CO/1964/19

DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTION 103 OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

B D WEDGE LIMITED AND OTHERS

-v-

EEF WEST MIDLANDS ASSOCIATION

Date of Decisions: **16 September 2008**

DECISIONS

Upon application by the Claimants under section 103 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

(1) I dismiss the complaint that the EEF West Midlands Association ("the Association") breached section 99(3A) of the 1992 Act by allegedly failing to secure that the notice to be given to members prior to the vote on the amalgamation of the Association did not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation.

(2) I dismiss the complaint that the EEF West Midlands Association breached section 100C(3)(a) of the 1992 Act by allegedly failing to secure that every person entitled to vote in the amalgamation ballot was allowed to vote without interference or constraint.

REASONS

1. By an application received in the Certification Office on 17 March 2008, 14 member companies of the EEF West Midlands Association ("the Claimants") sought to make a number of complaints against their employers' association the EEF West Midlands Association ("the Association"). The Claimant companies are: Acrow Galvanizing Ltd; Metaltreat Ltd; Scottish Galvanizers Ltd; Pillar Wedge Ltd; Edward Howell Galvanizers Ltd; Humber Galvanizing Ltd; Merseyside Galvanizing Ltd; Newport Galvanizers Ltd; East Anglian Galvanizing Ltd; South East Galvanizing Ltd; South West Galvanizers Ltd; B E Wedge Ltd; Wessex Galvanizers Ltd and Worksop Galvanizers Ltd. They are all subsidiaries of Wedge Group Galvanisers, which is itself a subsidiary of B E Wedge Holdings. Mr Jeremy Woolridge CBE is a director of each of these companies and is based at B E Wedge Ltd. Mr Woolridge is the immediate past Treasurer of the Association and, most recently, its Vice-Chairman.

2. Following correspondence with the solicitors to the claimant companies, the complaint that was pursued was in the following terms:

> *"That the EEF West Midlands Association breached section 99(3A) and/or section 100C(3)(a) of the 1992 Act on or about 21 January 2008.*
> ***Particulars.*** *On or about 21 January 2008, the complainant companies were sent an envelope containing a "voting pack" and a covering letter dated 21 January 2008 headed "Important – Have your say on EEF's future". Included within the voting pack was a leaflet headed "Voting information". Stapled to the letter dated 21 January 2008, which the Complainant maintains included recommendations, was the voting paper. It is alleged that the inclusion of the letter of 21 January 2008 and the leaflet within the envelope containing the Notice to Members breached section 99(3A) of the 1992 Act which requires that the Notice shall not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation and/or that the inclusion of the covering letter and the leaflet gave rise to a breach of Section 100C(3)(a) of the Act in that they tended to interfere with or constrain the vote of members."*

This is in effect two complaints arising out of the same facts. I shall deal separately with the alleged breaches of section 99(3A) and section 100C (3)(a).

3. The hearing of these matters took place on 4 September 2008. The Claimants' were represented by David Taylor of counsel. A witness statement to support the Claimants' case was tendered by Mr Woolridge, which was taken as read. As the Claimants' complaints had narrowed in the days prior to the hearing, there were parts of Mr Woolridge's statement that were no longer relevant to the issues that remained for determination. Upon application by the Association, I struck out paragraphs 14 to 19 (inclusive) of Mr Woolridge's statement on the grounds of relevance. The Association did not cross-examine Mr Woolridge. The Association was represented by Hugh Tomlinson QC. A witness statement in support of its case was tendered by Mr Ian Hughes, manager of the 'regulatory project' for the amalgamation, which statement was also taken as read. Mr Taylor did not cross-examine Mr Hughes. The Association had submitted a further 12 witness statements. These statements were put to one side as the complaint to which they were directed, the signing of various amalgamation documents, had been abandoned prior to the hearing. A bundle of the documents considered relevant by the parties, consisting of 216 pages, was prepared by my office together with an authorities bundle of 226 pages. Each party submitted a written skeleton argument.

Findings of Fact and Legal Background

4. Having considered the documents before me, the evidence of the witnesses and the representations of the parties, I find the facts to be as follows:

5. The body which is commonly referred to as the Engineering Employers Federation is in reality a collection of independent unincorporated employers associations, each separately listed at the Certification Office. In April 2007 the Council of the London based Engineering Employers' Federation ("the London EEF") resolved to seek its amalgamation with the nine regional associations in England and Wales to form a body to be known as the "EEF".

