

CERTIFICATE OF INDEPENDENCE

DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION UNDER SECTION 6 OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

NISA

Date of decision and reasons:

18 May 2001

Introduction and decision

1. An application for a certificate of independence for NISA, the News International Staff Association, was received in my Office on 29 August 2000. Formal objections were made to it by the TUC, Amalgamated Engineering and Electrical Union(AEEU), Graphical Paper and Media Union(GPMU) and National Union of Journalists(NUJ). An anonymous objection was also forwarded to me by an MP. I have been making enquiries as provided for in section 6(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) ("the 1992 Act").
2. I, and officials acting under my directions, have met and corresponded with the Chairman, General Secretary and representatives of the Association and with the employers at News International Newspapers Ltd. In addition the combined representations made to me by AEEU/GPMU/NUJ have been put to NISA for comment. In return AEEU/GPMU/NUJ have been given the opportunity to reply to those comments made by NISA. All the parties involved have been most helpful and the Association's representatives have argued strongly for independence. I am aware that the NISA representatives and News International Newspapers Ltd wish the Association to be independent as well as to be recognised as such by me. However I have concluded that NISA is not an independent

trade union within the definition set out in section 5 of the 1992 Act. I set out below the reasons for this decision.

Legislation

3. Under section 5 of the 1992 Act “ *an “independent trade union” means a trade union which -*

(a) is not under the domination or control of an employer or group of employers or of one or more employers' associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control; ”

Important Case Law

4. There are two cases which are particularly relevant to the consideration of any application for a certificate of independence. These are Squibb UK Staff Association v Certification Officer [1979] ICR 235 and Blue Circle Staff Association v Certification Officer [1977] ICR 224.

5. In Squibb, the Court of Appeal considered the meaning of the words ‘liable to interference’ now contained in s.5(b) of the 1992 Act. In a unanimous decision, Lord Denning MR agreed with the Certification Officer’s interpretation of liable to interference as meaning ‘vulnerable to interference’ or ‘exposed to the risk of interference by the employer’. I will return to this case later.

6. The Blue Circle case was the first one to go on appeal to the Employment Appeal Tribunal after the post of Certification Officer was established in 1975. The Tribunal effectively endorsed the then Certification Officers approach of considering applications against a range of criteria and making his decision on the basis of the overall balance of such considerations. The Tribunal recorded eight criteria. Over the years these have been condensed into the six now listed in the guide my Office issues to unions wishing to apply for a certificate of independence - namely History, Membership Base, Organisation and Structure, Finance, Employer Provided Facilities and Negotiating Record. It is against these criteria that I have judged this application. I set out below (paragraphs 14-28) my views on how they impact on NISA's application.

7. The Blue Circle case is also more directly relevant to this particular application from NISA. Some of the circumstances of the case were similar. Statutory procedures for the recognition of trade unions had just been introduced and Blue Circle were anxious to establish that their in house staff association was an independent trade union representing salaried staff. Other circumstances were very different - in particular trade unions were far more powerful and aggressive than their modern counterparts and the concept of partnership between employers and unions was less well established. Moreover the facts of the relationship between Blue Circle and its staff association differed in several ways from the relationship between News International and NISA. The EAT decision delivered by Mr Justice Cumming-Bruce in addition to effectively endorsing the criteria I and my predecessors have followed in considering independence claims (see para 6 above) set out some important principles relevant to the present case.

8. Having detailed the history of the association he pointed to some residual elements of influence in its operation (which he later said could be dealt with by minor amendments to rules and procedures). He then went on to say that there was

“a heavy onus on such a body to show that it has shaken off the paternal control which brought it into existence and fostered its growth, and which finally joined in drafting the very rules by which the control appears to be relaxed.”

“As time passes it will gradually become much clearer than it can be today whether the interference of the employers in the associations affairs has really come to an end.”

“But they must recognise that the process of asserting genuine and effective independence after some years of such dominance by management as has occurred in this case is likely to be protracted.”

Some of these words seem particularly apposite to the issue I now have to decide in relation to NISA.

Background

9. That then is the legislation, case law and criteria against which I have judged this application. I turn now to the basic factual background.
10. NISA has its foundation in various forms of “work’s council” which have been set up and organised by the employer, News International. In 1988 the company set up what was known as the Human Resources Committee at each of its three main plants (Kinning Park, Knowsley and Wapping). The members of the Committee were appointed by

management. In 1989 the constitution of the Committee was altered so that there were some elected representatives on the committee. In 1995 the Human Resources Committee was abandoned and in its place management started an Employees' Consultative Council at each plant. Each committee consisted of 22 members, 16 elected by the employees at each plant and six appointed by senior management. Each Council met monthly and an annual meeting was held of the three Councils.

