D/50-54 /11-12

DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE UNDER SECTIONS 47(1) and 108A (1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

(1) Mr Beaumont

(2) Mr Smith

v

Unite the Union

Date of Decision: **1 September 2011**

DECISION

Upon applications by Mr Beaumont and Mr Smith ("the claimants") under sections 47(1) and 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

Mr Beaumont

1. I refuse Mr Beaumont's application for a declaration that Unite the Union ("the Union") breached rule 6.2 of its rules by not allowing him to stand as a candidate in the 2011 National Executive Committee election.

2. I refuse Mr Beaumont's application for a declaration that the Union breached section 47(1) of the 1992 Act by allegedly unreasonably excluding him from standing as a candidate in the 2011 National Executive Committee election.

Mr Smith

3. I refuse Mr Smith's application for a declaration that Unite the Union breached rule 6.2 of its rules by not allowing him to stand as a candidate in the 2011 National Executive Committee election.

4. I refuse Mr Smith's application for a declaration that the Union breached section 47(1) of the 1992 Act by allegedly unreasonably excluding him from standing as a candidate in the 2011 National Executive Committee election.

REASONS

1. Mr Beaumont brought his application as a member of Unite the Union ("the Union" or "Unite"). He did so by a registration of complaint form which was received by email at my office on 28 January 2011. Mr Beaumont alleged breaches of Union rule 6.3 and section 47(1) of the 1992 Act.

2. Following correspondence with Mr Beaumont the complaints were confirmed by him in writing. At the hearing, I allowed his first complaint to be amended to refer instead to rule 6.2. His final complaints were therefore as follows:

   Complaint 1
   On or around 28 January, the union breached union rule 6.2 by not allowing Mr Beaumont to stand as a candidate in the forthcoming EC election. Mr Beaumont was at the time a Branch Office holder, he was Branch Secretary of Hounslow and Feltham 1404M.

   Complaint 2
   The union breached section 47(1) of the 1992 Act by unreasonably excluding Mr Beaumont from standing as a candidate in the 2011 National Executive Committee Election.

3. Mr Smith also brought his application as a member of Unite. He did so by a registration of complaint form which was received by email at my office on 2 February 2011. Mr Smith alleged breaches of union rule 6.3 and section 47(1) of the 1992 Act.

4. Following correspondence with Mr Smith the complaints were confirmed by him in writing. At the hearing, I allowed his first complaint to be amended to refer instead to rule 6.2. His final complaints were therefore as follows:

   Complaint 1
   On or around 28 January, the union breached union rule 6.2 by not allowing Mr Smith to stand as a candidate in the forthcoming EC election. Mr Smith was at the time a Branch Office holder, he was Branch Secretary of Newcastle Central 1901.

   Complaint 2
   The union breached section 47(1) of the 1992 Act by unreasonably excluding Mr Smith from standing as a candidate in the 2011 National Executive Committee Election.

5. I investigated the alleged breaches in correspondence. A hearing took place on 10 August 2011. At the hearing, the claimants were represented by Mr Jody Atkinson of counsel. Both claimants gave evidence in accordance with their written witness statements and were cross-examined. The Union was represented by Mr Peter Edwards of

counsel instructed by Mr Paul Evans of Thompsons Solicitors. Evidence for the Union was given by Mr Andrew Murray, its Chief of Staff, in accordance with his written witness statement. Mr Murray was cross examined. There was in evidence a 271 page bundle of documents consisting of letters and other documentation supplied by the parties for use at the hearing, including the rules of the Union. One additional document, submitted by Mr Beaumont, was added to the bundle at the hearing. An application on Mr Beaumont's behalf to adduce a further 77 pages of documentation was withdrawn on the basis that the issues that the documents were intended to establish were not going to be the subject of cross-examination by the Union. Mr Atkinson and the Union each provided skeleton arguments.

Findings of Fact

6. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follow: I set out these findings under four headings; the facts relating to Mr Beaumont's application, the facts relating to Mr Smith's application, the structure of the Union and the origins of rule 6.

Mr Beaumont

7. Mr Beaumont has been a member of the Union or its predecessors since 1984. At the time of the formation of Unite the Union, he was a member of AMICUS. He works in the field of IT and computer consultancy and has been a self-employed computer consultant since about 1999.

