

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER
SECTIONS 55 (1) and 108(A)(1) OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

Mr M Dooley

v

**Union of Construction, Allied Trades and Technicians
(No 2)**

Date of Decisions

9 July 2012

DECISIONS

Upon application by Mr Dooley ("the claimant") under sections 55 (1) and 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

1. I grant the declaration sought by Mr Dooley that UCATT breached rule 23(5) of its rules by its Selection Committee wrongly excluding Mr Dooley from standing as a candidate in the 2011 General Secretary election.

2. I grant the declaration sought by Mr Dooley that on or around 28 October 2011, UCATT breached section 47(1) of the 1992 Act, by excluding Mr Dooley and Mr Ritchie from standing as candidates in the 2011 General Secretary election.

REASONS

1. Mr Dooley was a member of Union of Construction, Allied Trades and Technicians ("the Union" or "UCATT"). By an application received at the Certification Office on 13 December 2011, Mr Dooley complained that the Union had breached section 47(1) of the 1992 Act by excluding him and Mr Ritchie as candidates in the 2011 General Secretary election. Pursuant to an application by Mr Dooley dated 25 March 2011, I gave leave for his application to be amended to include a complaint that his exclusion was also a breach of the rules of the Union. Following correspondence with the claimant, two complaints were confirmed by him in the following terms:

Complaint 1

On or around the 28th October 2011, UCATT breached section 47(1) of the 1992 Act twice, by excluding Mr Dooley and by excluding Mr Alan Ritchie from standing as candidates in the 2011 General Secretary election.

Complaint 2

The union breached rule 23(5) of its rules by its Selection Committee wrongly excluding Mr Dooley from standing as candidate in the 2011 election for the position of General Secretary. The Union acted in breach of rule by failing to constitute the Selection Panel in accordance with rule 23(5) and by the Selection Committee adopting criteria other than those provided for in rule 23(1).

2. I investigated the alleged breaches in correspondence and a hearing took place on Wednesday 23 May and Thursday 24 May 2012.
3. At the hearing, Mr Dooley was represented by Mr Jody Atkinson of counsel. Evidence for Mr Dooley was given by himself, Mr Cousins and Mr Bentham, who each provided a written witness statement. A further witness statement was tendered on Mr Dooley's behalf by Mr Brough. The Union was represented by Mr Oliver Segal QC instructed by OH Parsons and Partners. Evidence for the Union was given by Mr Steve Murphy (UCATT General Secretary), Mr Chris Murphy (Executive Council member) and Mr John Thompson (UCATT President) who each produced a written witness statement. A further witness statement on the Union's behalf was tendered by Mr James Wood. There was in evidence a 191 page bundle of documents as supplied by the parties for use at the hearing, together with the rules of the Union. At the hearing I gave leave to both Mr Dooley and the Union to add further documents to the bundle in this case. At a telephone Case Management Discussion on 19 April 2012, I directed that this application was to be heard together with the case of *Dooley v UCATT (No 3)* (see paragraph 4 below) for which a separate bundle was in evidence. The witness statements in this case were also used as the witness statements in *Dooley (No 3)*. There was a single bundle of authorities used in *Dooley (No2)* and *(No3)*. Mr Atkinson and Mr Segal provided lengthy and helpful skeleton arguments covering both *Dooley (No 2)* and *(No 3)*.

The Issues and Some Context

4. Mr Dooley was a member and Regional Officer of UCATT. He stood unsuccessfully for election as General Secretary in 2004 and 2009. Arising out of the 2009 election he commenced a complaint to me (***Dooley v UCATT (No.1) D/44-49/10-11***). Subsequently, on 20 January 2011, the Union dismissed Mr Dooley from his employed position as a Regional Officer. On 11 March 2011, I gave my decision in *Dooley (No.1)*. I found that the 2009 election had been conducted in breach of the 1992 Act and ordered that a further election be held. Mr Dooley and Mr Ritchie (the incumbent General Secretary) put themselves forward, with others, as candidates. At a meeting of the Selection Committee of the Union on 26 October 2011 both Mr Dooley and Mr Ritchie were excluded as candidates in that election. Mr Dooley commenced this action (***Dooley (No.2)***) to challenge the exclusion of himself and Mr Ritchie as being in breach of statute and the exclusion of himself as being in breach of the rules of the Union. Subsequently, on or about 27 February 2012, Mr Dooley was expelled as a member of the Union and made a further complaint to me that his expulsion was in breach of the rules. I refer to that case as ***Dooley (No.3)***.

Findings of Fact

5. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follows.

6. Mr Dooley has been a member of UCATT from time to time for over 35 years. He has studied at Ruskin College, Oxford and has a law degree from Brunel University. Most recently, Mr Dooley joined the Union in 1998. On 3 May 1999 he became an employee of the Union, as a Regional Officer based in London. Mr Dooley stood for election as General Secretary in 2004 and 2009. On both occasions he was defeated by Mr Ritchie. Mr Dooley was dismissed from his employment by the Union for gross misconduct by a letter dated 26 January 2011. On 4 November 2011 an Employment Tribunal found his dismissal to have been unfair but also found that he had contributed to his dismissal by 50%. That decision is now subject to an appeal and cross appeal to the Employment Appeal Tribunal, both of which applications were outstanding at the date of this decision. Mr Dooley was expelled as a member of the Union on or about 27 February 2012.
7. In this application, Mr Dooley complains that he and Mr Ritchie were excluded from standing as a candidate in the General Secretary election of 2011 by the Selection Committee of the Union. The powers of the Selection Committee are to be found in rule 23 of the rules of the Union and are as follows:-

RULE 23

Election of General Secretary

1. Members (not over six weeks in arrears) who have been five years successively in a section of this Union shall be eligible for election to the office of GS. Candidates must have a thorough knowledge of the working of the Union, and be competent to correspond with the Branches, and give information on any subject connected with the Union's business.