The EEF Associations in Northern Ireland, Scotland and the Engineering Construction Industry Association were not to be part of this amalgamation but to become independent associated bodies of the new EEF.

6. The statutory procedure for the amalgamation of employers' associations is contained in chapter VII of the 1992 Act. Section 133(1) of the 1992 Act provides that the provisions of that chapter which apply to the merger of trade unions shall also apply to the merger of employers associations but with a number of specific variations, which are provided for in section 133(2).

7. By section 97 of the 1992 Act, an employers' association seeking to amalgamate must prepare an Instrument of Amalgamation which must be approved by the Certification Officer in accordance with section 98. The employers' association must also comply with the requirement in section 99 to give a statutory notice to its members and with section 100 relating to balloting.

8. By section 99 of the 1992 Act, the Notice to Members must also be approved by the Certification Officer, who is required to approve the notice if it satisfies the requirements of section 99. Those requirements are that the Notice to Members must be in writing and that it must either set out in full the Instrument of Amalgamation or give such details of it that the recipient can form a reasonable judgment of its main effects. Further, section 99(3A) provides that, "*The notice shall not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation or transfer"*.

9. Section 100 of the 1992 Act deals with balloting and provides that a simple majority of those voting is sufficient to pass the resolution unless the rules of the employers' association expressly provides otherwise. Sections 100A to 100E were added by the Trade Union Reform and Employment Rights Act 1993 and provide for the detailed regulation of mergers in the case of trade unions. However, section 133(2)(b) restricts the application of section 100A to 100E to employers' associations to just three provisions; namely section 100B, 100C(1) and 100C(3)(a). The regulatory regime for employers' association mergers is therefore less detailed than for trade union mergers.

10. Should there be a vote in favour of an amalgamation by each of the employers' associations balloted, the Instrument of Amalgamation is to be submitted to the Certification Officer for registration in accordance with the procedure set out in the Trade Unions and Employers' Associations (Amalgamations, etc) Regulations 1975. Section 101 of the 1992 Act provides that the Certification Officer shall not register the Instrument of Amalgamation for six weeks from the date that it was submitted, within which period any member of a relevant employers' association may make a complaint under section 103 that it has, amongst other things, failed to comply with any of the requirements in section 99 to 100E.

11. In the present case the relevant draft Instrument of Amalgamation and Notice to Members were submitted to the Certification Officer for informal approval

in accordance with the procedures recommended by my office. Informal approval was given to both documents on 2 November 2007.

12. The Instrument of Amalgamation was then circulated by the London EEF to each of the Regional Associations as being the final version for their consideration. They were each invited to pass a resolution in standard form which stated that the relevant Management Board considered that the Instrument was in the interests of the members of that Association and authorising the signature of the Instrument by the relevant persons. The EEF West Midlands Association passed such a resolution by a majority of 17 to 4 on 23 November 2007.

13. By 28 November 2007 the Management Boards of all nine Regional Associations had approved such a Resolution and, on that date, the Council of the London EEF did likewise, by a majority of 30 to none.

14. On 5 December 2007, Mr Hughes submitted the Instrument of Amalgamation and Notice to Members to the Certification Office for formal approval, which was given the next day, 6 December.

15. On 15 January 2008 the Management Board of the EEF West Midlands Association met, in the absence of Mr Woolridge, and resolved by a majority of 17 to 2, to recommend the Instrument of Amalgamation to its membership.

16. On 21 January 2008 Mr Barrie Williams, the President of the EEF West Midlands Association, wrote to all its members in a form that each Association wrote to its members. The letter enclosed a voting pack. It was sent in an A4 envelope which was printed with the words "*One EEF*" and "*Important – have your say on EEF's future*". The envelope contained the following:

    16.1 A covering letter from Mr Williams which described the contents of the envelope and which stated "*Your Association's governing body strongly recommends that you vote in favour on the accompanying voting paper.*" The letter describes the Instrument of Amalgamation as being "*subject to your approval by this ballot*".

    16.2 A voting paper, which was stapled to the covering letter. It was explained at the hearing that these documents were stapled as they each bore the name of the recipient, whilst the remaining documents were in general form, not being personally addressed. The voting paper stated, "*If you agree that your association should amalgamate as described in the accompanying Notice to Members and Instrument of Amalgamation, vote For the Resolution below. If you disagree, vote Against.*" No objection is taken to the form or content of the voting paper.