8. Mr Beaumont is a member of the Hounslow and Feltham (1404M) branch of the Union which has, since 2009, incorporated the Hayes branch. It has about 267 members of which Mr Beaumont says only about seven are active. Its branch meetings are frequently inquorate, with less than five members in attendance, or only just quorate. It is nevertheless a functioning branch. Despite being described as a local branch, many of its members live outside Greater London with some living as far away as Birmingham and Scotland. Mr Beaumont has been its Branch Secretary or Chair since shortly after 1984 and has, most recently, been its Branch Secretary since about 2006.

9. By rule 7.1 of the rules of the Union, members in employment are allocated to the Industrial Sector in which they are employed. Mr Beaumont considered that he had once belonged to the Electrical Engineering and Electronics Sector but accepted at the hearing that he had been allocated to the Services and General Sector. This was because the Union had not been provided with a name for Mr Beaumont's employer and/or a workplace. The Services & General Sector is the default sector when this information is not given.

10. Mr Beaumont's application form and witness statement describes a number of points of conflict between himself and AMICUS which he

maintained carried over into Unite the Union. He referred to the five or six applications that he had brought to the Certification Office against AMICUS. He referred to the ten or so requests to inspect accounting records that he had made to AMICUS since 2002. He referred to the websites he had set up which had allegedly exposed corruption and malpractice in AMICUS and now in Unite, which websites had been the subject of union criticism and solicitors' letters. He referred to the evidence he gave to an Employment Tribunal on behalf of a dismissed union employee. He referred to his expulsion from AMICUS in 2002 and his subsequent successful tribunal claim to be reinstated, with compensation awarded by the EAT. Most recently, he referred to his support for a political grouping within Unite known as Grass Roots Left which opposes the views that allegedly prevail amongst the leadership of the Union and which supported Jerry Hicks in the 2010 General Secretary Designate election. It was suggested in Mr Beaumont's application form and in his witness statement that the real reason for his expulsion as a candidate in the Executive Council ("the EC") Elections in 2011 was this history of conflict and the resulting opposition to him within the hierarchy of the Union. The Union strongly denied that this background played any part in its decision to exclude Mr Beaumont as a candidate. It pointed out, amongst other things, that seven members of Grass Roots Left had stood in that election, albeit unsuccessfully, and that all those members who sought nomination on the basis that they were self-employed branch officials had been excluded. The Union's witness, Mr Murray, was not cross-examined on this point and no submissions were made to me on it by Mr Atkinson. On the material before me, I find that the decision to exclude Mr Beaumont as a candidate was not taken so as to penalise him personally for the conflicts and differences described above.

11. Nomination forms for the elections to the EC of the Union in 2011 were despatched on 4 January. The nomination period was to close on 7 February and the last date for receipt of nominations was 14 February.

12. Mr Beaumont informed the Union that he was seeking nomination by an email of 7 January 2011. He was seeking election as a regional representative for the London & Eastern Region. By an email of the same date, Ms Dykes of the Union asked him to confirm that he satisfied the requirement of rule 6, namely that he was an 'Accountable Representative of Workers'. In particular, he was asked to confirm his employment status and details of his employer. It was the understanding of the Union's administration that a Branch Secretary who was self-employed could not be an 'Accountable Representative of Workers' and was therefore ineligible to be a candidate under rule 6.

13. By an email of 10 January 2011, Mr Beaumont informed the Union that he was an elected Branch Secretary. He continued: *"I am self-employed in the Electronics & Engineering Sector. My employer is therefore me, though I work for various clients ..."* He stated that he worked from home.

14. By an email of 11 January 2011, Ms Dykes asked Mr Beaumont for certain information about his tax affairs, the majority of which Mr Beaumont provided the same day. On 13 January Ms Dykes emailed Mr Beaumont as follows: *"As you are self-employed, it will be necessary for the EC to consider whether, should you receive the required number of nominations, you are eligible to stand for this election. We will be in touch following the EC meeting."*

15. The EC meeting took place between 24 and 26 January 2011. This matter was discussed on either 25 or 26 January. The General Secretary, Mr Woodley, was also the Returning Officer for this election. He presented a short written report to the meeting on the progress of the election. The only contentious point that he raised was the application of rule 6 to candidates in the election. He stated:

> *"We have endeavoured to ensure that members fulfil the requirements of rule 6 i.e that they are accountable representative of workers. In this regard there are instances of members who are branch officials and have declared that they are self-employed. This appears not to fulfil the terms set out in the Guidance agreed by the EC in relation to Rule 6 and I will be requesting you to consider these at your meeting. In accordance with the Guidance a decision is required on the eligibility of such members to stand in this election."*

Mr Murray gave uncontested evidence about the content of the EC meeting, which is also briefly described in a short minute. The minute states that the General Secretary reported that a problem had arisen with nominations from two people who were ineligible to stand for election as a consequence of not being 'Accountable Representative of Workers' in line with the guidelines to rule 6 adopted by the EC in September 2008. He commented that they were not 'in employment'. The General Secretary considered that it would be inappropriate if the EC moved away from its earlier clear guidelines. The minutes further record that Mr Murray, as Chief of Staff, explained the Guidelines. He also made the point that whilst the EC had the scope and discretion to amend or discard the Guidelines, this must be done in an equitable manner and not in a way that might be seen as an abuse of power in the middle of an election process. He sought the EC's endorsement for the position outlined by himself and the General Secretary.

16. Upon reading this minute, Mr Beaumont and Mr Smith considered that they were the two members to whom reference had been made. In fact, the EC was unaware at that time that Mr Smith was seeking nomination. The two members to whom reference was made were Mr Beaumont and Mr Ivan Monkton. Mr Murray gave evidence, which I accept, that the discussion on this item on the agenda lasted about one hour, was quite heated and centred mainly on Mr Monkton, with Mr Beaumont being mentioned very little, if at all. Mr Monkton was a longstanding and well respected member of the TGWU General Executive Council and then of the Unite Executive Committee. He was also a member of the majority

grouping on the EC. Many EC members felt it would be unfair to exclude him from standing as he was a self-employed branch official. They argued that he should be allowed to stand even though a self-employed branch official, as should others in the same position such as Mr Beaumont. Other members argued that it would be wrong for the EC to make an exception to its recent guidelines out of sympathy for one of its own members. They argued that it was generally understood that branch officials who were self-employed could not stand and that it would be unfair to those who might otherwise have wished to stand (including some on the EC) if the guidelines were now changed. At the end of the debate the members of the EC voted by 26 votes to 21 votes (with 7 abstentions) to endorse the General Secretary's report. By doing so, the EC supported the position that branch office-holders who are self-employed are not 'in employment' for the purposes of the definition of what is an 'Accountable Representative of Workers' in rule 6.3.

17. Following the meeting of the EC, Mr Murray wrote to Mr Beaumont on 28 January 2011 as follows:

> *"Dear Mr Beaumont*
> *The Executive Council considered your intention to stand as a candidate in the forthcoming EC elections at its meeting this week. I am sorry to have to tell you that it decided that you did not appear to meet the criteria laid down in rule and EC guidance for eligibility to hold lay office in the Union,*
>
> *Rule 6 mandates that any candidate for election to lay office above branch level must be an 'accountable representative of workers'. The definition of this term includes branch office-holders in employment. EC Guidance on this rule adopted in September 2008 and already drawn to your attention defines this last term as being employed by a company or organisation that is not Unite the Union itself. Having considered all the evidence submitted by yourself regarding your employment situation, the EC decided that you do not fall within the terms of this guidance.*
>
> *This should not be taken as meaning that self-employed members are automatically ineligible to stand for lay office. Depending on particular industrial circumstances, it may well be possible for a self-employed member to be elected as a work place representative by another legitimate route. If you believe that you may be eligible to stand by virtue of some other such route within the terms of Rule 6 and the associated EC guidance, then please draw it to the attention of this office without delay. Should we receive such evidence before the close of nominations for this election on 14 February then any nomination you may have received will be allowed to stand. In default of this, any such nomination received will be ruled invalid and you will not be able to stand. For the present I am removing your name from the list of candidates seeking nomination for this election posted on the Union's website."*

18. A similar letter was written to Mr Monkton. He subsequently attended at his place of work and secured his election as a shop steward. He was then able to have his request for nomination reconsidered and was found to be eligible as a shop steward who was self-employed. He stood for election to the EC in 2011.