4. Candidates for the office of General Secretary must receive a minimum of 10 nominations.

Those accepting nomination shall at the same time forward their qualifications by letter to the GO for examination by the Selection Committee and selected candidates must be prepared to submit to a further examination, on paper or by any other method the Selection Committee may decide.

5. The finally selected candidates, not exceeding six in number to be submitted to the votes of the members, according to the rule for election of GS. The two candidates obtaining the highest number of votes shall be again submitted to the members for final selection, unless one of the candidates has an absolute majority of the votes cast. The Selection Committee shall be composed of three members of the GC, three members of the EC. Any candidate elected as GS shall be subject to a six months' probationary period, after which period the Selection Committee may, if s/he be deemed unsuitable for the office, a new election shall be called.

8. The Union contends that these rules entitle the Selection Committee to consider not only the matters which are expressly provided for in that rule but also whether a candidate is a 'fit and proper person' to appear on the ballot paper. It is submitted by the Union that Mr Dooley and Mr Ritchie were excluded from the 2011 General Secretary election as they were considered by the Selection Committee not to satisfy the qualification of being 'fit and proper persons'. Mr Dooley contended that the Selection Committee had never before considered that it was within its power to examine whether a candidate was 'fit and proper' in that general sense and I was accordingly asked to consider how the Selection Committee had previously gone about its business.

9. I was referred to the case of a Mr Lenahan whose position was considered by a Selection Committee in the mid 1980s and who was allowed to take up a position as an Officer notwithstanding a number of criminal convictions between 1954 and 1977, mainly for theft and assault, for some of which he received custodial sentences. It was further argued that, following a major internal dispute within the Union in 1995, Mr Lenahan together with others, was removed from the Executive Council ("the EC") by a vote of the General Council ("the GC") which was approved in a ballot of the entire membership. As a consequence of being removed from office Mr Lenahan was debarred from holding office on either the EC or GC for a period of five years. Notwithstanding these events, Mr Lenahan stood for the position of General Secretary in 1996 and was permitted to do so by the Selection Committee. He lost that election to Mr George Brumwell.
10. Mr Brumwell retired in 2004 and the subsequent election for General Secretary was contested by Mr Dooley, Mr Ritchie and two others. Mr Dooley asked me to have regard to four aspects of how the Selection Committee had carried out its functions on that occasion. First, he maintained that it required all candidates to subject themselves to written and oral examination. Secondly, it did not exclude the candidature of Mr Dooley even though he had been dismissed by previous employers for misconduct and had previously been convicted of criminal offences. Thirdly, Mr Brumwell had been present at the Selection Committee. The rules did not then provide for the General Secretary to be a member of the Selection Committee, as they had previously, but I find that Mr Brumwell was present as part of his normal duties to assist major committees of the Union. It would, of course, have been inappropriate for him to have been present if he had himself been standing for re-election. Fourthly, at least one member of the Selection Committee came from the same region as one of the candidates. Mr Ritchie was elected as General Secretary in 2004.
11. The General Secretary election in 2009 was contested by just Mr Ritchie and Mr Dooley. On this occasion, neither of the candidates were required to subject themselves to written and/or oral examination. Mr Dooley made two points about the role of the Selection Committee in 2009. First, he observed that a written and/or oral examination was considered unnecessary as both candidates had previously been approved as competent by a Selection Committee. Secondly, he noted that he was allowed to be a candidate notwithstanding that there were then a number of potential disciplinary matters against him under active consideration by the Union. He gave evidence that the EC had decided that these matters should be held in abeyance pending the election.
12. The potential disciplinary matters outstanding against Mr Dooley included the one for which he was subsequently dismissed as a Regional Officer. This related to certain membership application forms that Mr Dooley had submitted to the Union for processing that had originated from a particular employer, Hudson Contract Services Limited. On different occasions in 2008, Mr Dooley had forwarded such forms to the Union's head office notwithstanding that they contained signatures which the Employment Tribunal later described as being 'demonstrably fictitious'. There were other issues such as the circumstances in which the Union's logo appeared on Hudson's notepaper or letterheads and whether the Union should be dealing with Hudson's at all, given the nature of its business as a supplier of labour.

13. The General Secretary election in 2009 resulted in the election of Mr Ritchie in June of that year. In December 2009 Mr Dooley complained to me about the lawfulness of that election (Dooley (No.1)). His complaint was based on the Union having a claimed membership of about 130,000 whereas only 56,867 ballot papers had been distributed. This complaint was not adjudicated upon until March 2011.
14. In the meantime, during 2009 and 2010, the disciplinary complaint against Mr Dooley was being processed. Mr Dooley was criticised by the Employment Tribunal for not cooperating with the investigation as he should. A disciplinary hearing took place on 15 and 16 December 2010 and the EC decided on 20 January 2011 that Mr Dooley should be dismissed for gross misconduct. He was informed of his dismissal by a letter dated 26 January. The letter states that the EC decided that Mr Dooley had submitted what he knew to be 'false membership performance (sic) to the Union'. Mr Dooley's internal appeal was dismissed on 26 May.
15. On 1 February 2011 Mr Dooley commenced Employment Tribunal proceedings against the Union, claiming, amongst other things, unfair dismissal.
16. On 11 March 2011 I issued my decision in Dooley (No.1). I upheld Mr Dooley's principal complaint and dismissed two others. I also made an enforcement order requiring Mr Ritchie to stand down as General Secretary and a further election to be held. The Union appealed my decision to the Employment Appeal Tribunal (the "EAT") but the appeal was unsuccessful. Having regard to the appeal, I put back the date on which the Union was required to declare the result of the further election to 13 December 2011, subject to any application the Union might make for a further extension if it thought fit to do so.
17. The Employment Tribunal heard Mr Dooley's case over six days, between 14-17 June and 27, 28 July 2011.
18. As the re-run election was being organised, an issue arose about the expenses that had been claimed by Mr Ritchie as General Secretary. My office had received a request for access to certain accounting records of the Union and the Union asserted that, in considering its response, it had observed some apparent discrepancies in Mr Ritchie's expense claims. These were investigated and a meeting was organised with Mr Ritchie in Manchester on 25 July 2011 at which the discrepancies were put to him. A special EC then met on 28 July at which it was decided to suspend Mr Ritchie from employment and to institute a preliminary disciplinary investigation which was to be conducted by a Mr Rye. Since being removed as General Secretary in March 2011, Mr Ritchie had been given work to do as an Officer of the Union in Scotland. Mr Rye attempted to meet with Mr Ritchie on five occasions but Mr Ritchie failed to make himself available. He maintained that he was too unwell to attend such a meeting and had supporting medical certificates.
19. Notwithstanding these events, Mr Ritchie put himself forward as a candidate in the 2011 re-run General Secretary election. Four candidates received sufficient branch nominations to go forward. Mr Ritchie received 130 nominations, Mr Steve Murphy 59 nominations, Mr Dooley 29 nominations and Mr Swain 27 nominations. The next