    16.3 A leaflet entitled 'Voting Information for Members'. This leaflet puts the case for amalgamation and twice asks members to "*ratify*" the "*integration*" / "*proposal for a single EEF*". On its final page, the

leaflet states "*To help us build an EEF fit for the future, please vote 'For' on the enclosed ballot paper and post or fax your vote in accordance with the instructions.*" This is a four page, colour leaflet printed on glossy paper and laid out in two columns with headings.

16.4 The Notice to Members. This is a 1½ page document. It is printed on glossy paper but it is laid out as a legal document. No objection is taken to its form or content.

16.5 The Instrument of Amalgamation. This has four pages of content with additional pages for signatures. It is also printed on glossy paper and is laid out as a legal document. No objection is taken to its form or content.

The documents appeared in the envelope in the order as described above, with the letter of 21 January 2008 on top.

17. The voting period was between 4 and 18 February 2008 and the result of the ballot was announced shortly after 18 February. There was a substantial majority in favour of amalgamation. Of the 2,919 voting papers that were distributed nationally, 817 (28%) were returned. Of those voting, 781 (96%) voted for the amalgamation and 36 (4%) against. Within the EEF West Midlands Association, 557 voting papers were distributed and 147 (26%) were returned. Of those voting, 127 (86%) voted for and 20 (14%) voted against.

18. By a letter dated 17 March 2008 the Claimants' solicitors submitted their clients' complaints to the Certification Officer. An issue arose about whether it was appropriate for an application to be submitted before the employers associations had applied for registration of the Instrument of Amalgamation. However, this point became academic after the London EEF submitted the application for registration on 9 July 2008 and the Claimants' solicitors resubmitted their complaints on 14 August, within the six week period after which complaints are not permitted.

The Relevant Statutory Provisions

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

Chapter VII Amalgamations and Similar Matters

Section 97 ***Amalgamation or transfer of engagement***

(1) Two or more trade unions may amalgamate and become one trade union, with or without a division or dissolution of the funds of any one or more of the amalgamating unions, but shall not do so unless-

(a) the instrument of amalgamation is approved in accordance with section 98, and

(b) the requirements of section 99 (notice to members) and section 100 (resolution to be passed by required majority in ballot held in accordance with section 100A to 100E are complied with in respect of each of the amalgamating unions.

Section 98 ***Approval of instrument of amalgamation or transfer***

(1) The instrument of amalgamation or transfer must be approved by the Certification Officer and shall be submitted to him for approval before a ballot of the members of any amalgamating union, or (as the case may be) of the transferring union, is held on the resolution to approve the instrument.

(2) If the Certification Officer is satisfied-

(a) that an instrument of amalgamation complies with the requirements of any regulations in force under this Chapter, and

(b) …

he shall approve the instrument

Section 99 ***Notice to be given to members***

(1) The trade union shall take all reasonable steps to secure that every voting paper which is supplied for voting in the ballot on the resolution to approve the instrument of amalgamation or transfer is accompanied by a notice in writing approved for the purpose by the Certification Officer. ***[NB. This provision is amended by section 133(2)(a) below]***

(2) The notice shall be in writing and shall either-

(a) set out in full the instrument of amalgamation or transfer to which the resolution relates, or

(b) give an account of it sufficient to enable those receiving the notice to form a reasonable judgment of the main effects of the proposed amalgamation or transfer

(3) If the notice does not set out the instrument in full it shall state where copies of the instrument may be inspected by those receiving the notice.

(3A) The notice shall not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation or transfer.

(4) The notice shall also comply with the requirements of any regulation in force under this Chapter.

(5) The notice proposed to be supplied to members of the union under this section shall be submitted to the Certification Officer for approval; and he shall approve it if he is satisfied that it meets the requirements of this section.

Section 100 Requirements of ballot on resolution

(1) A resolution approving the instrument of amalgamation or transfer must be passed on a ballot of the members of the trade union held in accordance with section 100A to 100E.

(2) A simple majority of those voting is sufficient to pass such a resolution unless the rules of the trade union expressly require it to be approved by a greater majority or by a specified proportion of the members of the union.