19. On the other hand, on 28 January 2011, Mr Beaumont raised an internal complaint about his exclusion as a candidate and, on the same date, made a complaint to the Certification Office.

20. On 8 February 2011, Mr McLuskey, who had by then been appointed as the Returning Officer, responded to Mr Beaumont's complaint. Mr McLuskey stated that being 'in employment' meant being the employee of a particular employer. He went on:

> *"In order for a branch officer to qualify in that capacity as an 'accountable representative of workers' they must be "in employment". Therefore, because you are not 'in employment' you do not come within the definition of the term 'accountable representative of workers'. Further, even if you were in employment by being self-employed (which you are not), you would not be a "paid employee of a company or organisation which is not Unite the Union", as required by the EC guidance on rule 6.3. You are therefore not entitled to stand for election to the Executive Council. The Union has not acted in breach of rule 6.3."*

Mr Smith

21. Mr Smith began his working life in 1970 as a fitters mate but, by 1988, had progressed so that he had become a self-employed consulting engineer.

22. Mr Smith had most recently joined a predecessor union to Unite in 1988. At the time of the formation of Unite he was a member of AMICUS. He is a member of the Newcastle Central (1901) Branch which has about 2,300 members. Although a typical attendance at its branch meetings is only about 7 members, it is a functioning branch. Mr Smith has been its Branch Secretary since 2005.

23. By rule 7.1 of the rules of the Union, members in employment are allocated to the Industrial Sector in which they are employed. As the Union's database held no record of Mr Smith's employer or workplace, he was allocated to the Services & General Sector, which is the default sector when this information is not given.

24. Mr Smith's application form and witness statement described a number of points of conflict between himself and AMICUS which he maintained carried over into Unite the Union. He referred to himself and his branch as being supporters of Grass Roots Left which opposes the views that allegedly prevail amongst the leadership of the Union. He referred to his support for Jerry Hicks in the election for General Secretary Designate in 2010. He referred to the evidence he gave on behalf of someone alleging unjustifiable discipline by the Union in 2010 and he referred to three Employment Tribunal claims he had commenced against the Union in the last 18 months. He described himself as being generally critical of the Union's political direction. The Union strongly denied that this background played any part in its decision to exclude Mr Smith as a candidate. It pointed out, amongst other things, that seven members of Grass Roots Left had stood in the 2011 EC election, albeit

unsuccessfully, and that all other members seeking nomination on the basis that they were self-employed branch officers had been excluded. The Union's witness, Mr Murray was not cross-examined on this point and no submissions were made to me on it by Mr Atkinson. On the material before me, I find that the decision to exclude Mr Smith as a candidate was not taken so as to penalise him personally for the conflicts and differences described above.

25. Mr Smith informed the Union that he was seeking nomination for election to the EC by an email of 20 January 2011. He was seeking election as a regional representative for the North East, Yorkshire and Humberside Region.

26. By an email of 21 January 2011, Ms Dykes of the Union, asked Mr Smith to confirm that he satisfied the requirement of rule 6, namely that he was an 'Accountable Representative of Workers'. In particular he was asked to confirm his employment status and details of his employer. It was the understanding of the Union's administration that a branch official who was self-employed could not be an 'Accountable Representative of Workers' and was therefore ineligible to be a candidate under rule 6.' Mr Smith responded on 24 January. He merely stated that he was the secretary of Newcastle Central Branch.

27. By an email of 25 January 2011 Ms Dykes asked Mr Smith for the name and address of his employer. Mr Smith responded on 29 January, stating, "*I do not have an employer as such; I am self-employed*". He nevertheless asserted that he was eligible to seek nomination by reason of rules 6.2 and 6.3.

28. In the meantime, on 25 or 26 January 2011, the Executive Committee had discussed the application of rule 6 to branch officials who are self-employed. At the time of this meeting, the Executive Committee was unaware of Mr Smith's request to be nominated. The Executive Committee endorsed a report from the General Secretary, the effect of which was to support the position that branch office-holders who are self-employed are not 'in employment' for the purposes of the definition of an 'Accountable Representative of Workers' in rule 6.3.