stage of the procedure was a consideration of the potential candidates by the Selection Committee.

20. When Mr Ritchie stood down as General Secretary, Mr George Guy was appointed as Acting General Secretary or General Secretary Pro Tem. He selected the members of the Selection Committee. In accordance with rule 23.5, the Selection Committee was made up of three members from the EC and three members from the GC. Mr Guy included the Chairs of each of these bodies and chose members who did not represent the same regions as were the regions of the candidates. He also included one member of the EC who had voted against Mr Dooley's dismissal on 20 January 2011. Mr Dooley argued that this method of choosing the members of the Selection Panel was in breach of rule 23 as its members had to be elected by their respective bodies. I note, however, that rule 23 is silent upon how the members of the Selection Committee are themselves to be selected. In my judgment, in the absence of bad faith, it is not a breach of rule 23 for the members of the Selection Committee to be selected by a General Secretary who is not himself standing in the election. As members of the EC and/or GC may be standing in the election, there may well be good reason for allowing some flexibility in achieving as fair a balance as possible on the Selection Committee. In any event, this matter is put beyond doubt by the later ratification by the EC and GC of the members selected by Mr Guy.
21. On 26 October 2011 all four candidates in the General Secretary election were required to attend at head office for a written and oral examination by the Selection Committee. The oral examination consisted of the same 14 questions being asked of each candidate. The subsequent minute or report of the Selection Committee commented that: "*All candidates had scored average or above average in the written and oral examination*". In the cases of Mr Dooley and Mr Ritchie, however, Mr Guy went on to ask additional questions. Mr Dooley was asked about the impact that his dismissal for gross misconduct might have on the Committee's decision whether he was a fit and proper person to run the Union. Mr Dooley responded by referring to his 11 years service for the Union and commented that it would be unreasonable for his dismissal to be taken into account. Contrary to Mr Dooley's evidence, I find that he did not then challenge the right of the Selection Committee to consider whether candidates were fit and proper persons in a general sense. I note the absence of any such complaint in his subsequent letter to Mr Guy of 31 October.
22. Knowing that Mr Ritchie was to attend before the Selection Committee on 26 October 2011, Mr Rye attempted to arrange an investigation meeting with him that day. Mr Ritchie declined to meet with him, effectively saying that his health was good enough for one meeting that day but two meetings would be more than his health could stand. Prior to his meeting with the Selection Committee, Mr Ritchie produced a letter from his solicitors which explained his position. This letter included the following three observations. It stated that Mr Ritchie did not accept that the Selection Committee was properly constituted. It also stated that it was not custom and practice to require a person who had previously satisfied the Selection Committee to attend another interview by a Selection Committee. It further stated that the Selection Committee interview must not be used in order to pursue threatened disciplinary allegations against him by the back door. After Mr Ritchie had dealt with the same 14 questions as the other candidates, Mr Guy asked him how the Selection Committee should regard his continued failure to meet with Mr Rye, which

was frustrating the Union's investigation of potentially serious charges against him and whether the Selection Committee could conclude that he was indeed a fit and competent person to lead the Union. Mr Ritchie said that he did not have to prove his worth to the Selection Committee, that he had satisfied the Selection Committee with his qualifications in 2004 and was not therefore required to attend before another one. He restated that he had medical reasons for not meeting with Mr Rye and that in any event he had not received anything in writing from Mr Rye about those allegations.

23. The Selection Committee decided to reject the candidature of both Mr Dooley and Mr Ritchie. In the case of Mr Dooley, it did so on the basis that his dismissal for gross misconduct was a matter which related to his fitness and competence to hold the office of General Secretary. In the case of Mr Ritchie, it did so on the basis that his failure to engage with the investigations into his expenses might relate to his fitness and competence to hold office.
24. Mr Dooley made the following observations about the conduct of the Selection Committee. First, neither he nor Mr Ritchie had been alerted prior to their interviews that they would be asked questions about whether they were fit and proper persons, as opposed to their specific competencies. Secondly, Mr Dooley criticised the role played at that meeting by Mr Guy who he considered should not have been present. However, I find that this latter criticism is misplaced, having regard to the duty of a General Secretary to assist Committees and the fact that Mr Guy was not himself standing for an election.
25. On 27 October 2011 the EC endorsed the method of selection of the members of the Selection Committee. It also endorsed the Selection Committee's decision to exclude Mr Dooley and Mr Ritchie from standing in the General Secretary election of 2011.
26. On 28 October 2011 Mr Guy wrote to Mr Dooley and Mr Ritchie informing them that they were excluded as candidates in the election. These letters noted that the General Secretary is also the General Treasurer of the Union. In the letter to Mr Dooley, Mr Guy stated that the Selection Committee was aware that a decision of the Employment Tribunal was pending, but that it had taken account of the nature of the factual findings of the EC in January 2011 in concluding that Mr Dooley had committed acts of gross misconduct. In the letter to Mr Ritchie, Mr Guy referred to "*Extremely serious issues which may relate to your fitness and competence to hold office remaining unresolved because you have failed to engage reasonably with a legitimate investigation sanctioned by the EC.*"
27. On 4 November 2011, the Employment Tribunal published its decision. A number of Mr Dooley's claims were dismissed but the Tribunal found that he had been unfairly dismissed with a finding of 50% contributory conduct. Mr Dooley relies heavily on the Tribunal's finding that, "*We do not consider that a reasonable employer, without more, would have concluded that the Claimant had acted fraudulently or dishonestly*" (paragraph 159). The Tribunal found that the membership forms, which constituted the most serious allegations against Mr Dooley, were "demonstrably fictitious" and that the Union had wholly justifiable grounds for investigating his conduct. However, it also found that the Union had failed to act as a reasonable employer in its conduct of the disciplinary hearing; partly for allowing the hearing to continue until 9.15pm one