Section 100B Entitlement to vote

Entitlement to vote in the ballot shall be accorded equally to all members of the trade union.

Section 100C Voting

(1) The method of voting must be by the marking of a voting paper by the person voting.

(3) Every person who is entitled to vote in the ballot must –

(a) be allowed to vote without interference or constraint, and

(b) so far as is reasonably practicable, be enabled to do so without incurring any direct cost to himself.

(5) No voting paper which is sent to a person for voting shall have enclosed with it any other document except

(a) the notice which, under section 99(1), is to accompany the voting paper,

(b) an addressed envelope, and

(c) a document containing instructions for the return of the voting paper, without any other statement.

Section 101 Registration of instrument of amalgamation or transfer

(1) An instrument of amalgamation or transfer shall not take effect before it has been registered by the Certification Officer under this Chapter.

(2) It shall not be registered before the end of the period of six weeks beginning with the date on which an application for its registration is sent to the Certification Officer.

Section.103 Complaints as regards passing of resolution

(1) A member of a trade union who claims that the union –

(a) has failed to comply with any of the requirements of sections 99 to 100E, or

(b) has, in connection with a resolution approving an instrument of amalgamation or transfer, failed to comply with any rule of the union relating to the passing of the resolution,

may complain to the Certification Officer.

(2) Any complaint must be made before the end of the period of six weeks beginning with the date on which an application for registration of the instrument of amalgamation or transfer is sent to the Certification Officer.

Where a complaint is made, the Certification Officer shall not register the instrument before the complaint is finally determined or is withdrawn.

Employers' Associations

Section 133 ***Amalgamation and transfers of engagements***

(1) Subject to subsection (2), the provisions of Chapter VII of Part 1 of this Act (amalgamations and similar matters) apply to unincorporated employers' associations as in relation to trade unions

(2) In its application to such associations that Chapter shall have effect-

(a) as if in section 99(1) for the words from "that every" to "accompanied by" there were substituted the words "that, not less than seven days before the ballot on the resolution to approve the instrument of amalgamation or transfer is held, every member is supplied with",

(b) as if the requirement imposed by section 100A to 100E consisted only of those specified in section 100B and 100C(1) and (3)(a) together with the requirement that every member must, so far as is reasonably possible, be given a fair opportunity of voting, … .

Complaint One

20. This complaint alleged that the EEF West Midlands Association breached section 99(3A) of the 1992 Act by the letter from its President to members of 21 January 2008 and the enclosed leaflet "*Voting Information for Members*".

21. Section 99(1) of the 1992 Act (as varied by section 133(2)) provides for the Notice to Members to be supplied to members not less than seven days before the ballot on the resolution to approve the Instrument of Amalgamation. Section 99(3A) provides as follows:

> *"The notice shall not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation or transfer."*

Summary of Submissions

22. For the Claimants, Mr Taylor submitted that a purposive construction of the 1992 Act should be adopted, and that I should find that the enclosure of exhortatory material with the ballot paper is inherently objectionable. He argued that the purpose of section 99 is to require there to be a Notice to Members which contains a clear and neutral explanation of the effect of the proposed resolution and that the intention of sub-section (3A) is to ensure that members receive nothing more. He compared the Notice to Members with a Key Facts document in a letter from an insurance company giving details of a particular policy. Mr Taylor submitted that, if additional material of an exhortatory nature is enclosed which is not distinguishable from the Notice to Members, there is a danger that members will be influenced in the way they cast their vote and the ballot will be unfair. He accepted that the Respondent was entitled to canvas support for the amalgamation but did not accept that the Respondent was entitled to do so in the same envelope used to distribute the ballot paper. He also accepted that there could be no valid complaint if a member received two envelopes on the same day (one containing the balloting material and the other containing canvassing material) but argued that to put both in the same envelope would confuse the member as to whether he or she is looking at a formal document or at canvassing material. In this connection, Mr Taylor maintained that the order in which the documents appeared in the envelope caused the member to consider first the exhortatory material and that his or her natural tendency would then be to pay little attention to the more formal documentation. He argued that an objective recipient would read the letter and the leaflet and not get to the Instrument of Amalgamation or Notice to Members. Mr Taylor submitted that in these circumstances the member would have only seen material which explained the benefits of amalgamation and would have been given the impression that they were only being asked to rubber stamp or ratify a decision already taken.

