found it unreasonable for the pool of potential nominees for the position of National Secretary of this Union to be restricted to 9 or 10 persons. However, I find that rule 14.C does establish a class of members, all of whom are excluded from nomination by the rules of the Union; namely those not on the NEC. The identity of those in the class is readily and objectively ascertainable at the time nominations are invited. I further find that this is not a rule which provides for such a class to be determined by reference to whom the Union chooses to exclude. Accordingly I find that the Union may rely upon section 47(3) to uphold its condition that candidates for the position of National Secretary must be members of the NEC. That condition is deemed not to be unreasonable by section 47(3).

89. For the reasons above, I refuse Mr Thompson’s application for a declaration that the Union breached section 47(1) of the 1992 Act on or about 22 June 2012 by allegedly having excluded him unreasonably from being eligible for nomination as a candidate in the 2012 National Secretary election.”

42. Rules 14A and 14F(i) provide:

“14.A. The National President and National Secretary shall be elected in line with legislation.

...

14.F. Secretary

(i) The Secretary shall be elected as lay Secretary every five years in accordance with 14.A and 14.B.”

43. The CO held:

“92. It was common ground that these complaints would succeed if I find that the Union had conducted the election for National Secretary otherwise than in line with legislation. The breach of the legislation which was alleged is a breach of section 47(1) of the 1992 Act.

93. I have found that the election for National Secretary was not conducted in breach of section 47(1) of the 1992 Act and accordingly it has not been established that the election was conducted other than in line with legislation.”

Discussion and Conclusion

44. The applications in Complaints 1, 2, 4 and 5 were made to the CO pursuant to TULRCA Section 108A which provides:

“(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; ...”

The CO may make or refuse the declaration asked for. Section 108B provides:

“(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

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

Section 108C provides that an appeal lies to the Employment Appeal Tribunal (‘EAT’) on any question of law arising in proceedings before or arising from any decision of the CO under Chapter VIIA.

45. Applications in Complaints 3 and 4 in part were made to the CO pursuant to TULRCA Section 55 which enables complaints to be made of breach of Section 47. By Section 56A an

appeal lies to the EAT on any question of law arising in proceedings before or arising from a decision of the CO under Section 55.

The Grounds of Appeal

Complaint 1: Enforcement Order

46. For Mr Thompson, Mr Scargill contended that Mr Kitchen was not a full member of the Union at the relevant time, 17 July 2012. Accordingly the Enforcement Order should have provided that Mr Thompson be declared elected unopposed as Yorkshire Area Agent/Secretary as the NEC meeting on 17 July 2012 should have made such a declaration.

47. This contention depends upon a successful challenge to the decision of the CO that Mr Kitchen was qualified for full membership of the NUM at the material time and that the Union was therefore not in breach of Rule 20A on or about 17 July 2012 when the NEC accepted a nomination from him for election as Yorkshire Area Agent. For reasons set out below in determining the challenge to the dismissals of Complaints 2 and 5, in my judgment the CO did not err in deciding that Mr Kitchen was a full member of the NUM at the relevant time. It was therefore not in breach of the Rules of the Union in accepting the nomination of Mr Kitchen for the post of Area Agent. Accordingly the CO did not err in law in failing to require that Mr Thompson be declared elected unopposed as Yorkshire Area Agent/Secretary at the NEC meeting on 17 July 2012.

48. Mr Brown QC contended that there was nothing objectionable in the CO referring in his Enforcement Order to the possibility of the NEC determining that there should be no Area Agent/Secretary of the Yorkshire Area of the Union. Rule 19A permits the NEC to determine whether an Area shall have such Agents.

49. I accept the submission made by Mr Scargill on behalf of Mr Thompson that the CO exceeded his powers in inserting a proviso suggesting that unless the NEC decided that there shall be no Area Agent/Secretary of the Yorkshire Area of the Union the Union was to proceed with the election. Pursuant to **TULRCA** Section 108B the CO shall make an enforcement order requiring the Union “to take such steps to remedy the breach”. The breach of rule found by the CO to be established was:

“... that the Union breached rule 20B of its rules by failing to hold the election for the position of Yorkshire Area Agent/Secretary within the timetable for that election published on 22 June 2012.”

Referring to a possibility of revisiting the decision that there was to be an Area Agent for the Yorkshire Area formed no part of remedying the breach of failing to adhere to the timetable for the election.