day, partly for allowing Mr Dooley to be badgered at the hearing, partly for allowing Mr Ritchie to prosecute the case knowing the animosity between them for some years and partly for two members of the EC who had heard the evidence in December 2010 not being present when the decision was taken in January 2011. The Tribunal also found that there could have been no reasonable grounds for the Union treating Mr Dooley's involvement with Hudsons more seriously than that of his line manager, Mr Swain, who had accompanied Mr Dooley to meetings with Hudsons. The finding of contributory conduct related in effect to Mr Dooley's blameworthy carelessness in dealing with the membership forms and his blameworthiness in failing to cooperate with Mr Guy's disciplinary investigation.

28. On 9 November 2011, Mr Dooley commenced this application to me (Dooley (No. 2)).
29. At about this time Mr Ritchie and others commenced proceedings against the Union and members of the EC in the Chancery Division of the High Court. These were to continue a derivative action under CPR 19.9A, for an order that the claimants be indemnified against liability for costs and for an interim injunction stopping the election whilst Mr Ritchie's name was not on the ballot paper. This application was heard on 22 and 23 November 2011 and judgment was given by Mrs Justice Proudman on 28 November. Mr Segal QC represented the Defendants and successfully resisted each of the applications. It was found that the claimants had an arguable case but that the balance of convenience laid in favour of not granting an injunction. Curiously, the application for an injunction was made at the suit of the Union, as the claimants personally were not prepared to give a cross undertaking in damages. The Union relies on the following passage at paragraph 45 of the judgment, "*I observe in passing that, whether or not Mr Ritchie can be expelled as a member or formally debarred from holding office, any finding of impropriety (which is upheld after challenge) in relation to expenses and so on, will be bound in practice to make his position in holding high office in the Union untenable.*"
30. On 17 November 2011 Mr Ritchie was charged by the Union with a disciplinary offence in relation to his expenses.
31. On 13 December 2011 the result of the General Secretary election 2011 was declared. Mr Steve Murphy was elected, having defeated Mr Jerry Swain.
32. Mr Ritchie's disciplinary charges were to be heard on 2 February 2012. However, on 2 February Mr Ritchie resigned, both as an employee of the Union and as a member. On 27 February Mr Murphy wrote to Mr Ritchie seeking from him a refund of about £120,000, less any appropriate amount representing expenses genuinely incurred and supported by appropriate receipts, invoices etc.

The Relevant Statutory Provisions

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

Requirements to be satisfied with respect to elections

47. Candidates

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

candidate.

(2) No candidate shall be required, directly or indirectly, to be a member of a political party.

(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 who the union chooses to exclude shall be disregarded

55 Application to Certification Officer

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

(5A) 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 more of the following requirements -

- (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.

The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.

108A Right to apply to Certification Officer

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

(2) The matters are -

- (a) the appointment or election of a person to, or the removal of a person from, any office;
- (b) disciplinary proceedings by the union (including expulsion);
- (c) the balloting of members on any issue other than industrial action;
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
- (e) such other matters as may be specified in an order made by the Secretary of State.

108B Declarations and Orders

(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;
- (b) To abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

The Relevant Union Rules

34. The rules of the Union which are relevant to this application are as follows:-

RULE 23

Election of General Secretary

1. Members (not over six weeks in arrears) who have been five years successively in a section of this Union shall be eligible for election to the office of GS. Candidates must have a thorough knowledge of the working of the Union, and be competent to correspond with the Branches, and give information on any subject connected with the Union's business.

4. Candidates for the office of General Secretary must receive a minimum of 10 nominations.

Those accepting nomination shall at the same time forward their qualifications by letter to the GO for examination by the Selection Committee and selected candidates must be prepared to submit to a further examination, on paper or by any other method the Selection Committee may decide.

5. The finally selected candidates, not exceeding six in number to be submitted to the votes of the members, according to the rule for election of GS. The two candidates obtaining the highest number of votes shall be again submitted to the members for final selection, unless one of the candidates has an absolute majority of the votes cast. The Selection Committee shall be composed of three members of the GC, three members of the EC. Any candidate elected as GS shall be subject to a six months' probationary period, after which period the Selection Committee may, if s/he be deemed unsuitable for the office, a new election shall be called.

Consideration and Conclusions

35. I propose dealing with Mr Dooley's second complaint (breach of rule) and then his first complaint (breach of statute).

Complaint Two

36. Mr Dooley's second complaint is in the following terms

Complaint 2

"The union breached rule 23(5) of its rules by its Selection Committee wrongly excluding Mr Dooley from standing as candidate in the 2011 election for the position of General Secretary. The Union acted in breach of rule by failing to constitute the Selection Panel in accordance with rule 23(5) and by the Selection Committee adopting criteria other than those provided for in rule 23(1)."

37. Rule 23.5 of the Rules of the Union provides as follows

5. The finally selected candidates, not exceeding six in number to be submitted to the votes of the members, according to the rule for election of GS. The two candidates obtaining the highest number of votes shall be again submitted to the members for final selection, unless one of the candidates has an absolute majority of the votes cast. The Selection Committee shall be composed of three members of the GC, three members of the EC. Any candidate elected as GS shall be subject to a six months' probationary period, after which period the Selection Committee may, if s/he be deemed unsuitable for the office, a new election shall be called.