11. In July 1998 a decision was taken by the Employees' Consultative Council to set up a working party to change the Council and to produce a representative body which could be a proper partner on behalf of the workforce in collective bargaining. The working party's considerations were influenced in some measure by the findings of a staff attitude survey and the Government proposals on trade union recognition published as a white paper entitled "Fairness at Work". After consultations staff were balloted in April 1999 on proposals to establish a News International Staff Association at the three plants. Support for these proposals was followed by ballots to elect representatives to the three Associations. The proposals also provided for representatives of each Association to form a Joint Executive Council (JEC). The News International Staff Associations came into effect from July 1999. Whilst the Association and JEC representatives met amongst themselves from time to time, the formal meetings of the Association and JEC were arranged, attended and minuted by management.
12. At the first annual general meeting of the three Staff Associations in October 1999 delegates voted to proceed to the formation of a union and thereafter to making an application for a certificate of independence. As part of this process a new rule book, for NISA, was drafted and a formal Recognition and Procedure Agreement was signed between News International Newspapers Ltd and News International Staff Association

effective from 26 July 2000. On the basis of the rule book then in force NISA was entered on the list of trade unions on 15 August 2000.

13. The Joint Executive Council/NISA National Executive Committee, still with management representatives present, continued to consider amendments to the NISA rule book and in January 2001 sent to all News International employees a copy of the finalised version of the rule book together with nomination forms for the positions of NISA General Secretary and Chairman. As a result of the subsequent ballot Mr D Ferguson was elected Chairman and Mr D Holden elected General Secretary. Mr Holden took up his full time post as NISA General Secretary on 1 April 2001.

Assessment against the Criteria for Independence

14. In reaching my conclusion I have considered the evidence on NISA's standing in relation to all of the six criteria listed above (paragraph 6). I discuss them below under only five headings as the issue of employer provided facilities permeates virtually all of them.

History

15. News International played a key role in establishing and running the Employees' Consultative Committee and in the Working Party set up, after the publication of the Fairness at Work Proposals, to produce a more representative body. The subsequent establishment of Staff Associations owed much to management support and encouragement. This is recognised by NISA itself when, in response to my concerns, it stated that; "*NISA has never denied that its roots start in a committee which was appointed by management nor that it has progressed and grown by reason of management support.*" It has argued that the evidence clearly demonstrates that its

members have used Fairness at Work and the Employment Relations Act 1999 as a means by which to persuade management that NISA should develop and become the independent union which the National Executive now believes that it is. It further states; *“What is also true is that it is only relatively recently that the union could claim to be independent of News International. Whilst the history is relevant it is the current state of NISA which is under consideration and which is important in making the decision on the issue of independence.”* That is correct. But what I have to decide is whether, using the criteria established in the Blue Circle appeal, sufficient time has elapsed to permit NISA to attain freedom from the domination of the employer which has clearly existed until recently.

16. Until very recently meetings of the Joint Executive Council/NISA National Executive Committee were co-ordinated, attended and minuted by members of News International Human Resources Department. The minutes record that, whilst parts of the meeting were closed to management representatives, a contribution was made to the matters under discussion by management present. The Minutes of the Staff Association meetings at the three main plants also indicate attendance and participation by management representatives. However when I met the union representatives I was told that at the most recent meeting of the NISA Executive (held on 28 February 2001) the management representative from the Human Resources Department attended by invitation. While the minutes for the previous meeting had been taken by NISA, the minutes of the meeting on 28 February (the last meeting before their face to face meeting with me) had been taken by a member of Human Resources.

17. In the past News International has been involved in both the provision and funding of training for News International Staff Association officials and representatives. Most

recently the NISA representatives have chosen the course which was then provided at company expense. This course was TUC approved. NISA is currently engaged in balloting for representatives to its executive and will now take responsibility for the provision and funding of the training of its officials.

Membership

18. NISA is a single company trade union. Whilst this is not, in itself, a critical factor, it is nevertheless one which I must take account of in respect of the present application.

19. Like its predecessors the Human Resources Committee, the Employees' Consultative Council and News International Staff Association, membership of NISA has currently been automatically granted to every employee of News International. Whilst the rules provided for membership to be available to those engaged in a range of occupations involved in the newspaper and magazine industries, the formal recruitment of any members, whether employees of News International or otherwise, has yet to take place.

