

D/10-13/96

DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTIONS 25 AND 55 OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992

IN THE MATTER OF A COMPLAINT
AGAINST THE CIVIL AND PUBLIC SERVICES ASSOCIATION

Date of Decision:

4 September, 1996

APPLICATION

Under section 25 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") a member of a trade union who claims that the union has failed to comply with section 24 of the 1992 Act may apply to the Certification Officer for a declaration to that effect.

Similarly under section 55 a member or a candidate for an election to certain positions may apply to the Certification Officer for a declaration that the union has failed to comply with the requirements of Part I, Chapter IV of the 1992 Act.

In making a declaration under sections 25 and 55 I am required to specify the provisions with which the trade union has failed to comply.

1. On 9 May 1995 I received a formal application from a member of the Civil and Public Services Association (CPSA or "the union") which was later clarified and enlarged by subsequent

correspondence in December 1995 and early 1996.

2. The complaints, which centred around the 1994 and 1995 CPSA elections for its National Executive Committee, Vice Presidents and President positions were that:

(1) the union had failed to maintain an accurate and up to date register of the names and addresses of its members (breaching section 24 of the 1992 Act);

(2) in respect of the 1994 elections, the union contravened the statutory requirement that voting papers be sent to the home address or to another address which members had requested the union in writing to treat as their postal address (breaching section 51(4) (a) of the 1992 Act);

(3) a similar complaint but in respect of the 1995 elections;

(4) the union had breached the statutory requirements by permitting the scrutineer to extend the voting period in certain postal areas (breaching sections 50(1) and 51(2) (a) of the 1992 Act).

I shall call these Complaints 1,2,3 and 4 respectively.

3. I investigated Complaints 1-4 in correspondence and eventually called a formal hearing where the union was represented by Mr David Cockburn of Pattinson and Brewer, solicitors, supported by the union's General Secretary and two of his staff. The complainant represented himself.

JURISDICTION

4. Shortly before and at the outset of the hearing the union's solicitor submitted on behalf of the union that I did not have jurisdiction to hear the application under section 55 of the 1992 Act relating to the 1994 election because the complaint had been made after the period allowed under the 1992 Act. There was no challenge to my jurisdiction to hear the complaint about the register of member's names and addresses, nor those about the 1995 elections. Section 54(3) of the Act provides that no application may be made to the Certification Officer after the end of the period of one year beginning with the day on which the union announced the result of the election. The union announced the results of the 1994 elections on 12 May 1994, therefore the last day for making a complaint about these elections would be 11 May 1995. The Certification Officer has no discretion under

the Act to extend this period.

5. The union had been made aware of the complaints following a letter from the Certification Officer of 21 February 1996. In that letter the Certification Officer had stated that the complaint had been first registered at his office on 9 May 1995 (that is within the 12 month period) but the complaint was:

"phrased in a very imprecise terms and the Certification Officer took no action at that time...following further correspondence with the complainant the Certification Officer received the details and background to the complaint on 13 February 1996..."

6. The union pointed out that the complainant's letter which was dated 5 May 1995 in which he registered the complaints stated:

"...I wish to make a complaint concerning the CPSA's failure to comply with Section 24 of the 1992 Act in respect of the CPSA's 1994 elections for National Executive Committee, Vice Presidents and President. Therefore, in accordance with Section 25 of the Act I am lodging my application today for a declaration from the Certification Officer to this effect. I request that you accept this letter as establishing my application in conformity with the Act.

I shall be writing again very shortly setting out my complaint in more detail..."

7. The union's interpretation of the letter was that this was an application under section 25 alone of the 1992 Act and that the "further details" that were to be forwarded by the complainant were details of his complaint under section 25.

8. The union noted that the Certification Officer had taken the view that the letter was also an application under section 55 of the Act. The union did not agree that this could be so as the application was expressed solely in the context of section 25.

9. In cases where there was doubt the union accepted that it was open to the Certification Officer to interpret complaints even though all specific statutory provisions may not have been identified by a complainant. However the union did not consider that this was one of those cases. The application was specific, unambiguous and from a complainant who had already made several previous applications and was very familiar with the sections of the Act on this subject. In the circumstances the union requested that I rule the complaints to be out of time in respect of the 1994 elections.