Summary of Submissions

38. Mr Atkinson, for Mr Dooley, submitted that both Mr Dooley's complaints should be seen against the background of there being a hidden agenda to use the 2011 rerun election as an opportunity to entrench a new leadership in power, removing both the

former General Secretary, Mr Ritchie, and a strong potential candidate, Mr Dooley. As to the correct construction of Rule 23, Mr Atkinson noted that the EAT in **Unison v Staunton (2009) IRLR 418** had approved at paragraph 29 the reasoning at paragraph 26 of my decision that was then under appeal. In paragraph 26 of **Staunton** I comment that the right of members of a trade union to stand for election is an extremely important right and that it should not be taken away unless the members have so decided in a clearly expressed rule. In Mr Atkinson's submission, the clear meaning of rule 23 is that the Selection Committee shall only consider those matters listed in rule 23.1 in deciding whether to exclude any potential candidate. He argued that this was consistent with Mr Dooley's evidence as to how the rule had operated in the past, including the decision of the Selection Committee not to call either Mr Dooley or Mr Ritchie for interview in 2009 on the basis that they had both established that they had the required qualifications when examined by the Selection Committee in 2004. Mr Atkinson also found support for his submissions in **Ecclestone v NUJ (1999) IRLR 166** in which Mrs Justice Janet Smith, sitting in the Chancery Division, found that the exclusion of Mr Ecclestone from standing in an election was in breach of the rules of the NUJ. He noted the judge's comments that it was the opinion expressed by the electorate on the candidate's qualifications that should be decisive, not the opinion of the NEC. He further noted the judge's observations on the word 'qualifications', which was interpreted in that case so as to exclude whether or not the NEC had confidence in Mr Ecclestone. Mr Atkinson also submitted that it was unnecessary to stretch the meaning of rule 23 as the Union already had a rule which debarred a person from holding office as a disciplinary sanction and a person found guilty of a disciplinary offence could legitimately be debarred from standing.

39. Applying the law to the facts, Mr Atkinson submitted that Mr Dooley's case was effectively made by the decision of the Employment Tribunal on 4 November 2011, that no "*reasonable employer, without more, would have concluded that the claimant had acted fraudulently and/or dishonestly*". Accordingly, Mr Atkinson argued that, even if the Selection Committee had the power to apply a "fit and proper person" test (which he denied), it could not have properly excluded Mr Dooley from the election on the facts of this case. In his submission, it did not assist the Union that the EC's decision to exclude Mr Dooley predated the decision of the Employment Tribunal as the EC's decision had to be judged objectively, not on the state of its reasonable belief at the time the decision was made. He relied on paragraph 34 of the judgment of the EAT in **Staunton** in making this submission.
40. Although Mr Dooley's complaint of breach of rule does not refer to the position of Mr Ritchie, Mr Atkinson noted that his exclusion was even more unreasonable as he had not been found to have committed any misconduct at the time of his exclusion. At the time the Selection Committee met, Mr Ritchie's alleged misconduct was merely being investigated to test whether there should be a disciplinary hearing. Mr Atkinson considered this to be on all fours with the case of **Staunton**. He argued that rule 25.1 entitled the Union to bar any member from holding office but that this sanction could only be applied following due process. He further argued that when Mr Dooley was under suspicion of misconduct at the time of the 2009 General Secretary election, the EC decided to hold its investigation in abeyance pending the election. Mr Atkinson contended that this is what the Union

should have done with regard to their suspicions of misconduct by Mr Ritchie in 2011.

41. For the Union, Mr Segal QC, submitted a lengthy skeleton argument. I shall summarise here his major written and oral submissions. Mr Segal first noted that this complaint relates only to the position of Mr Dooley, not the position of Mr Ritchie. Mr Segal accepted that the construction of rule 23 was not an entirely straightforward matter but he considered that it became 'tolerably clear' upon analysis. He noted that, by rule 23.4, those nominated must "*submit their qualifications ... for examination by the Selection Committee*". In his submission, "qualifications" should not be given a narrow meaning or be restricted to the same factors as govern "eligibility" in rule 23.1. Specifically, he argued that those "qualifications" must include being fit in the sense of suitable for office and submitted that this is consistent with the power of the Selection Committee in rule 25.5 to consider the suitability of an elected General Secretary in the six months probationary period following election. Mr Segal also relied upon the case of **Ecclestone**. He noted that in Ecclestone the court was prepared to imply a power enabling the NEC to lay down qualifications beyond the basic express requirements of the rule in carrying out its function of preparing a short list of applicants. He further noted that the court had found the NEC had a discretion to decide what were the required qualifications for the post and to decide who complied with them. Mr Segal observed that the NUJ had lost that case because the qualification it purported to apply (having the confidence of the NEC) was not capable of being a qualification, not because the NEC did not have the implied power to determine what was a qualification. Mr Segal argued that not only did the Selection Committee of UCATT have the power to consider whether an applicant was a "fit and proper person" to hold office, but that it applied this qualification reasonably and fairly in the case of Mr Dooley. He maintained that the dismissal of Mr Dooley for gross misconduct in January 2011 was an objective fact which the Selection Committee was entitled to take into account. Mr Segal submitted that the fact of Mr Dooley's dismissal distinguishes his case from that of Ecclestone and from the treatment of Mr Lenahan in 1996. Mr Segal submitted that the question for me to determine was essentially a simple one; namely whether the decision of the Selection Committee insofar as Mr Dooley was concerned, was so arbitrary, subjective or otherwise irrational as to constitute an untenable decision. Mr Segal argued that the answer to that question was plainly "no" as the decision of the EC was that a person who had recently been dismissed for gross misconduct involving dishonesty in his dealings as a Union employee was not fit to stand for the most senior position in the Union.

