D/31/07

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

MR P ROBERTS

v

NATIONAL ASSOCIATION OF SCHOOLMASTERS UNION OF WOMEN TEACHERS

Date of Decision: **16 November 2007**

DECISION

Upon application by Mr Roberts ("the Claimant") under section 55(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

I refuse to make the declaration sought by the Claimant that the National Association of Schoolmasters Union of Women Teachers breached section 47(1) of the 1992 Act by allegedly excluding the Claimant unreasonably from standing as a candidate in the elections to its National Executive in 2007.

REASONS

1. The Claimant is a member of the National Association of Schoolmasters Union of Women Teachers ("the Union" or "NASUWT"). By an application dated 2 June 2007 the Claimant made a complaint against his Union that he was unreasonably excluded from standing as a candidate in its 2007 elections to the National Executive. Following correspondence with the Claimant, he confirmed the complaint in the following terms:-

> *"that in its 2007 elections to its National Executive the NASUWT breached section 47(1) of the 1992 Act by unreasonably excluding Mr Roberts from standing as a candidate by virtue of rule 20(1)(a) of the rules of the Union"*.

2. I investigated the alleged breach in correspondence and a hearing took place on 29 October 2007. At the hearing, the Claimant was represented by Professor McColgan of counsel instructed by Mr Stein of Leigh Day & Co solicitors. The Claimant provided a witness statement and gave oral evidence. A witness statement was also submitted on the Claimant's behalf by a Mr Williams who did not attend the hearing. The Union was represented by Mr O'Dempsey of counsel instructed by Mr Cooper of Russell Jones & Walker solicitors. Mr J Bartlett, Deputy General Secretary, gave oral evidence for the Union and provided a witness statement. Two

bundles were prepared for the hearing by my office. Bundle one contained 152 pages of documents considered relevant by the parties. A further document was added to this bundle at the hearing at the Claimant's request. Bundle two contained 182 pages of legal authorities and the relevant rules of the Union. The Claimant produced two further authorities at the hearing. Each counsel produced a skeleton argument.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties I find the facts to be as follows:-

4. The Claimant is a teacher. He began his teaching career in the 1970s, at which time he joined the National Union of Teachers (the "NUT"). In 1996 he also joined the NASUWT and the Association of Teachers and Lecturers (the "ATL"). He was by then persuaded that the best way forward for the teaching unions was for them to merge and have one voice. By 1997 he was the Branch Secretary in Brent for both the NUT and ATL. By 2002 he had been elected to the National Executives of the NUT and ATL. In 2004 he was narrowly defeated in the election for the post of General Secretary in the ATL. In 2004 and 2006 he stood unsuccessfully for election to the National Executive of the NASUWT. In January 2006, he was elected as Branch Secretary for the NASUWT in Brent (having previously served for a few months as Acting Branch Secretary). Accordingly, by 2006, the Claimant was a member of the NASUWT, NUT and ATL. He was the Branch Secretary for all three unions in Brent and he was a member of the National Executives of the NUT and ATL.

5. Since about 1996 the Claimant has been advocating the amalgamation of the three unions to which he belonged. He is the co-founder and present Organising Secretary of Professional Unity 2000, a body which was established to campaign for that aim. The Claimant maintains that the majority of NASUWT members support the aims of Professional Unity 2000 even if this is not the position of most activists within the Union.

6. The NASUWT has adopted a formal policy of opposing amalgamation with the other two unions. In 2002 and 2003 there were motions put to its Annual Conference to change that policy but both motions were defeated. The three unions not only compete with one another for members on a day to day basis, but they also have historical and policy differences. The most significant policy difference in recent years has concerned the approach of the unions to a government initiative in 2003 known as Social Partnership. The NASUWT and ATL agreed to participate in this initiative, but the NUT did not. Subsequently, the NUT engaged in a campaign of what has been called aggressive criticism of the NASUWT for its participation. Although the Claimant disagreed with this campaign, it caused considerable ill-feeling between the two unions. There are also policy differences between the NASUWT and ATL over such issues as the testing of pupils (SATS), off-site educational activities and whether persons other than career teachers should be recruited.

7. The NASUWT respects the principled position taken by the Claimant over the merger issue and acknowledges his right to advocate it. The Union wished to make clear that it does not question the Claimant's good faith.