20. As a consequence of this NISA has no membership subscriptions or membership income.

Organisation and Structure

21. Currently NISA is dependent upon the employer for communications with its membership. There is no list of members available to NISA and any mailings to the membership has to be undertaken by the employer. Apart from the postal services other means of communication within the union are also dependent on the employer (eg the staff newspaper and the internal e-mail system). The union has argued that, with the appointment of a full time General Secretary, the compilation of a membership list will now commence. This will be a significant task unless the employer provides some

assistance. It has also been stated that an alternative means of communication is for the various representatives to speak directly with the employees. Whether this is by means of meetings or by individual contact the communication will still be dependent on the employer's goodwill and facilities to be anywhere near effective.

22. The minutes of the Joint Executive Council meeting held on 8 August 2001 records that, in response to a question of whether someone who took the post of General Secretary of NISA could return to NI, Ian Macdonald, Managing Director - Operations, "*had made a statement that anyone who applied for the job would be offered a job if he wanted to come back.*" The current General Secretary has made it clear that he has no intention of ever returning to the employment of News International.

Finance

23. Without any subscription income or any other assets both the News International Staff Association and its successor, NISA, have been dependent on the employer for meeting any costs incurred in the course of their activities. This applies particularly to the initial start up costs in establishing NISA.
24. In order to achieve independence from the employer the Joint Executive Council persuaded the employer to provide funding for NISA. The amount proposed was to equate with approximately the cost to News International in continuing to run the News International Staff Association for the next two years. On the 15 August 2000 a trust deed was established by News International PLC where by a sum of £250,000 was used to establish the NISA Trust. A schedule to the trust provides; "*This trust is established for the purposes of providing financial independence to the Staff Association and the trust fund may accordingly be applied for all purposes of the Staff Association.*" Three

trustees were appointed, one by the employer, one by NISA and one jointly. The joint trustee is NISA's solicitor. Recently the employer has indicated that the company would be willing to amend the trust deed to remove any influence it has over the appointment of trustees.

25. Whilst the trustees are free to use the trust for the purposes of funding NISA's activities there is one restriction. This is that in the event that NISA shall at any time cease to exist as an independent (which, to avoid confusion, seems to mean "separate") undertaking the balance remaining in the trust is to be returned to News International. This applies specifically if NISA should decide to amalgamate with, or transfer its engagements to, another union.
26. A significant proportion of the NISA start up costs (rule book, statutory fees, travel expenses etc.) were funded by the employer. The Association has now started to draw on the trust fund to meet legal, accommodation, salary and all other costs. There is no other income or funding available to the Association.
27. It is the view of NISA that the trust fund, provided by News International, will provide sufficient funds to enable it to operate for up to two years without any other funding. The Association intend to introduce a subscription payment from October 2001 and are faced with setting an appropriate level which will provide a source of income but which will not deter membership. The intention will be to use the trust fund as a buffer so as to permit an initial relatively low level of subscription which could then be gradually increased over a period of time. The view was expressed that if there were difficulties in attracting subscribing members to a service which was previously available at no cost, and this resulted in funding problems, News International could be approached in two years time

to make further funding available to NISA.

Negotiating Record

28. The various predecessors of NISA have only been able to negotiate on pay and conditions since the establishment of the Employee's Consultative Council in 1995. During that time five significant agreements were reached. None of the objectors disputed that the Millennium bonuses and the 2000 three year pay award were good for the membership. However there is a real difficulty in assessing their significance as the union could have been pushing at the open door of a compliant employer who wished them to appear to be effective negotiators. I note also that both of the deals took effect before NISA was formed and while the Staff Association was still very much management's creature.

Conclusions

29. It is clear, and recognised by the Association, that the employer has played a close and controlling role in the development of the organisation from its inception in 1988 as the Human Resources Committee until its present format. It is only recently that NISA has taken full responsibility for the organisation and the minute taking of the meetings of its Executive Committee. The union has also admitted that it was not until 1995, when the News International employees were able to elect their own representatives to the Employees' Consultative Council, were the first steps taken towards any form of independence from the employer. At that time I have no doubt that the Association was, in the words of the Act "under the domination or control of an employer." I do not believe that is any longer the case. But it is my view NISA has still some way to go before it can meet the statutory definition of independence by removing itself from being liable to interference by the employer. In the words of Lord Denning in Squib:

“One has to envisage the possibility that there may be a difference of opinion in the future between the employer and the staff association. It does not matter whether it is likely or not, it may be completely unlikely, but one has to envisage the possibility of a difference of opinion Whatever it may be, there may be a difference of opinion. It may be a mere possibility. But when it arises, the questions have to be asked. What is the strength of the employers? What pressures can they bring to bear against the staff association? What facilities could they withdraw? The section contemplates that the association may be liable to interference arising out of financial or material support or by any other means whatsoever.”