Conclusions – Complaint Two

42. In the case of **Staunton** I observed that the right of a union member to stand for election is an important right of membership, as in any democratic membership organisation, and should not be taken away unless the members have so decided in a clearly expressed rule to that effect. I remain of the view that this is the correct starting point in any consideration of a case of this type.
43. Both Mr Atkinson and Mr Segal have relied upon the case of **Ecclestone**. In that case the judge was prepared to imply a power of selection that went beyond the express rule. Whilst that case would be binding upon me on the same facts and

deserves careful consideration, there are considerable dangers in an invitation to construe the rules of one trade union in the same way as the quite different rules of another union, however authoritatively the latter rules may have been construed and notwithstanding superficial similarities between the rules of the two unions. The rules of trade unions owe much to their traditions and history. They are frequently amended in a piecemeal and sometimes inconsistent manner. It is having regard to such realities that it has frequently been found that the rules of a trade union are not to be interpreted as if they were a statute or commercial contract but in accordance with the following observations in **Jacques v. AEUW (1986) ICR 683**. Warner J observed that the effect of the authorities is that the rules of trade unions are to be interpreted;

“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”

In my judgment, having regard to the strong democratic traditions of most trade unions and the political nature of trade union activists, it is unlikely that either the authors or readers of the rules in this case would readily imply a provision giving those currently in power the right to determine who could stand for future election. This is much more likely to have been left to the electorate. However, in each case the rules in question require careful examination.

44. In this case, the rules in question are rules 23.1, 23.4 and 23.5 which I have set out in paragraph 7, but which I repeat here:

23.1. Members (not over six weeks in arrears) who have been five years successively in a section of this Union shall be eligible for election to the office of GS. Candidates must have a thorough knowledge of the working of the Union, and be competent to correspond with the Branches, and give information on any subject connected with the Union’s business.

23.4 Candidates for the office of General Secretary must receive a minimum of 10 nominations.

Those accepting nomination shall at the same time forward their qualifications by letter to the GO for examination by the Selection Committee and selected candidates must be prepared to submit to a further examination, on paper or by any other method the Selection Committee may decide.

23.5. The finally selected candidates, not exceeding six in number to be submitted to the votes of the members, according to the rule for election of GS. The two candidates obtaining the highest number of votes shall be again submitted to the members for final selection, unless one of the candidates has an absolute majority of the votes cast. The Selection Committee shall be composed of three members of the GC, three members of the EC. Any candidate elected as GS shall be subject to a six months’ probationary period, after which period the Selection Committee may, if s/he be deemed unsuitable for the office, a new election shall be called.

45. Rule 23.1 sets out five criteria to stand for election as General Secretary. They are:

- (a) members not over 6 weeks in arrears;
- (b) 5 years successively in a section;
- (c) a thorough knowledge of the workings of the Union;

- (d) competent to correspond with the branches;
- (e) an ability to give information on any subject connected with the Union's business.

I accept Mr Dooley's evidence that the origin of this provision lies in the Union's previous practice of electing its full time officials and in its experience that not all building workers had the necessary literacy skills and skills in administration which were necessary for the job.

46. Against this background, those who receive ten or more nominations for election as General Secretary are asked whether they accept nomination. By rule 23.4, those accepting nomination, when accepting nomination, are also to forward their qualifications to head office by letter for examination by the Selection Committee. This enables the Selection Committee to perform the objective check as to whether nominees are members not over 6 weeks in arrears and have been in the section for five years successively. It also enables the Selection Committee to form a prima facie view of the other three criteria which require the exercise of some subjective judgment. Those nominees who are not ruled out at that stage become 'selected candidates' and can be required to submit themselves to a further examination, on paper or by any other method the Selection Committee may decide. Having gone through this procedure, 'the finally selected candidates' not exceeding six in number are to be submitted to the votes of the Members.
47. In my judgment, this process sets out an objective and a subjective exercise for the Selection Committee to undertake, initially on the papers and subsequently should it be deemed appropriate, following a written and/or oral test. This is in contrast with the rules of the NUJ in **Ecclestone** and suggests that it may not be permissible to simply read over the implied power of the NEC of the NUJ to the Selection Committee of UCATT. Having regard to the origins of the Selection Committee, I find that rule 23 sets out expressly its entire authority without any need to imply, nor indeed any basis for the implication of, further powers. The authority of the Selection Committee is limited to the objective checks described above and to exercising its judgment on the three further criteria set out expressly in rule 23.1. Beyond that, I find that the eventual selection is to be performed by the electorate without further sieving by a body which may or may not have a factional axe to grind.
48. I find support for my construction of rule 23 from the way in which the Selection Committee has previously carried out its functions. It appears to have never before applied a 'fit and proper person' test and has allowed candidates to submit themselves to the electorate notwithstanding their previous conduct within or outside the Union, including debarment from high office and criminal convictions.
49. Contrary to the submissions of Mr Segal QC, I do not find that I am compelled to the contrary conclusion by the final sentence of rule 23.5 which provides that a newly elected General Secretary has a probationary period of six months and may be removed by the Selection Committee if deemed unsuitable for office. In my judgment, this does not give the Selection Committee an unfettered right to remove the General Secretary on any grounds if it genuinely considers him or her to be unsuitable. It cannot be correct that the rules were intended to give the Selection

Committee such an unfettered power over a recent decision of the whole electorate. A better and more consistent construction of this final sentence is that the Selection Committee may revisit the subjective judgments it had made earlier over the criteria set out in rule 23.1 and, with the benefit of six months experience, change its mind about the applications of those criteria, but only those criteria.

50. For the above reasons, I grant the declaration sought by Mr Dooley that UCATT breached rule 23.5 of its rules by its Selection Committee wrongly excluding him from standing as a candidate in the 2011 General Secretary election.

Complaint One

51. Mr Dooley's first complaint is as follows:-

Complaint 1

"On or around the 28th October 2011, UCATT breached section 47(1) of the 1992 Act twice, by excluding Mr Dooley and by excluding Mr Alan Ritchie from standing as candidates in the 2011 General Secretary election."