23. For the Respondent, Mr Tomlinson QC, submitted that the complaint was misconceived. He accepted that the circular letter of 21 January 2008 from Mr Williams and the leaflet 'Voting Information for Members' recommended that members vote in favour of the amalgamation, but argued that the requirement in section 99(3A) of the 1992 Act applied only to the Notice to Members and that there was no recommendation, to approve the amalgamation, in the Notice to Members. In Mr Tomlinson's submission, the fact that the envelope contained the Notice to Members and a recommendation does not mean that the Notice to Members contained a recommendation. He further submitted that Parliament had clearly considered what may be placed in the envelope with the voting paper as, in relation to trade unions, section 100C(5) expressly

provides that the voting paper should have no document sent with it other than the Notice to Members, voting instructions and a return envelope. However, in considering which of the procedures applicable to trade unions should also apply to employers' associations', Parliament had decided to remove the requirement in section 100C(5), which it had done by section 133(2)(b). Mr Tomlinson speculated that the different approach taken by Parliament to employers associations' could reflect its view as to the difference in the nature of the 'electorate'; it being generally the case that employers' associations have fewer members and that those members would conduct their dealings with their Association through its chairman, chief executive or other senior personnel. He further submitted that the policy behind section 99(3A) was to prevent there being any recommendation on the ballot being contained in an official document, specifically the Notice to Members as approved by the Certification Officer, which might give the impression that the recommendation had also been officially approved. He argued that, on the facts of this case, it was clear to the members receiving the envelope in question that the Notice to Members was the official document, whilst the letter and leaflet were canvassing material from the relevant EEF Association.

Conclusion – Complaint One

24. Section 99(3A) of the 1992 Act states that,

> *"The notice shall not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation or transfer".*

It is accordingly necessary to examine on the facts of this case what is "*The notice*" and the meaning of the word "*contain*".

25. The whole of section 99 of the 1992 Act deals with the Notice to Members. It requires that the Notice must have been approved by the Certification Officer. The employers' association or trade union must therefore submit a specific and identifiable document or documents for approval. The Notice to Members may incorporate the content of other documents expressly or impliedly, in which case the content of those other documents would be "contained" within it. In the present case, the document headed Notice to Members states expressly that the Instrument of Amalgamation is part of the Notice and it is thereby expressly incorporated into it. The Notice can be said to contain the content of the Instrument of Amalgamation. It was these documents that were approved by the Assistant Certification Officer on 6 December 2007. No argument was addressed to me that the Notice to Members expressly or impliedly incorporated the letter of 21 January 2008 or the leaflet 'Voting Information for Members'. Indeed, any such argument would have been untenable on the facts of this case.

26. I accept Mr Tomlinson's submission that Parliament gave its mind to whether other documents could be included with the voting paper in the case of the merger of employers' associations and, by the disapplication of section 100C(5), decided that other material could be included with the ballot paper. I reject Mr Taylor's submission that I should regard the disapplication of

section 100C(5) to employers' associations as being an oversight on the part of Parliament and not intended.

27. I also find that Parliament gave its mind to the issue of recommendations on a proposed merger of employer's associations. Section 99(3A) was inserted into the 1992 Act by the same Act that disapplied section 100C(5), the Trade Union Reform and Employment Rights Act 1993. This sub-section is explicit in its reference to the Notice to Members as being the document in which the making of a recommendation is prohibited. Section 99 as a whole makes clear what constitutes the Notice to Members. Against this legislative background, I find that the intention of Parliament is to be given effect by a straight forward application of the words used in their ordinary literal meaning, and that there is no scope to give them the strained interpretation for which Mr Taylor contends by way of a purposive approach.

28. Section 99(3A) of the 1992 Act applies only to the Notice to Members as provided for in section 99. In this case, I find that the Notice to Members was the document which was so headed together with the Instrument of Amalgamation and not the entire content of the letter of 21 January 2008. Indeed, if the contrary were so, the whole of the content of the envelope would have needed my approval under section 99, and there is no complaint relating to the approval. Mr Taylor accepted that neither of the documents that I have found to constitute the Notice to Members contained a recommendation or expressed an opinion about the proposed amalgamation and this complaint must therefore fail.

29. For the above reasons, I dismiss the complaint that the EEF West Midlands Association breached section 99(3A) of the 1992 Act by allegedly failing to secure that the Notice to be given to members prior to the vote on the amalgamation of the Association did not contain any statement making a recommendation or expressing an opinion about the proposed amalgamation.