29. By an email of 1 February 2011, Mr Murray informed Mr Smith that as a branch officer who was self-employed he was not eligible to be a candidate in the EC election. Mr Murray's email was in the same terms as his email to Mr Beaumont of 28 January (see above, paragraph 17).

30. On 1 February 2011 Mr Smith made an internal complaint to the Union and on 2 February he made a complaint to the Certification Office.

31. By an email of 8 February 2011 Mr McLuskey, as the then Returning Officer, rejected Mr Smith's internal complaint. His email to Mr Smith was in the same terms as his email to Mr Beaumont of 8 February (see above, paragraph 20).

The structure of the Union

32. Unite the Union is the product of the amalgamation of the TGWU and AMICUS which was effective on 27 April 2007.

33. At the outset of the new Union there was a "Joint Executive Committee" ("the JEC") which was to serve for 12 months. At that time the Union rules were made up of a set of General Rules together with rules for the TGWU section and the AMICUS section. The rules of the two sections were in effect the rules of the former unions. One of the main tasks of this JEC was to produce a single set of rules covering all members.

34. In April 2008 a new Executive Committee was elected by the two sections in accordance with their respective rules. It was to serve for a period of three years until 2011 and was known as the First Executive Committee ("the FEC").

35. A completely revised rule book was voted upon and approved by the whole membership in May 2008. In September 2008 the FEC agreed guidelines to accompany the new rules. Although the new rules were due to come into effect on 1 November they did not in fact come into effect until 1 May 2009. The new rules constituted a unified rule book for the entire Union. When they came into effect the two sections of the Union ceased to exist. These rules were partially amended in September 2009.

36. From the time of its formation, Unite had joint General Secretaries: Mr Woodley (formerly of the TGWU) and Mr Simpson (formerly of AMICUS). It had been agreed that, upon their retirement, they would be replaced by a single elected General Secretary. Accordingly, in November 2010, there was an election for a General Secretary Designate. Mr McLuskey was elected.

37. In December 2010 Mr Simpson retired. In January 2011, in advance of his retirement, Mr Woodley stepped down from being General Secretary and Mr McLuskey took his place.

38. The elections in 2011 for what was now to be called the Executive Council ("the EC") were the first to be conducted under the new rules, without there being a TGWU and an AMICUS section. Accordingly by 2011 there was to be a single General Secretary and an EC elected by the entire membership under a common set of rules.

The Origins of Rule 6.2

39. The General Rules of the Union at the time of its formation in 2007 provided for a new rule book to be prepared and required that it included

provisions for various matters. General Rule 5.4(i)(c) provided as follows:

> *"5.4 The new rules to be prepared by the Joint Executive Committee shall include provision for*
> *(a) to (h)......*
> *(i)(c) In order to be eligible to be a candidate for election for, or hold office on, the Executive Council and/or any constitutional committee, the member in question must be an accountable representative of workers.*
> *(i) The definition of such a term shall be in the exclusive power of the lay Executive Council, which is empowered to take into account the changing industrial realities and the unique nature of some industries e.g. (construction, contracting, leisure, rural etc) in formulating such a definition. It must nevertheless include branch officeholders who are in employment, shop stewards, health & safety and equalities representatives.*
> *(ii) It is further required that a fair procedure be developed to deal sympathetically with cases where a member's eligibility to stand for election or continue to hold office may be affected by employer victimisation."*

40. Mr Murray was on the secretariat to the Rules Commission which prepared the new rules. He explained the reasons for the above General Rule as follows:

> *"Those leading both AMICUS and TGWU at the point when those unions merged to form Unite, believe that only those who represented workers on a day to day basis should be on the Union's key constitutional committees. They believed that the members of key constitutional committees, such as the Executive Committee, should have genuine industrial roots and be genuine representatives of workers in particular work places. It was felt that if the Executive Committee was made up of such members, it would speak with an authentic voice and its decisions would be credible in the eyes of the wider membership. Further, the members of the Executive Council would as workers have to live with the consequences of their own decisions affecting workers. Those leading AMICUS and TGWU believed that members who had only a marginal involvement with the day-to-day realities of work should not be taking key political and strategic decisions on behalf of the Union's wider membership."*

41. Mr Murray pointed out that whilst neither the TGWU nor AMICUS had a rule identical to Unite rule 6.2, they both sought to ensure that membership of their executive committees was dominated by those who had day to day experience of the work place. AMICUS had sought to achieve this by ensuring that the majority of members of its NEC were elected by and from its industrial, occupational and professional sectors, which resulted in about 75% of members of the NEC being nominated as candidates by specific work places. The historical approach of the TGWU was different but it was generally understood that in order to be elected to its GEC, a member had to be employed in relation to a trade represented by the TGWU or seeking employment in relation to that trade.