52. Section 47 of the 1992 Act provides as follows:-

47 Candidates

- (1) *No member of the trade union shall be unreasonably excluded from standing as a candidate.*
- (2) *No candidate shall be required, directly or indirectly, to be a member of a political party.*
- (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 who the union chooses to exclude shall be disregarded*

53. Mr Atkinson, for Mr Dooley, adopted the approach to section 47(1) of the 1992 Act as was approved in the **Ecclestone** case. He submitted that a person should not be excluded from standing for office by the imposition of unreasonable or unfair criteria or by the unfair or unreasonable application of criteria which are fair in themselves. In assessing the fairness of the criteria, Mr Atkinson noted that Mrs Justice Janet Smith had referred to good employment practices requiring that the selection criteria should be laid down in advance of their application. He pointed out that not only was there no requirement of being 'a fit and proper person' when nominations were sought but that neither Mr Dooley nor Mr Ritchie were told in advance that the Selection Committee was going to conduct a wide ranging enquiry as to their fitness. With regard to the unreasonableness of Mr Dooley's exclusion, Mr Atkinson repeated his submissions set out in paragraph 39 above. With regard to the exclusion of Mr Ritchie, Mr Atkinson submitted that this was even more clearly unreasonable as he had not been found to have committed any misconduct at the time he was excluded. Mr Atkinson observed that the facts of Mr Ritchie's alleged misconduct were merely being examined at that time to test whether there should be a formal disciplinary investigation. He argued that this situation was on all fours with the case of **Staunton**. He further argued that the Union had a disciplinary rule which entitled it to bar any Member from holding office

but that such a sanction could only be applied following due process. Mr Atkinson submitted that when Mr Dooley was under suspicion of misconduct at the time of the 2009 General Secretary election the EC had decided to hold its investigations in abeyance pending the election. He contended that this is what the Union could and should have done with regard to their suspicions of misconduct by Mr Ritchie in 2011.

54. Mr Segal QC, for the Union, again relied upon his extensive skeleton argument. However, following discussion, he clarified that the Union was not relying upon the deeming effect of section 47(3) of the 1992 Act, by which an exclusion of a class of members under the rules of the Union is to be deemed reasonable. It was noted that there is no rule of the Union which expressly creates such a class of members and, even if there were, that class would probably fall foul of the final sentence of section 47(3). Rather, the Union argued that its exclusion of Mr Dooley and Mr Ritchie was reasonable within the meaning of section 47(1). Mr Segal submitted that the ability of the Selection Committee to exclude nominees who were considered not to be 'fit and proper persons' can be implied into its powers in rule 23 and the application of that power to Mr Dooley and Mr Ritchie was reasonable on the facts of this case. As to Mr Dooley, Mr Segal argued that the Selection Committee's decision to exclude him on 20 October 2011 was on the basis that the EC had previously dismissed him as a Regional Officer for gross misconduct involving dishonesty, which decision was upheld on an internal appeal, and that this justified a finding by the Selection Committee that Mr Dooley was not a 'fit and proper person' to hold the position of General Secretary. He maintained that the decision of the Employment Tribunal on 4 November 2011 that Mr Dooley had been unfairly dismissed should be ignored as its decision was not before the Selection Committee when it excluded him. Mr Segal further noted that the facts of this case could be distinguished from those in the case of **Ecclestone**, in which the exclusion of Mr Ecclestone was found to have been unreasonable. He noted that in this case the exclusion of Mr Dooley was based on the fact of his dismissal, unlike the exclusion of Mr Ecclestone which was based on the judgment of the NEC of the NUJ that it no longer had confidence in him. Mr Segal maintained that the Selection Committee in this case addressed the 'fit and proper person' qualification on an objective and rational basis. As to Mr Ritchie, Mr Segal argued that the reason why the allegations against him had not proceeded to a disciplinary hearing was Mr Ritchie's unreasonable failure to cooperate with Mr Rye's preliminary investigation. He maintained that the Selection Committee came to a reasonable decision to exclude Mr Ritchie from standing for the position of General Secretary/General Treasurer on the evidence before it on 20 October 2011; namely that no meeting with Mr Ritchie had been possible notwithstanding five invitations from Mr Rye and on Mr Ritchie's answers to the questions put to him by the Selection Committee. Mr Segal also relied upon the comment of Proudman J in the interlocutory proceedings brought by Mr Ritchie and others. At para 23, Proudman J stated: "*There are unresolved issues as to Mr Ritchie's financial conduct. Although he is of course innocent unless and until the allegations are made good ... the issues are currently at large and cannot as a matter of common sense simply be ignored. It would be perverse to suppose that the membership would vote Mr Ritchie into a position of financial responsibility if he were found to have committed substantial breaches of trust relating to the Union's funds*".

Conclusions – Complaint One

55. I note that the Union has clarified that it does not rely on section 47(3) of the 1992 Act (see para 54 above).
56. I must therefore determine whether Mr Dooley and Mr Ritchie were unreasonably excluded from standing as candidates in the 2011 General Secretary elections of the Union in accordance with section 47(1) of the 1992 Act. I find that the determination of the reasonableness or otherwise of the exclusion is one which I must reach objectively on the facts as a whole. I observe that the test I must apply is not expressed in the same way as section 98(4) of the Employment Relations Act 1996 by which the fairness of a dismissal is to be considered. Accordingly, I find that the authorities on “a range of reasonable responses” in the application of section 98(4) are not relevant to my determination. Rather, as observed by Underhill P at para 34 of the **Staunton** case,

“The statutory test of reasonableness must be objective; and if, on the evidence produced to the Certification Officer, Mr Staunton’s exclusion was shown to have been reasonable, it would not in principle matter that the reasons relied on had not been properly appreciated or articulated at the time of the initial decision”.

In that case Underhill P was considering an exclusion which appeared unreasonable but which the Union may have been able to demonstrate was objectively reasonable for reasons not properly appreciated or articulated at the time. The present case concerns the converse, a case of prima facie reasonableness on the part of the Union which the claimant may be able to demonstrate was objectively unreasonable for reasons not properly appreciated or articulated at the time.