8. In 2005 the National Officers Committee of the NASUWT considered whether any amendments might usefully be made to the Rules of the Union. Amongst other matters, they had in mind the lessons to be learned from the recent cases that had been brought against the Union to the Certification Officer, to the Northern Ireland Certification Officer and to the Industrial Tribunal in Northern Ireland. By December 2005 the draft amendments were made known and the Claimant e-mailed the General Secretary, Ms Chris Keates, to protest about a proposed rule which would have the effect of excluding him from being a candidate in NEC elections if he remained in his elected positions within the ATL and NUT. The General Secretary responded by e-mail dated 9 January 2006 in which she stated:

> *"Whereas there may be some matters where ATL, NUT and ourselves act in tandem, the three unions compete for members within the teaching profession and from those joining it. The principal executive bodies of each union regularly make decisions that may impact on their ability to recruit and retain NASUWT members. It is therefore not unreasonable to exclude from candidature of membership of the NEC someone in your position, when decisions of this nature are a regular feature of the NEC.*
>
> *It is not unreasonable for NASUWT to take appropriate steps to ensure that those who are on the NEC are not in a position where they have competing interests by reason of their membership of the principal governing body of or another body within a competing organisation.*
>
> *We are advised that a member of the NEC, as of any principal executive body of a trade union, owes fiduciary duties to our members, and that it may also not be consistent with such duties for a member of the NEC to hold office in a competing organisation.*
>
> *For these reasons we consider that the exclusion is reasonable and if you choose to challenge the exclusion, your challenge will be defended vigorously."*

9. In January 2006 the National Executive of the Union approved 26 proposed amendments to the Rules of the Union and arranged for them to be debated at a Special Conference to be held in Birmingham on 29 April. It had originally been envisaged that the amendments would be debated at the Annual Conference to be held between 11 and 15 April but the NEC decided that the number and importance of the proposed amendments required a Special Conference to be held.

10. On 25 April 2006 the Claimant wrote to the General Secretary requesting that the proposed rule in question be withdrawn. In that letter he commented, *"I am under no illusion that it is me that has prompted this and it is at least primarily aimed at me"*. The General Secretary did not respond to that letter.

11. At the Special Conference on 29 April 2006 the proposed amendments were debated. Most were adopted but some were defeated. The Claimant participated in the debate on the amendment to which he particularly objected. The proposed new rule was approved and this is now Rule 20(1)(a). It provides:

Rule 20. Elections
(1) Eligibility
(a) No member shall be eligible to stand in an election for any elected office at local or national level within the Union if s/he is a member of the principal governing body of, or an elected officer of, another trade union representing persons who are eligible for membership of the Union. On becoming a member of the principal governing body of, or an elected officer of, another trade union representing persons who are eligible for membership of the Union, a member of the Union shall immediately vacate any elected office at local or national level within the Union.

12. On 9 May 2006 the Claimant e-mailed the General Secretary to find out the implications of the rule change to his position as Branch Secretary. The General Secretary sent a holding reply within 20 minutes and a substantive reply on 12 June. She explained, amongst other things, that he could remain in office as the Branch Secretary in Brent until the time of the next election to that position, which was to be in January 2007.

13. In November 2006 the General Secretary sought nominations for the National Executive Elections 2007/2008. The nominations were to be received by 31 January 2007 and the ballot results were to be declared on 6 March.

14. On 18 December 2006 the Claimant e-mailed the General Secretary stating that he wished to stand in the forthcoming NEC elections but that he was prevented from doing so by the recently introduced Rule 20(1)(a). He asked the General Secretary to reconsider the application of that rule and indicated his intention of mounting a legal challenge if he was prevented from standing. There is no reply to that e-mail in the bundle.

15. The Claimant commenced this complaint by a Registration of Complaint Form dated 2 June 2007.

The Relevant Statutory Provisions

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

S.47 Candidates
(1) No member of the trade union shall be unreasonably excluded from standing as a candidate.

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

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

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

S.54 Remedy for failure to comply with requirements: general

(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55(to the Certification Officer)…

(2) An application under those sections may be made –

(a) by a person who is a member of the trade union (provided, where the election has been held, he was also a member at the time when it was held), or
(b) by a person who is or was a candidate at the election;

and the references in those sections to a person having a sufficient interest are to such a person.

S.55 Application to Certification Officer
(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

The Relevant Union Rules

17. The Rules of the Union which are relevant for the purpose of this application are as follows:-

Rule 20. Elections
(1) Eligibility
(a) No member shall be eligible to stand in an election for any elected office at local or national level within the Union if s/he is a member of the principal governing body of, or an elected officer of, another trade union representing persons who are eligible for membership of the Union. On becoming a member of the principal governing body of, or an elected officer of another trade union representing persons who are eligible for membership of the Union, a member of the Union shall immediately vacate any elected office at local or national level within the Union.