Complaint Two

30. This complaint alleged that the EEF West Midland Association was in breach of section 100C(3)(a) of the 1992 Act by virtue of the letter from its President to members of 21 January 2008 and the enclosed leaflet '*Voting Information for Members*'.

31. Section 100C(3)(c) of the 1992 Act provides that:

> "*Every person who is entitled to vote in the ballot must-*
> *(a) be allowed to vote without interference or constrain, and*
> (b) …".

Summary of Submissions

32. For the Claimants, Mr Taylor submitted that even if it was permissible to enclose exhortatory material with the voting paper, there are limitations upon the nature of the material which can be included and the manner in which the information can be presented. In making this submission, he relied upon a

decision of the Certification Officer, **Public and Commercial Services Union (D/4-5/99)**. Mr Taylor argued that exhortatory material which is presented in an over-prominent position in the voting pack or which is not clearly identified as being canvassing in nature is likely to be confused with the statutory Notice to Members or, worse still, cause the statutory Notice to be disregarded. On the facts of this case, Mr Taylor relied not only upon the content of the letter and the leaflet but also the order in which they appeared in the voting pack and the layout of the various documents. He submitted that, in the circumstances of this case, the reasonable recipient would have given most attention to the letter and leaflet and, in all probability, would have disregarded the Notice to Members and Instrument of Amalgamation, which appeared later in the 'pack' and were presented as off-putting legal documents. Mr Taylor maintained that this would give rise to a very substantial risk of interference or constraint. He argued that what amounts to interference and constraint is a question of fact and that anything which interferes with the voter's free will to vote is an unlawful interference. He did not advance any case based upon the word "*constrain*". He submitted that on the facts of this case the free will of the members had been impugned by the fact that the letter and leaflet enclosed with the voting pack sent on 21 January 2008 only advanced arguments in favour of amalgamation, were positioned at the front of the voting pack and were in a style which would cause them to be read first and/or confused as being part of the statutory materials.

33. For the Respondent, Mr Tomlinson QC submitted that this application was also misconceived. He argued that the meaning of "*interference or constraint*" had been considered many times over the years by different Certification Officers and that there had been a consistent interpretation, as most recently applied in 2004 in the case of **Lynch v UNIFI (CO/1964/18)**. He maintained that, in accordance with that interpretation, the inclusion of the covering letter and leaflet could not sensibly be said to amount to "*interference or constraint*" within the meaning of those words as used in the legislation. Mr Tomlinson submitted that the letter and leaflet did not have the effect of intimidating or putting a member in fear of voting. He accepted that they were partisan in that they put forward the EEF's view in favour of the merger but denied that they were misleading or inaccurate. He particularly denied that they contained blatant lies or seriously misleading statements. He submitted that, having read the materials, members were free to vote as they chose and that it was unrealistic to think that the letter and leaflet were considered by any reasonable reader as being anything other than an expression of the view of the governing body. He noted that the readers of these documents would be the holders of senior positions in various member companies who would be well used to reading legal documents and differentiating them from canvassing material. Mr Tomlinson argued that the mischief at which section 100C(3)(a) of the 1992 Act is aimed is interference with the voting process and not the canvassing of views by the governing bodies. He maintained that in the case of a merger it would be surprising, and perhaps a dereliction of duty, should the governing bodies not seek to persuade their members that their decision to merge was in the best interests of members.

Conclusion – Complaint Two

34. The requirement that persons be allowed to vote without interference or constraint is one that appears in a number of places in the 1992 Act and has been the subject of previous decisions by both myself and my predecessors. In **Lynch v UNIFI**, a case involving a trade union merger, I re-stated the interpretation of that expression that I had previously accepted. Having considered the submissions of Mr Taylor, I remain of the view, that I expressed in **Lynch,** that the most convenient and succinct expression of how the words "*interference and constraint*" are to be interpreted is to be found in the case of **Paul v NALGO (D/14/86)** in which case the then Certification Officer found that the purpose of the prohibition on interference or constraint "*... is to ensure that members are not subject to any pressure which would have the effect of preventing them from freely exercising their right to vote*" and that "*... the right to allow a person to vote without interference or constraint is intended to exclude such contact as would intimidate or put a member in fear of voting or amount to physical interference*". Further assistance on the interpretation of this expression is to be found in the 1981 case of **Clare v The Eagle Star Staff Association (CO/1964/3)**, in which the then Certification Officer stated:

> "*The statement made to persuade members to vote one way rather than another does not, in my view, amount to an "interference or constraint" merely because it is exaggerated, misleading or inaccurate. I do not rule out the possibility that, in some circumstances, a blatant untruth or a seriously misleading statement could amount to an "interference or constraint" under the Act ..."*

My immediate predecessor, Mr Whybrew, commented upon this observation in 1994 in **NUM (Yorkshire Area) (CO/1964/13)**. He stated:

> *"It would take a most blatant lie or seriously misleading statement to constitute interference or constraint with voting."*

35. I found in **Lynch v UNIFI** that the union's campaign in favour of its proposed transfer of engagements did not in itself constitute a breach of section 100C(3)(a) of the 1992 Act and, indeed, Mr Taylor does not seek to persuade me that such a general campaign in favour of a merger would be a breach. Rather, he seeks to persuade me, on the particular facts of this case, that the inclusion of the letter and leaflet with the voting paper and statutory materials amounted to a failure to allow the members to vote without interference.

36. In advancing this argument, Mr Taylor had regard to certain observations made by Mr Whybrew in the case of **Public and Commercial Services Union**. This case preceded the insertion of section 100C(5) in the 1992 Act, which prohibited trade unions from including what materials they wished with voting papers on a merger ballot. At paragraph 2.79, Mr Whybrew commented that, "*I therefore draw the inference that whilst a union may include extraneous material within the balloting paper, this freedom is not an absolute one"*. He went on to give the example of where the ballot paper is accompanied by a huge mass of advertising or other extraneous material so as

to obscure the balloting material and effectively invite immediate destruction of the entire package.

37. The material about which Mr Taylor complains is the letter of 21 January 2008 and the leaflet '*Voting Information for Members*'. However, they were clearly not of such a nature or so voluminous as might invite the destruction of the entire package. Indeed, the outside of the envelope alluded to the amalgamation and the importance of its contents. Further, in my judgment, the letter and leaflet could not, on any objective reading, be confused with the statutory materials that are required to accompany the voting paper or so mislead a potential voter that he or she would not understand the significance of the vote cast. This is apparent from both the appearance and content of those documents. The letter of 21 January is a single page covering letter which lists its contents and which recommends members to vote in favour of the amalgamation. It also states expressly that the legal agreement to merge, the Instrument of Amalgamation, will be "*subject to your approval*". The leaflet is a four page, double sided document, which is, in my judgment, plainly distinguished from the statutory materials by its layout and the different colours in which it is printed. I find that any objective reader would immediately recognise the leaflet to be a partisan canvassing document and not to be confused with the statutory materials. The voting paper itself directs the reader to the statutory material. It states *"If you agree that your association should amalgamate as described in the accompanying Notice to Members and Instrument of Amalgamation, vote For the Resolution below. If you disagree, vote Against."* The reader is thus directed to the statutory material for an explanation of the terms of the amalgamation. The omission in the voting paper of any reference to the letter and leaflet is a further indication to the reader that they are not part of the formal process. Mr Tomlinson does not dispute that the letter and leaflet are partisan but he vigorously denied any allegation that they contained any "*most blatant lie or seriously misleading statement*". Indeed, Mr Taylor did not assert that they did so. In my judgment, and consistent with earlier cases on this point, any argument that canvassing material infringes a member's right to be allowed to vote without interference or constraint is only likely to succeed on the most extreme facts. The facts of this case fall short of those which would be sufficient. I find that an objective reader of the materials accompanying the voting paper, including the covering letter and the leaflet, would have been allowed to vote without interference or constraint within the meaning of section 100C(3)(a) of the 1992 Act.

38. For the above reasons, I dismiss the complaint that the EEF West Midlands Association breached section 100C(3)(a) of the 1992 Act by allegedly failing to secure that every person entitled to vote in the amalgamation ballot was allowed to vote without interference or constraint.

39. Notwithstanding the outcome of this application on its particular facts, employers associations in a similar position in the future may well consider whether canvassing material should be included with the ballot paper, having regard to electoral best practise and the risks of litigation.

David Cockburn

The Certification Officer