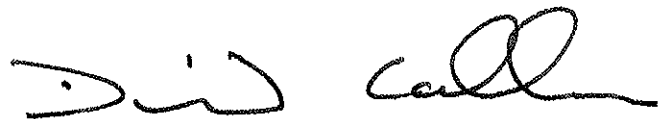
57. Having directed myself on the correct approach to section 47(1) of the 1992 Act, I consider what importance I should give to my finding in Complaint Two that the Selection Committee had no power under the rules to exclude Mr Dooley or Mr Ritchie. In my judgment this finding is very damaging to the Union’s case. It is hard to envisage a situation in which a Union would be acting reasonably in excluding someone from standing for election as General Secretary in breach of its own rules. I find that the facts of this case are not such as would drive me to the conclusion that the exclusion of Mr Dooley and Mr Ritchie was reasonable, notwithstanding that they were in breach of rule.
58. In the case of Mr Dooley, the facts before me are that he was excluded as a candidate on the grounds of his dismissal as a Regional Officer which dismissal was subsequently found by an Employment Tribunal to have been unfair. Furthermore, the egregious part of Mr Dooley’s conduct was said to have been his dishonesty and yet, after a six day hearing, the Employment Tribunal concluded that it did not “*consider that a reasonable employer, without more, would have concluded that the claimant had acted fraudulently and/or dishonestly*”. Furthermore, I find it relevant that neither Mr Dooley nor Mr Ritchie were told in advance that a test of “fit and proper person” would be applied to those seeking nomination nor that they would be questioned on such a criterion by the Selection Committee. Accordingly, I find that such procedures that were applied by the Union

to determine 'fit and proper' status were applied unfairly. In all the circumstances, I find that the Union acted unreasonably in excluding Mr Dooley from standing as a candidate in the 2011 General Secretary election in breach of its own rules and on the facts.

59. In the case of Mr Ritchie, I note that he was facing very serious allegations of financial irregularity regarding the expenses he had claimed as an employee of the Union. He was suspended from employment by the Union on 3 August 2011 pending a preliminary investigation into those allegations by Mr Rye. If Mr Rye had established good grounds, Mr Ritchie would have been charged, there would have been a formal disciplinary investigation followed by a hearing and possibly a disciplinary sanction. The Union argues forcibly that Mr Rye's preliminary investigation was frustrated by Mr Ritchie's failure to respond to Mr Rye's invitations to attend five discussions, including one on the day that Mr Ritchie attended before the Selection Committee. On the other hand, Mr Ritchie states that he was unable to attend those meetings with Mr Rye on medical grounds and that he had appropriate medical certificates. He maintained that he was too unwell to attend both before the Selection Committee and an investigation meeting with Mr Rye on 20 October 2011. It is not for me to determine if Mr Ritchie acted reasonably in failing to meet with Mr Rye. My task is to determine whether the Union acted reasonably in excluding him from the 2011 General Secretary election on the evidence before me.
60. As I found in the case of **Staunton** (para 27 and 29 of that decision) the automatic exclusion of a person from standing for office because he or she is subject to a precautionary disciplinary suspension (pending a disciplinary hearing) is prima facie unreasonable. However, in this case, it is not the fact of suspension that the Union relies upon but Mr Ritchie's failure to cooperate with Mr Rye. The Union was undoubtedly in a difficult position but I find that it failed either to challenge Mr Ritchie's medical evidence or to push ahead timeously with the disciplinary proceedings against him. Having failed to take such steps, the Union excluded Mr Ritchie from the election. His position at that time was as someone against whom there was reasonable suspicion of gross misconduct but no more. If he was eventually found to be innocent, Mr Ritchie's exclusion as a candidate would have caused him considerable detriment as the incumbent General Secretary with the highest number of branch nominations. If he had been allowed to stand in the 2011 General Secretary election, he may not have been elected in all the circumstances or, if elected, the disciplinary process could have continued against him. Further, as observed in paragraph 59 above, such procedures that were applied by the Union to determine 'fit and proper' status were applied unfairly. Balancing all these factors I find that the Union acted unreasonably in excluding Mr Ritchie from standing as a candidate in the 2011 General Secretary election in breach of its own rules and on the facts.
61. For the above reasons I grant the declaration sought by Mr Dooley that on or around 28 October 2011 the Union breached section 47(1) of the 1992 Act by excluding Mr Dooley and Mr Ritchie from standing as candidates in the 2011 General Secretary election.

Enforcement Orders

62. When I make a declaration I am required by section 55(5A) and section 108B(3) of the 1992 Act to make an enforcement order unless I consider that to do so would be inappropriate. On the facts of this case I consider that it would not be appropriate to make an enforcement order.
63. In deciding not to make an enforcement order I am mindful that neither Mr Dooley nor Mr Ritchie are now members of the Union and so could not stand in any re-run election. Mr Ritchie resigned on 2 February 2012 and Mr Dooley was expelled on 27 February 2012. The issue of Mr Dooley's expulsion was raised before me in Dooley (No.3) which I have determined today and in which I have dismissed each of Mr Dooley's complaints that he was expelled unlawfully. Mr Atkinson submitted that, even in these circumstances, I should order a further election as Mr Dooley and Mr Ritchie had a following of like-minded members who would otherwise be deprived of an opportunity to seek someone of their persuasion to stand for the position of General Secretary. I reject that argument. Given the alleged animosity between Mr Dooley and Mr Ritchie, it is unlikely that they would have shared a common constituency of voters. Further, I have insufficient evidence to persuade me that the support they enjoyed in the nomination process would transfer to other candidates who may or may not emerge in a re-run election and who may or may not reflect the different views of Mr Dooley and/or Mr Ritchie, about which I have heard little. In my judgment, the proposition advanced by Mr Atkinson is too fanciful in itself to form the basis of an enforcement order. Accordingly, as neither Mr Dooley nor Mr Ritchie would be eligible to stand in any re-run election, I find that it would be inappropriate to make an enforcement order on the facts of this case.



David Cockburn
The Certification Officer