50. The appeal from the enforcement order is allowed to the extent of deleting from the first sentence of the Order and from the second sentence of paragraph 70 of the judgment of the CO the words “unless the National Executive Committee determines that there shall be no Area Agent/Secretary of the Yorkshire Area of the Union”.

Complaints 2 and 5

51. The outcome of complaints 2 and 5 turned on whether at the material time Mr Kitchen was entitled to full membership of the Union as a person

“... employed by the Union or by an Area including National or Area Officials/Agents”

within the meaning of Rule 5A(iii).

52. Mr Kitchen's employment by the Area as Area Agent came to an end on 31 May 2012, the expiry of his term of office. He continued to hold office as National Secretary. The CO rejected the argument advanced on behalf of the NUM that the only effect of the word "lay" in Rule 10A which provided that the National Officials including the Secretary "shall be lay National Officials" was to exclude a person with a professional qualification. The CO held that the rules do not provide for the National Union to enter into a contract of employment for the payment of its lay National Officials and that National officials are not employed in that capacity by the National Union. Frequently but not invariably they are "the holder of a paid position" within the Union such as Yorkshire Area Agent.

53. Mr Brown QC supported the reasoning and conclusion of the CO set out in paragraph 78 that the National Secretary remained eligible for full membership of the Union. He submitted that the CO did not err in construing Rule 5A(iii) as including lay National Officials as a separate category of those eligible for full membership of the Union whether or not they were also employees. Mr Brown QC relied, as did the CO, on **Jacques** to support a common-sense approach to the construction of Rule 5A(iii). He supported the reasoning of the CO that the retention of the reference to National Officials in Rule 10A after the introduction of the word 'lay' in 2002 gave support to a construction of Rule 5A(iii) which qualifies National Officials for membership of the Union whether or not they are employees. Mr Brown QC endorsed the remarks of the CO that it would be odd that having been eligible initially for election as National Secretary as a member of the union, an individual lost that entitlement by occupancy of the post or that he ceased to be a member if he had to give up work at a colliery in order to carry out his duties as National Secretary.

54. Mr Scargill relied on the judgment of the EAT in the **NUM v Murdoch** UKEAT/0469 of 22 October 2004. In that case the Claimant contended that his dismissal was automatically unfair because there was a contractual requirement that he be a member of the NUM. The issue before the EAT was whether the Employment Tribunal had erred in holding that the contract continued beyond Mr Murdoch's expulsion from the Union. The EAT held that the ET erred in holding that the contract did not come to an end on the date the Claimant was expelled from the Union. Mr Langstaff QC with Mr Brown, then junior counsel, appeared for the Union.

55. In my judgment the case of **Murdoch** does not assist in determining the issue of membership in this appeal. The outcome of the appeal in **Murdoch** turned on a term in the employee's contract requiring him to be a member of the Union. When that condition was no longer fulfilled the employment came to an end. The membership issue in this appeal turns on whether the CO erred in his construction of Rule 5A(iii) and in the additional basis for holding that Mr Kitchen was a member of the NUM at the material time: that he had an express or implied contract with the Union or the Area under which he was to carry out administrative functions which would have been carried out by the Yorkshire Area Agent.

56. Mr Scargill also sought to rely on paragraphs 44, 45 and 73 of the judgment of HHJ Moore in his own case in February 2012 against the Yorkshire Area Trustees. The issue in that case was whether a clause in Mr Scargill's contract which required him to be a member of the NUM rendered his contract unenforceable. The judge held that it did not. As in **Murdoch**, the issue was different from that under consideration in this appeal.

57. Mr Scargill contended that paragraphs 78 and 79 of the judgment of the CO are contradictory. He submitted that whilst in paragraph 78 the CO held that whether Mr Kitchen

was an employee of the Union was not determinative of his membership of the NUM, yet in paragraph 79 he held that Mr Kitchen could not rely on his contract of employment dated 1 June 2012 as the basis of such membership.

58. The CO rightly relied upon **Jacques** to construe Rule 5A(iii). He held:

“77. In construing the rules of a trade union it has frequently been held that it is not appropriate to approach them as one would a commercial contract or tax statute. One of the most commonly quoted examples of this approach is that of Warner J in *Jacques v. AUEW* (1986) ICR 683. He said at page 692:

“The effect of the authorities may, I think, be summarised by saying that the rules of a Trade Union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court’s view they must have been intended to mean, bearing mind their authorship, their purpose and the readership to which they were addressed”.”