10. I gave this matter very careful consideration. When I receive complaints in vague, or specific but wrongly directed, terms it is not my practice to tell the complainant how he should phrase the complaint. Nor is it my practice to apply strict rules of pleading to such complaints. Equally though, I do not expect complainants, who are invariably unrepresented lay members, to immediately identify the precise and most relevant parts of the legislation that may have been breached. In my experience many complainants are unable readily to identify the relevant provision of the statute, or mistakenly refer to specific provisions. It takes most complainants more than one letter to specify their complaint correctly. In determining whether a complaint is made in time I always consider whether there was sufficient substance in the letters received within the time limit to formulate a complaint on that material. If there is I judge that I have jurisdiction to hear the complaint.

11. Applying those principles to this case was not an easy matter. The original letter did contain a specific complaint under section 25 (on which there is no time limit) but the complainant expressly related to the keeping of the register in respect of the 1994 elections. However in supporting that complaint reference was made to scrutineer's reports on the 1994 elections. The reference specifically pointed to a passage stating that voting papers had been sent to members for whom no registered address was held. That was precisely the issue on which the section 55 complaint was made.

12. I considered whether the complainant's supposed knowledge of the law and his experience in pursuing cases against the union made any difference. I decided that while I would not expect someone with his background to fail the test very often it would be wrong to apply a different test to him than I would apply to others. I regard the letter of 5 May as having satisfied my test of having sufficient material to form the basis of a complaint even though it was inexactly worded.

13. For these reasons I judge that I do have jurisdiction to consider Complaint 2 along with the others on which my jurisdiction was not questioned.

DECISION AND DECLARATION

14. For the reasons given below I declare that in its 1994 elections, by sending ballot papers to workplace addresses when the members concerned had not given written authority for those

addresses to be used, the CPSA was in breach of section 51(4)(a) of the 1992 Act.

15. For the reasons also given below I decline to make a declaration in respect of the other three complaints.

COMPLAINT 1. (That the union did not maintain an accurate and up to date register of members names and addresses).

Legislative requirements

16. **Section 24** of the 1992 Act concerns a union's duty to maintain a register of members' names and addresses. The relevant requirements state:

"24(1). A trade union shall compile and maintain a register of the names and addresses of its members, and shall secure, so far as is reasonably practicable, that the entries in the register are accurate and are kept up-to-date....

...(5) for the purposes of this section a member's address means either his home address or another address which he has requested the union in writing to treat as his postal address..."

The Complainant's Case

17. The complainant alleged that the union had failed to maintain an accurate and up to date register of its members as is required by statute. The complainant observed that the legal requirement for unions to compile and maintain a register of names and addresses of its members originated in 1984. Therefore by the end of 1993 when the union was making the 1994 election arrangements it would have had 9 years to compile and keep its register up to date.

18. As evidence of the union's failure in this respect the complainant pointed to a number of examples of inaccuracy and conflicting statements by the union or its agents in regard to its membership:

* In its 1994 annual report the union stated that its membership at 31 August 1994 was 123,682;

* The front cover of the union's 1994 annual report was emblazoned with the legend "125,000 members endorse CPSA" implying that to the nearest 1,000 there were 125,000 members in the CPSA at 31 December 1994.

* The number of ballot papers issued by the union's election scrutineer in May 1994 for the election of its President was 131,683;

* Around April 1995 the union's election scrutineer reported that the total number of ballot papers issued for the 1995 elections was 115,448, some 10,000 less than the apparent total membership at December 1995 and more than 16,000 less than the number of ballot papers reported as having been issued in the 1994 elections.

* The union's election scrutineer had reported that in the 1994 elections ballot papers had been sent to "unregistered addresses", that is the addresses did not conform to the requirements of section 24(1) nor indeed to section 51(4)(a) of the 1992 Act (see Complaint 2).

The union's annual returns to the Certification Officer, until that relating to 1995, had always shown "NIL" as the number of members for whom no proper address was held; even the 1995 return showed a figure for March 1996 not December 1995.