(4)
(g) No member shall be eligible to stand in an election for the position of General Secretary if s/he is a member of the principal governing body of, or an officer of, another trade union representing persons who are eligible for membership of the Union.

A Brief Summary of the Submissions

18. For the Claimant, Professor McColgan submitted that the Union could not avail itself of the defence provided for in section 47(3) of the 1992 Act as, in the words of the commentary in Harvey on Industrial Relations and Employment Law; the Union was operating "*a blacklist in the guise of a class*". She argued that the Union's sole purpose of introducing new rule 20(1)(a) was to exclude the Claimant and that, for the purposes of section 47(3), there cannot be a class where the defining criteria are chosen for the purposes of excluding a specific individual. Professor McColgan did not submit that the criteria for exclusion used in Rule 20(1)(a) could never be a valid class for the purposes of section 47(3) but rather that they fell outside the protection of that sub-section on the facts of this case as their purpose was to exclude the candidature of the Claimant. She maintained that the intention behind Rule 20(1)(a) was clear from a number of factors. Firstly, she submitted that the Claimant was the only person known to hold office in one or more of the other relevant unions and therefore the only person who would be excluded by the new rule. Secondly, the explanations advanced in the witness statement of Mr Bartlett for the new rule being proposed did not hold water. He had stated that the Union was concerned about three named individuals and others who were seeking or might seek office in a competing union. However, under cross-examination, Mr Bartlett

had withdrawn his statement about one of these individuals and had been unable to provide any evidence to support his assertion about the others. Thirdly, Mr Bartlett's witness statement asserts that the activities of the Claimant were not the "sole motivation" for the proposal to amend the Rules, thereby accepting that it was a motivation. Fourthly, Professor McColgan submitted that if the Union was indeed concerned about confidentiality and conflicts of interest, there were other mechanisms open to it to deal with these concerns without imposing a blanket exclusion. Fifthly, she referred to the Claimant's evidence that he had been told by two members of the Executive Committee (EC) that the proposed amendment was being talked about as the "Get Hank" rule. Hank is the name by which the Claimant is known. Sixthly, the reason for excluding the Claimant was that he was seen as a real threat by those in the Union's hierarchy who were viscerally opposed to Professional Unity 2000 and the idea of a single union for teachers. Professor McColgan then addressed section 47(1) of the 1992 Act on the basis that, if I dismissed the Union's arguments under section 47(3), I would need to consider the reasonableness of the Claimant's exclusion in accordance with section 47(1). Professor McColgan argued that the reasons advanced by the Union for introducing Rule 20(1)(a) were spurious and that an exclusion aimed at excluding a specific individual cannot be reasonable. She further argued that even if the Union's reasons were to be accepted at face value, they were not a proportionate response to the problems that they purported to deal with, as other solutions to those problems could have been found. It was argued that the new rule could be properly categorised as a sledgehammer being applied to something which can at most be described as a nut. Professor McColgan submitted that in all the circumstances, the inference that should be drawn is that Rule 20(1)(a) was indeed being used as a guise for a blacklist, in the words of her skeleton argument, "*as a deliberate attempt to thwart the democratic process by excluding Mr Roberts and other (currently hypothetical) powerful advocates of professional unity from gaining elected office within the NASUWT and so threatening the sectarian interests of the current hierarchy*".

19. For the Union, Mr O'Dempsey argued that there was no breach of Section 47(1) of the 1992 Act as the Claimant had been excluded by a rule of the Union which satisfied section 47(3), thereby deeming the Claimant's exclusion from the relevant election to have been reasonable. Mr O'Dempsey argued that the criteria established by Rule 20(1)(a) for excluding potential candidates were both objective and predictive. He maintained that the limitation imposed by the statute on the selection of "a class" is that the rule must not permit the class to be determined by the subsequent and subjective choice of the union, as was the case in **Ecclestone v NUJ (1999) IRLR 166**. Mr O'Dempsey argued that the members of the class excluded from candidature by Rule 20(1)(a) were not chosen by the Union. They were, in effect, self-selecting in that it was their choice to stand for election in other unions. In Mr O'Dempsey's submission, section 47(3) does not permit an examination of the reasons for the adoption of the rule in question but that, in any event, the case advanced on the Claimant's behalf fell a long way short of establishing bad faith on cogent and coherent evidence. Mr O'Dempsey then addressed section 47(1) of the 1992 Act on the basis that, if I dismissed the Union's arguments under section 47(3), I would need to consider the reasonableness of the Claimant's exclusion in accordance with section 47(1). Mr O'Dempsey asserted that the Claimant was not unreasonably excluded from standing as a candidate on the following grounds. He