Rule 5A(iii) is to be construed in the context of other relevant rules of the NUM. By Rule 14C a candidate for the position of National Secretary is to be a member of the NUM in full financial membership. By application of Rule 5A(i), (ii) and (iii) such candidates must be employed in one of the specified capacities. It was rightly held by the CO that “lay” in Rule 10A means that the National Officials are not employed in that capacity by the Union. They receive reimbursement of expenses. They receive a salary from their Area with part paid to the Union as recompense for time spent away from the particular Area on National Union business. In my judgment these financial arrangements indicate that National Officials may be employees of their Area. The wording of Rule 5A(iii) applies to all persons employed by the Union or by an Area. National Officials are included in that category and are so included with Area Officials/Agents who are unarguably employees.

59. The CO recognised that in practise National Official were usually, although not invariably, employed as Area agents. The matters relied upon by the CO in paragraph 78 adopted by the NUM do not displace the ordinary meaning of Rule 5A(iii) read in the context

of the Rules as a whole. In my judgment the CO erred in his construction of 5A(iii). To be entitled to full membership of the NUM under Rule 5A(iii) a National Official must be an employee of the Union or of an Area.

60. In paragraph 80 the CO set out the second basis upon which he held that Mr Kitchen was a member of the NUM at the material time, that he had an express or implied contract of employment for the carrying out of administrative duties carried out by an Area Agent. Mr Scargill pointed out that the letter from the Solicitor of the NUM of 15 February 2013 in response to the complaints presented by Mr Thompson to the CO made no reference to an implied contract of employment. Mr Kitchen ceased to be Yorkshire Area Agent on 31 May 2012. He had been defeated in an election in 2012 in which he sought another term as Yorkshire Area Agent. The contract of 1 June 2012 with the National Union produced during the hearing could not be relied upon as lay National Officials could not be employed in that capacity.

61. Mr Scargill stated that whilst the minutes of the NUM Yorkshire Area Council meeting of 20 November 2012 refer to the NEC agreeing at their meeting of 14 November 2012 to Mr Kitchen taking over the administration of the Yorkshire Area, the minutes do not suggest that he was employed for this work. The point made on the minutes of the 20 November 2012 meeting was that the NEC was not reported as having agreed that Mr Kitchen would carry out his duties as an employee. Further, the NEC minutes did not refer to any agreement that Mr Kitchen would carry out administrative duties for the Yorkshire Area. Accordingly Mr Scargill submitted that Mr Kitchen did not have an express or an implied contract of employment with the Area or the Union and should not have received a salary.

62. Mr Brown QC supported what he described as the “subsidiary” ground for holding that Mr Kitchen was entitled to full membership of the Union; that at the material time, after 31 May 2012, he was engaged under an express or implied contract of employment to carry out the administrative duties of Area Agent.

63. The Minutes of the meeting of the Yorkshire Area Council on 20 November 2012 reporting the decision of the NEC on 14 November 2012 are consistent with what the CO recorded as information given to him that Mr Kitchen was authorised to carry out administrative duties for the Yorkshire Area which would have been carried out by the Area Agent if one had been in post. In addition to Mr Kitchen, Mr Skidmore, the Yorkshire Area Chairman and Mr Hartshorne, the Yorkshire Area Vice-Chairman gave oral evidence before the CO.

64. The reliance by the CO on the information given to him to conclude that Mr Kitchen had been employed in part to perform the administrative functions that would have been performed by the Yorkshire Area Agent, was not challenged in a discrete ground of appeal as perverse whether in respect of the period before 14 November 2012 or at all. In any event it would have been difficult to pursue such a challenge without obtaining the relevant notes of evidence of the CO. It was open to the CO to conclude that Mr Kitchen performed such work pursuant to an express or implied contract of employment. Nor did the CO err in holding that the Union at National and Area level has the authority to enter into contracts of employment where the Rules do not provide otherwise, or that Mr Kitchen’s employment in any capacity other than that of a lay National Official was not prohibited by the Rules. In my judgment the CO did not err in law in holding that Mr Kitchen was entitled to membership of the NUM under Rule 5A(iii) as an employee performing administrative duties for the Yorkshire Area. Although

this basis for submitting that Mr Kitchen was so entitled was not advanced by the solicitor of the NUM in correspondence before the hearing before the CO, it was a basis for the decision of the CO and has been relied upon by the NUM to uphold his decision.