19. In the complainant's opinion all this gave rise to the question of the accuracy of the union's membership records. Although the union had claimed to do regular verification exercises on its membership list there should have been some tangible results and an improvement in accuracy. However the union's general secretary was quoted as saying that after the 1994 election there would still be "approximately 13,000 names left on our "B List" (ie of members for whom no home address was held and who had failed to register any other address).

20. In the opinion of the complainant all this evidence showed that the union had failed to maintain an accurate and up to date list of its membership in breach of section 24(1) of the 1992 Act.

The Union's Response

21. The union refuted the allegation. It had done everything it could "so far as is reasonably practicable" to maintain an accurate and up to date register of member's names and addresses.

22. It had taken many steps prior to the 1994 election to ensure that its register was correct, these steps included:

- * The CPSA membership application form contains a specially designated box for "the ballot address";
- * it followed up applications for membership where no appropriate address was given;
- * it had regular membership verification exercises;
- * in 1994 it devoted considerable resources to the check-off renewal campaign and as part of this exercise many incorrect or out of date address were identified and corrected;
- * any mail returned undelivered was used to remove inappropriate addresses and to activate enquiries for the up-to-date address;
- * a number of other measures including advertising in the union journal and reminding branch secretaries of the need for members to have up-to-date balloting addresses.

23. The union also pointed out that even before the complaint was made it had written to the Certification Officer on 10 January 1995 detailing the action it had taken to keep its membership records up-to-date. In the circumstances it had done all that was reasonably practicable to ensure that its membership records were accurate and up-to-date. Accordingly the union considered that the complaint was unfounded and should be dismissed.

Reasons for refusing to make the declaration

24. In his evidence the complainant based much of his case on discrepancies, some quite large, between the membership numbers over a period of years. The various membership numbers can be summarised as follows:

<u>Date</u>	<u>Source</u>	<u>Number of members</u>
December 1993	Annual return	131,841
April 1994	Voting papers printed	140,000
April 1994	Voting papers issued	131,772
May 1994	Voting papers issued	131,683
August 1994	"Red Tape" journal	123,682
December 1994	Annual return	125,801
April 1995	Voting papers issued	115,448
December 1995	Annual return	121,749

25. Having quizzed the union on these figures and in the absence of any contradictory evidence from the complainant I have concluded that:

- (i) the only figure apparently out of line in the first four is that for voting papers printed. This stems from the normal practice of producing extra copies of the voting papers (the issue of which is supervised by the independent scrutineer) in case any are lost in the post; also printing contractors tend to round up orders to come within their charging bands. These circumstances account for the difference between the around 131,000 and 140,000.
- (ii) The difference between the May 1994 and August 1994 figures (approximately 8,000) is probably due to members not rejoining the union following the statutory "check off" exercise of members contributions.
- (iii) The difference between 115,448 and 123,682 is largely the effect of excluding the union's "List B" members from voting.

26. The figures quoted by the complainant do not themselves provide evidence of substantial inaccuracies in the union's membership figures. The union now has a means of counting those on its "B" list and the steps set out in paragraph 22 are very much the sort of actions unions have to take in my judgement to satisfy the requirement to "secure so far as reasonably practicable" that the register of members is accurate and up-to-date.

27. For these reasons I dismiss the complaint.

COMPLAINT 2 (Voting papers may only be sent to a workplace address if that address has been authorised in writing by the member) - 1994 election.

Legislative Requirements

28. **Section 46 of the 1992 Act** concerns the duty of trade unions to hold elections for certain positions. The relevant part of this sections provides that:

"(1) A trade union shall secure -

(a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter,...."

also sub section 51(4) (a) provides:

"(4) So far as is reasonably practicable, every person who is entitled to vote at the election must -

(a) have sent to him by post, at his home address or another address which he has requested the trade union in writing to treat as his postal address, a voting paper

Complainant's Case

29. In respect of the 1994 CPSA executive committee elections the complainant alleged that the union had sent ballot papers to workplace addresses which had not been authorised by members for use as their balloting address. The union had sent a large number of voting papers to unauthorised addresses. Those on its "B list" were sent papers even though they were members who had failed to register an address and whose home address the union did not hold. It was alleged that the despatch of such ballot papers was on a scale which could have affected the outcome of the elections. Between 13,000 and 16,000 voting papers were sent to "B list" members out of a total membership of around 125,000. Furthermore this practice of sending ballot papers to unauthorised addresses could give the opportunity for ballot rigging which would not otherwise have existed.