When I consider these questions it appears to me that there is no doubt NISA is exposed to a risk of interference by the employer that cannot be described as insignificant.

30. One major weakness it faces is its membership basis where it has two significant problems. In the first place, because it has no membership register, it is dependent on the employer for communicating with the bulk of its membership. Whilst I have no doubt that the employer will continue to mail Association papers etc. to its employees there is always the liability that it may, at some time, object to the content of one of the mailings and so refuse to allow its services to be used. NISA could use an alternative means of communicating with its members but I am far from convinced that the processes that they have suggested would ensure that any message that they wanted to send out would at present reach the bulk of the membership speedily and clearly.

31. The second problem is that so far the Association has no idea of the support that it has. Working on the basis that all employees of News International are founder members of NISA effectively means that membership of the union is a benefit of employment by News International. Until NISA starts to recruit members by asking for a commitment to the organisation by the completion of a membership form and the payment of a subscription will there be any real idea of the depth of support. There are no doubt many who sympathize with the aims and objectives of NISA, but whether their sympathies will extend to the payment for services which were previously free remains to be seen. I also believe that some employees are already members of other trade unions and whether they will wish to subscribe for dual membership is not clear.
32. In the course of discussions with NISA the point was made on several occasions that the majority of those answering staff attitude surveys and of those voting in the election of NISA officers expressed support for NISA and its values rather than for traditional trade unions. This may well be the case but it is not relevant to the decision I have to make. It seems to me perfectly possible that employees might favour being represented by an organisation that costs them nothing and which has the backing and support of management. Such an organisation, while arguably consistent with some views of partnership between employers and trade unions, is though unlikely to satisfy the statutory test of independence which I have to apply.
33. This brings me to my other major concern, the financing of the NISA operation. At the present it is entirely dependent on the trust fund established by News International. Much has been made of the trust deed, the appointment of trustees and the complete freedom that NISA thus has to use the trust funds for its own purposes. I have to say that I would

view with some major reservations the independence of any trade union which had been established and was dependent on a sum of money gifted to it by the employer. But the fund supporting NISA has not been donated as a gift, it has been given under the restrictions of a trust deed. The restriction being that NISA will forfeit the trust fund should it amalgamate with another union. I recognise that the restriction might be considered negligible but nevertheless the money is in fact a “gift with strings”. I accept that the sum involved, £250,000, may be no more than it cost News International to fund the predecessor bodies to NISA and that there may be many reasons why an employer might want to fund a trade union. That however is not a matter for me. What is, is the fact that at the present NISA is entirely dependent on the money provided by News International.

34. This reliance on the trust fund is compounded by the fact that at the moment there is no other source of income and, until subscription income is generated, NISA will remain dependent on the trust fund. Unfortunately no one has a clear idea as to how much income membership subscription will bring in. I think it is generally accepted that the trust fund is likely to provide sufficient funding to allow NISA to operate for two years with no other income coming in. The trust fund will obviously last longer once subscriptions are introduced from October 2001. But the executive is faced with a difficult decision in this matter, set subscriptions too high and “founder members” will not sign up, too low and there will be a drain on the trust fund. Once NISA reaches the position where it is no longer financially viable it will, as was suggested to me by a member of the current executive, have the option of approaching News International for further funding. While the union is at least potentially dependent on management finance for its effective

operation it is hard to see how it can be free from management influence whether such influence is explicitly or implicitly expressed or merely in the minds of the union's members.

35. It is quite clear to me that the officers and representatives of NISA that I have met believe that their organisation is independent and are determined to operate it as such. However to adapt the words of Mr Justice Cumming-Bruce there must be a heavy onus on a body with a history such as NISA's to show that it has shaken off the paternal control which brought it into existence and fosters its growth and which joined in drafting the very rules by which the control appears to have been relaxed. The process of lifting that burden and asserting genuine and effective independence after some years of such domination is likely to be protracted.
36. I have weighed the strength of the employers, the pressures they could bring against the staff association and the facilities they could withdraw against the membership base, structures and financial resources of the staff association. At this time I do not believe that NISA has reached the stage where it is able to satisfy the statutory definition of independence. It has begun to emerge from a period of domination and control by the employer but it has not yet reached the stage where it can be said that the vulnerability to interference by the employer is insignificant. I have therefore reached the decision that NISA is not an independent trade union within the definition set out in section 5 of the 1992 Act.
37. Under section 9(2) of the 1992 Act a trade union aggrieved by my refusal to issue it with a certificate may appeal to the Employment Appeal Tribunal.

E G WHYBREW

Certification Officer