65. The appeal from the decision of the CO dismissing Complaints 2 and 5 is dismissed.

Complaint 3 and 4

66. Mr Scargill on behalf of Mr Thompson contended that the CO erred in not finding the restriction of nomination for election to the post of National Official to be contrary to Section 47(3) **TULRCA**. Nomination was restricted by Rule 14C to members of the NEC. Qualification for nomination would therefore be restricted to 10 or a small number of people. It was said that nomination would be open to manipulation. Mr Scargill submitted that the CO erred in relying on **TULRCA** Section 47(3) as justification for the Rule. Rule 14C does not establish a 'class' of members within the meaning of the section. It excludes 99.4% (or 99.3%) of the Union's membership from standing in an election for the office of National Official.

67. Mr Brown QC contended that the CO correctly directed himself in law on the issue of compliance with **TULRCA** Section 47. The requirement to be a member of the NEC was consistently applied and there was no manipulation. It was further submitted that the Rule was reasonable.

68. Rule 14C provides that each Area shall nominate one candidate for the position of National President and National Secretary provided that such nomination is confined to a member of the NEC. In addition to the three National Officials, by Rule 9A the NEC is made

up of representative members elected by Areas. There is also one representative of and elected by the Miners' Parliamentary Group. That representative is not entitled to vote.

69. The CO held:

“88. Unfettered by section 47(3) of the 1992 Act, I would have found it unreasonable for the pool of potential nominees for the position of National Secretary of this Union to be restricted to 9 or 10 persons. However, I find that rule 14.C does establish a class of members, all of whom are excluded from nomination by the rules of the Union; namely those not on the NEC. The identity of those in the class is readily and objectively ascertainable at the time nominations are invited. I further find that this is not a rule which provides for such a class to be determined by reference to whom the Union chooses to exclude. Accordingly I find that the Union may rely upon section 47(3) to uphold its condition that candidates for the position of National Secretary must be members of the NEC. That condition is deemed not to be unreasonable by section 47(3).”

The first sentence of the paragraph shows that the CO had in mind the risk of restricting the eligibility of election as National Official to members of the NEC.

70. In my judgment the CO did not misdirect himself in law or come to a perverse conclusion in his findings in paragraph 88. He did not err in law in dismissing complaints three and four.

Disposal

Submissions

71. Mr Scargill has submitted that if the contention that the CO should have declared that Mr Thompson be elected unopposed as Yorkshire Area Agent/Secretary as the only qualified candidate approved on 17 July 2012 is rejected, an election for the post should now be held. He has stated that the decision of the NEC on 4 September 2013 that there shall be no Yorkshire Area Agent/Secretary was inconsistent with its decision on 24 July 2013 taken in accordance with the order of the CO to proceed with the election and was in breach of the Rules of the NUM.

72. Mr Brown QC has informed the EAT that the election for Area Agent was run from July 2013 to comply with the CO's decision but was discontinued in September 2013 when the NEC resolved that there should not be a Yorkshire Area Agent due to declining membership numbers. The decision to discontinue the election was notified to Mr Thompson and to the membership as a whole and was not challenged by way of complaint to the CO.

Conclusion

73. If he considered it to be such, Mr Thompson could have lodged a Complaint about the decision of the NEC on 4 September 2013 with the CO under **TULRCA** Section 108A(2)(d) of a breach of the Rules of the NUM, or, arguably, appealed to the EAT under Section 108C on a question of law arising from the decision of the CO. The Notice of Appeal under consideration in this appeal was lodged on 26 July 2013, before the meeting of the NEC on 4 September 2013. The Grounds of Appeal in the Notice of Appeal, which form the basis of any appeal to the EAT, are challenges to the decisions and enforcement order of the CO on the Complaints before him and not to the actions of the NEC on 4 September 2013.

74. Save for the appeal from part of the Enforcement Order on Complaint 1 the appeal is dismissed.

75. The words 'Unless the National Executive Committee determines that there shall be no Area Agent/Secretary of the Yorkshire Area of the Union', are deleted from the Enforcement Order.

76. I am grateful for the submissions made by Mr Scargill and Mr Brown QC.