30. In evidence the complainant pointed to the independent scrutineer's report which at paragraph f stated "Where no registration has been received (complainant's emphasis) ballot papers have been addressed personally to members at their office address." The complainant also pointed to a letter from the union to the Certification Officer dated 10 January 1995 in which the union admitted that it had been its practice for some years to send ballot papers to members on its "B list". In view of this evidence the complainant maintained that the union was in breach of the requirements of section 51(4) (a) of the 1992 Act.

The Union's Response

31. The union agreed that in the 1994 elections it had sent some 13,000 voting papers to members on its "B list" and conceded that to this extent voting papers were not sent to the statutory balloting addresses of those members.

32. In mitigation the union asked me to bear in mind that it had in good faith balloted members on its "B list" on the basis of legal opinion it had received in 1989. At that time the union's membership list, like those of many other unions, was not fully developed. To have sent voting papers only to those with "proper addresses" would have effectively disenfranchised very large numbers of members. In these circumstances it was thought that a court would probably be sympathetic to a union faced with such a dilemma. A court might find that it had not been reasonably practicable to comply with the strict requirement to send ballot papers only to members' "proper addresses". It was recognised that this argument would not hold for ever. It was worth noting that since 1985 the number of members without a registered balloting address had reduced from about 78% to 10% as a result of measures the union had taken. It was now accepted that by 1994 there was no longer any justification for sending ballot papers to those on the "B list". The union had excluded such members in the 1995 ballots and should have done so earlier. Its policy had been based on an effort to try to comply with the law in difficult circumstances and there had been no complaints from members on this issue.

Reasons for making the declaration

33. The union conceded, in my view rightly, that in the 1994 elections it sent ballot papers to some 13,000 members at their workplace even though those members had not provided a written request for that address to be used. I accept that this union, like others, face a real dilemma in the circumstances described. If it ballots "B list" members it breaches one section of the Act and if it does not it risks a charge of breaching another section. In the circumstances I can understand why it adopted the pragmatic approach it did. However it is incumbent on the union to do everything practicable to obtain "proper" addresses (which it did) and then exclude from ballots those for whom it does not have such addresses (this it does now). The union's judgement and mine is that certainly by 1994 it should have excluded the "B list" members. It is for these reasons that I make the

declaration set out in paragraph 14.

COMPLAINT 3 (Voting papers may only be sent to a workplace address if that address has been authorised in writing by the member) - 1995 election.

Legislative requirements

34. This complaint is based on the same legal requirements as Complaint 2. These are set out in paragraph 28.

Complainant's Case

35. This complaint referred to the 1995 CPSA executive committee elections. Although the circumstances were similar to complaint 2 it differed in one important way; that is the union did not send voting papers to its members on "List B" but only to home addresses or to those who had authorised in writing an address for balloting purposes ("List A" members).

36. The complainant asserted that in view of the union's past unsatisfactory record in running elections the burden of proof was on the union to prove that no ballot papers had been issued to "unregistered" addresses in the 1995 elections. The complainant observed that a relatively small number of 600 votes would have affected the elections results which in his opinion could not be regarded as safe.

The Union's Response

37. The union noted that, unlike in the correspondence, the complainant was no longer saying that it was wrong to exclude "B list" members. He was now making a general allegation on which he provided no evidence whatsoever. The test, in any case, was not that every member and no one else was sent a ballot paper at their proper address but that the union had done everything reasonably practicable to bring that about. It did not accept that the history meant it must prove the ballot complied with the legislation.

Reasons for refusing a declaration

38. There was no evidence that ballot papers were sent to anyone who should not have received one, or not sent to anyone for whom the union had a proper address. I have already found - Complaint

1 - that the union did what was reasonably practicable to ensure that its register was accurate, up to date and contained proper addresses.

39. In the circumstances there was no case whatsoever to answer and I dismiss the complaint.

COMPLAINT 4 (Union permitted scrutineer to extend the voting period for certain postal areas) - 1995 election.