argued that the exclusion was pursuant to a democratically approved rule; that the vote of the Union introducing the rule reflected the reasonable expectation of members; that the excluding criteria reflects the membership nature of the rules and the need to avoid potential conflicts of interests for members of the NEC; that it is reasonable to exclude a person who is an elected officer or post holder within a competitor union; that the exclusion minimises the risk of a person being elected who will have conflicts of interest or loyalty, having regard in particular to the competition with other unions for membership and that the rule is a proportionate means of protecting the Union's position as it is restricted to elected positions only. In addition, Mr O'Dempsey pointed to the different approaches that the three unions had adopted to various strategic issues and the NASUWT's express policy to maintain its independence from other unions. He further argued that an officer of the Union has a fiduciary duty to the Union and that by entering into an engagement in which he or she has or could have a conflict of interest, he or she would be in breach of that fiduciary duty. In Mr O'Dempsey's submission, it could not be unreasonable to exclude a member from being a candidate in circumstances in which, if elected, he would be in breach of his fiduciary duty.

Conclusions

20. The Claimant alleged that the Union breached section 47(1) of the 1992 Act by excluding him from standing as a candidate in its 2007 National Executive Elections. Section 47(1) provides as follows:

> Section 47(1)
> "*No member of the trade union shall be unreasonably excluded from standing as a candidate."*

21. However, the exclusion of a member from standing as a candidate is deemed not to be unreasonable if section 47(3) is satisfied. Section 47(3) provides as follows:

> Section 47(3)
> *"A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all the members are excluded by the rules of the union.*
>
> *But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded."*

I will therefore deal firstly with the question of whether the Claimant's exclusion is deemed not to have been unreasonable by section 47(3).

22. The Union rule by which the Claimant was excluded from standing in the 2007 National Executive election is Rule 20(1)(a). This provides as follows:

> ***Rule 20. Elections***
> *(1) Eligibility*
> *(a) No member shall be eligible to stand in an election for any elected office at local or national level within the Union if s/he is a member of the principal governing body of, or an elected officer of, another trade union representing persons who are eligible for membership of the Union. On becoming a member of the principal governing body of, or an elected officer of, another trade union representing persons who are eligible for membership of the Union, a member of the Union shall immediately vacate any elected office at local or national level within the Union.*

23. It was common ground that Rule 20(1)(a) establishes a class of which all the members are excluded by the rules of the Union. It was also common ground that the rule provides criteria for establishing exclusions which are objective and predictive, in the sense that any member might be aware of his or her position prior to seeking candidature. Indeed, Professor McColgan conceded that Rule 20(1)(a) would ordinarily satisfy the requirements of section 47(3). In her submission, however, the Rule did not satisfy section 47(3) on the facts of this case as it had been introduced in bad faith specifically to exclude the Claimant. It created, in her submission, a blacklist in the guise of a class. Applying this submission to the words of section 47(3), I must consider, on the facts of this case, whether Rule 20(1)(a) "*…provides for such a class to be determined by reference to whom the union chooses to exclude…*" on the grounds of the Union's alleged bad faith in adopting this new rule.

24. In considering this issue, I observe that the ability of members to stand in statutory elections is self-evidently an important aspect of membership of a trade union which Parliament has recognised in section 47. On the other hand, by inserting the deeming provision in section 47(3), Parliament has also recognised the right of trade unions to determine for themselves whether any particular class of member should be excluded from being a candidate. It is, however, significant that section 47(3) only applies if the exclusion is contained in a rule of the union. It is not sufficient if it is agreed by the senior officers or even by the National Executive Committee. Typically, as in the case of the NASUWT, an amendment to the rules requires a motion to be carried at an Annual or Special General Meeting with a two-thirds majority. It is often said that an Annual or Special General Meeting of a union is its parliament, at which the members have the ultimate say through their elected delegates. The 1992 Act, in effect, recognises the right of such a body to decide upon the reasonableness of the criteria for exclusion from candidature. Even so, not even an Annual or General Meeting can agree to a rule change which enables the excluded class to be determined by reference to whom the union chooses to exclude.

25. On the facts of this case, I find that Rule 20(1)(a) provides for an excluded class, the membership of which is determined objectively and predictively. The Claimant falls within the excluded class and accordingly his exclusion is prima facie deemed by section 47(3) to be not unreasonable under section 47(1). However, Professor McColgan argues that such an analysis can be vitiated by bad faith on the part of the Union and that the bad faith in this case is illustrated by the Claimant's understanding that the purpose of Rule 20(1)(a) was to "Get Hank".