Legislative requirements

40. **Section 50** concerns entitlement to vote and the relevant part of this section states:

"(1) Subject to the provisions of this section, entitlement to vote shall be accorded equally to all members of the trade union..."

Section 51 is about voting; the relevant part of this section (sub section (2)(a)) provides:

"(2) Each voting paper must:

(a) state the name of the independent scrutineer and clearly specify the address to which, and the date by which, it is to be returned,..."

Complainant's Case

41. The complaint was that in the 1995 executive committee elections the union had permitted the independent scrutineer to extend the voting period for members in selected postal areas where industrial action affecting the Royal Mail was, or had been, taking place. In the complainant's opinion such an extension was not authorised by CPSA electoral regulations. It was also contrary to the statutory provisions which demanded that entitlement to vote should be accorded equally to all members and that voting papers must clearly specify the date (not a date) by which they should be returned.

42. In the 1995 elections the period specified for voting was 7

April to 5 May 1995. However the complainant stated that the voting period had been irregularly extended until 12 May for members in certain areas including those in the NE (Newcastle) and EH and KY (both in Scotland) postal areas. Therefore for members in those areas 5 May 1995 was not the date by which they should be returned; conversely he argued if 12 May was the date which voting papers should be returned then those voting papers did not contain that date.

43. The complainant pointed out that the voting period had been extended by the union following "representations from the returning officers and counting officers". However the union had surprisingly given no details to members of why the extension was necessary given that it was "outwith the CPSA Rules and the law". The complainant asserted that this was because the extension would have provoked more protest from members in other areas also affected by the postal dispute but who had not had their voting period extended.

44. The complainant maintained that the NE post code areas (in particular) had not been affected by the postal dispute to the extent alleged by the union. Postal workers ended their strike on 24 April with a full return to work on 26 April ie 7 days before the extension was instituted by the union and 9 days before the end of the original voting period on 5 May 1995. It was pointed out that the union had not explicitly provided any evidence as to the effects of the postal dispute in the NE areas.

45. Furthermore the union's decision to extend selectively the voting period was not made until 3 May 1995 which was 26 days after the voting period started, 9 days after the Newcastle postal workers returned to normal working and merely 2 days before the elections were due to end. It was possible that with modern counting methods the cumulative results of the elections may have been known on 3 and 4 May when the decision to allow the extension was made. Furthermore the 7 days extension created an opportunity for additional papers being improperly despatched "en bloc", by post or other means, to other nearby post code areas and thence returned by being posted in the post code areas given the extension of time. In any event it may not have been possible for the scrutineer/independent person to distinguish ballot papers posted in the areas affected by the postal disputes from those posted in other areas. This gave rise to unfairness and scope for malpractice in the elections.

46. On the basis of this evidence the complainant considered that by permitting the scrutineer to extend the voting period for certain areas the union was in breach of section 50(1) and

51(2) (a) of that Act.

The Union's Response

47. The election voting papers were distributed by the scrutineers' mailing house on 7 April 1995 and each contained a statement that they must be returned to the Returning Officer by 5 May 1995.

48. During this time the union noted press reports that an indefinite strike of postal workers had started on 5 April in the Newcastle area. The union became concerned that the strike would affect the ability of members in Newcastle to vote. The strike was not settled until 24 April by which time there was a large backlog of mail to deliver. Subsequently strikes in the EH and KY postal areas in Scotland became known to the union.

49. In the circumstances it was clear that members in the NE, EH and KY areas would not have sufficient time to vote and in the interests of fairness it was decided to extend the voting period in these areas by one week. The decision to have a limited extension of voting rather than extend for the whole of the membership took into account a number of factors:

- (i) only a small number of members were affected by the strikes;
- (ii) the Returning Officer could easily separate the votes from members in the affected post codes during the extended period of voting by reference to the serial numbers on the ballot paper;
- (iii) the rules of the union provide that the election results must be declared at the annual conference. If the balloting period was extended for the whole of the membership, this would not have been possible;
- (iv) the CPSA is an extremely political union. Based on previous experiences, to have announced a general extension of the balloting period to deal with a problem affecting such a minority of the membership would have caused considerable suspicion and ill will;
- (v) the union's view was that an underlying principle of the balloting provisions is that members should have

an equal opportunity to vote. By extending the ballot period for just the members adversely affected, the union was attempting to restore some equality of voting opportunity to the disadvantaged members. If, on the other hand, the union extended the voting period generally, the inequality of balloting opportunity would have been preserved as between the different groups.

50. The union observed that section 51(2)(a) of the Act provides that "each voting paper must state the name of the independent scrutineer and clearly specify the address to which, and the date by which, it is to be returned". Despite the reference to "the date" in the singular, the union's view was that it had not acted in breach of this provision. The voting papers did in fact specify the date upon which it was to be returned. The postal dispute could not have been foreseen at the time that the voting papers were printed and the statute contains no provision to deal with such a intervening event.

51. In the absence of any provision expressly prohibiting the extension of the voting period the union considered that any such prohibition should not be implied so long as the extension is such that it will not cause a breach of any other statutory provision.

52. Given the absence of any specific prohibition, the union submitted that it may in such circumstances lawfully extend the period of voting either generally or for a defined group of members so long as the extension is not manifestly unreasonable or motivated by bad faith.

53. The union also pointed out that the Returning Officer did not keep a running tally of the votes cast, as was suggested by the complainant. Furthermore the union understood that counting of the voting papers does not begin until at or about the close of the ballot. It also asked the Certification Officer to note that 304 ballot papers were received from the affected postal areas during the extension of time. This was an insufficient number of votes to affect any result in the ballot.

Reasons for refusing a declaration

55. I accept the union's evidence that members in the strike areas concerned had not received their ballot papers in time to guarantee a vote being returned by the closing date of 5 May 1995. After correspondence with the scrutineer I also accept that the arrangements for the extension meant that only ballot papers sent to, and returned by, members in the affected postal areas were counted. There is no evidence that any of the potential malpractices identified by the complainant (paragraph 45) actually occurred; indeed there is strong evidence that they did not.

56. The question I have to answer then is did the extension breach the legislative requirements? The law is silent on what should happen if something outside the union's control intervenes to prevent members returning their ballot papers on time. The complainant though argues that the reference to "the date" (in the singular) by which ballot papers must be returned implies that the union cannot substitute another date for that on the ballot papers. I see the strength of this argument but do not accept it. While clearly each ballot paper can only carry one date by which it must be returned this provision of itself does not necessarily prevent a union specifying different dates on different papers in the same election. Nor does it necessarily stand in the way of a union altering the date of return if unforeseen circumstances intervene.

57. A union faced with the effect of a selective postal strike and concerned to do all that was reasonably practicable to ensure that all of those entitled to vote are given a convenient opportunity to vote by post has a number of choices. It could:

- (a) stick to the original closing date and disallow all votes received after that date;
- (b) extend the period of voting and count all votes received before the new closing date;
- (c) extend the period in the affected areas and count only the votes from those areas;
- (d) cancel the ballot, print and despatch to all members voting papers with a new closing date.

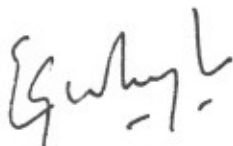
Depending on the circumstances of the case it might be able to justify any one of those actions. How far the circumstances justify a particular course as one falling within a range of

reasonable responses to the unforeseen circumstances is bound to be a matter of fine judgement. The union must always be prepared to defend its decision against the requirement to do what is reasonably practicable to give a convenient opportunity to vote by post, or allegations that it was motivated by bad faith. But in particular circumstances any one of these courses might be the right one for the union to take.

58. In this case the union had clear evidence that a substantial number of members in specific localities would not receive their ballots entirely outside the union's control. In these circumstances I believe the the union's actions were justified and not in breach of the law. For these reasons I dismiss Complaint 4. I do though think it would have been wiser for them to have told their members generally that it had extended the voting period selectively.

Remedies

59. I have found against the union in one of the four complaints. That one related to the 1994 elections and to members being sent voting papers at their workplaces without the necessary authorisations being held by the union. The CPSA holds elections annually so no one is currently in office by virtue of the offending elections. For the 1995 elections the union changed its practice and balloted only those members for whom it had an authorised address. No further action is required.



E G Whybrew
Certification Officer