26. In my judgment, a rule of a union which appears to meet the provisions of section 47(3) may be impugned on the grounds of bad faith but only if the bad faith is such to establish that, on its true interpretation, the rule provides for the class to be determined by reference to whom the union chooses to exclude. The onus of displacing the ordinary meaning of such a rule in this way by reference to bad faith is a difficult one to discharge. It is one which is made more difficult by the fact that the rule will typically have been adopted by a special majority at an Annual or Special General Meeting and the motive of the person drafting the rule amendment or the person proposing the amendment might not be the reason, let alone the main reason, that it was approved by the delegates at Conference.

27. In my judgment, the Union held a genuine and legitimate concern that there would be an actual or potential conflict of interest should it continue to permit members to hold elected positions who simultaneously held elected positions in competing unions. I accept the Union's evidence that there is intense competition between the three unions for members and that there are deeply held policy differences between them. Indeed, in a testimonial letter praising the Claimant of 15 February 2007, Mr Greenshields, National Junior Vice President of the NUT, wrote, *"…it is not an easy path to be an activist and elected officer in more than one union ... We all know there are tensions between teacher unions over policy and strategy ... There are also tensions over recruitment and retention of members"*. There could well be other potential solutions to the problems caused by the perceived conflict of interest, but the existence of alternative solutions is not conclusive that the solution chosen by the Union was chosen in bad faith. Further, whilst it is possible that the policy differences between the three unions might change over time, that possibility does not preclude present decisions being taken on the present conditions.

28. On the facts of this case, I have no doubt that those who drafted the proposed rule 20(1)(a) had the Claimant in mind. He was after all the only person known at that time to be a member of the class to be excluded. I also do not doubt the genuineness of the Claimant's belief that the new rule was aimed specifically and exclusively at him for the purposes of denying him an additional platform to advance the views of Professional Unity 2000. However, it does not follow that the class identified in Rule 20(1)(a) was determined with the sole purpose of excluding the Claimant.

29. In my judgment, the Claimant has not established that the Union acted in bad faith in a way which requires Rule 20(1)(a) to be read as a rule which provides for the excluded class to be determined by whom the Union chooses to exclude. In this connection it is significant that the Claimant was unable to produce any witnesses or direct documentary evidence to support his submission of bad faith. It is also significant that the decision to amend the Rules was made by a Special Conference and no evidence was advanced which suggested that the delegates at Conference acted in bad faith. I was unconvinced by the arguments advanced by Professor McColgan, based on the circumstances which preceded the Special Conference, that the rule change adopted by Conference could be successfully impugned on the grounds of bad faith. In my judgment, Rule 20(1)(a) was adopted in good faith to meet the Union's genuine and legitimate concern that there would be an actual or potential conflict of interest should it continue to permit members to hold elected positions who simultaneously held elected positions in competing unions. I find that, whilst the Claimant was the current example of the problem with which the rule was intended to deal, the rule was not adopted with the sole purpose of excluding the Claimant.

30. Accordingly, in my judgment, the Claimant was not excluded from being a candidate in the 2007 National Executive elections in breach of section 47(1) of the 1992 Act as his exclusion was deemed to be not unreasonable by section 47(3). The Claimant belonged to a class of members all of whom were excluded by Rule 20(1)(a) from being candidates, namely those holding elected office in a competitor union. Further, Rule 20(1)(a) does not, in my judgment, create a class of members which is determined by reference to whom the Union chooses to exclude.

31. Having regard to my finding on the application of section 47(3) of the 1992 Act, it is not necessary for me to consider whether the Claimant's exclusion from standing as a candidate was unreasonable when considered at large. However, should I be wrong about the application of section 47(3), I would have found that the Claimant's exclusion as a candidate was not unreasonable for the purposes of section 47(1). In so deciding, I have balanced the factors to which I have referred and have concluded that the Union had a legitimate interest in preventing actual or perceived conflicts of interest among its elected officials and post holders, that a motion highlighting that concern was debated by the highest body within the Union's constitution and that body adopted in good faith the measure which had the effect of excluding the Claimant. I have had regard to the importance of members being able to stand for elected office but weighed against this the submission that the Claimant could at any time have stood for election within the NASUWT if he had resigned from his positions within the competitor unions.

32. For the above reasons I refuse to grant the declaration sought by the Claimant that the National Association of Schoolmasters Union of Women Teachers breached section 47(1) of the 1992 Act by allegedly excluding the Claimant unreasonably from standing as a candidate in the elections to its National Executive in 2007.

David Cockburn

The Certification Officer