42. Mr Murray stated that the Rules Commission considered that neither the TGWU nor AMICUS approach was sufficient to give effect to the intention *"to really emphasise the requirement that those who led the union should be properly involved in the world of work and have credibility as representatives of workers."* Mr Murray explained that this approach not only informed the drafting of rule 6.2 and 6.3, but also the Guidance approved by the FEC in September 2008.

43. Mr Beaumont stated that this general approach to what constituted an 'Accountable Representative of Workers' was promoted by Mr Simpson as a way of stopping what Mr Simpson had allegedly referred to as being *"weekend anoraks".*

44. Mr Murray sought to explain why rule 6.2 and 6.3 provided that a self-employed person who is a shop steward, health & safety representative or equalities representative is eligible to be a candidate whereas a person who is a branch office-holder is required to be 'in employment'. He explained that many branches, especially those of the former AMICUS, have no real connection with any work place and may well have branch officers who are retired. On the other hand, most former TGWU branches are linked to a work place and it is very common for the office-holders in such branches not only to be employed in that workplace but also to perform day-to-day representative functions for its members, much in the same way as would a shop steward or convenor.

45. Mr Murray also gave evidence that self-employed members can and do get themselves elected as work place representatives, for example in the London Taxi Section and in the construction industry and that they would then be accepted as 'Accountable Representative of Workers'.

The Relevant Statutory Provisions

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

Section 47 Candidates

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

(2) ...

(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.

Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection

(2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

(a) the appointment or election of a person to, or the removal of a person from any office

(b) - (e)

The Relevant Rules

47. The rules of the Union which are relevant for the purposes of this application are as follows:-

RULE 3. MEMBERSHIP

3.2 There shall be a category of membership for those members who are unable to follow employment because of retirement or permanent disablement. The Executive Council shall determine the qualification for membership of this category as well as the level of contributions and entitlement to benefit. Such membership shall not accord an entitlement to vote in any ballot or election held by the Union other than an election to the office of General Secretary under rules 15 and 16, and election to any position within the Retired members' Association or any ballot or election in which all members must by statute, be accorded an unconditional entitlement to vote.

RULE 6. LAY OFFICE

6.2 *In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers.*

6.3 *The definition of the term "accountable representative of workers" shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (e.g. Construction, contracting, leisure, rule etc) in formulating such a definition. It must nevertheless include Branch office-holders who are in employment, shop stewards, health & safety and equalities representatives.*

6.4 It is further required that a fair procedure be developed by the Executive Council to deal sympathetically with cases where a member's eligibility to stand for election or continue to hold office may be affected by employer victimisation.

RULE 7 INDUSTRIAL/OCCUPATIONAL/PROFESSIONAL SECTORS

7.1 Members in employment shall be allocated to the Industrial Section in which they are employed. The term 'Industrial Sector' is a generic term including occupational and professional sectors.

RULE 14. EXECUTIVE COUNCIL

14.9 The Government, management and control of the Union shall be vested in the Executive Council collectively, which may do such things consistent with the rules and objects of the Union as it may consider expedient to promote the interests of the Union or any of its members. In particular and without limiting the general powers conferred on it by these rules the Executive Council shall have the power to:

> *14.9.17 Decide any question relating to the meaning and the interpretation of these rules or any matter not expressly provided for by these rules which decision shall be binding on all members of the union.*

RULE 16. ELECTION OF EXECUTIVE COUNCIL MEMBERS AND THE GENERAL SECRETARY

16.6 Executive Council candidates for election to represent a Region shall be nominated by at least three Branches within that Region or that part of a Region as the case may be. A branch shall be entitled to make only such number of nominations as there are members to be elected from that Region or part thereof.

RULE 17. BRANCHES

17.7 Each Branch shall have for its management a Chair, a Treasurer, and a Secretary and such officers as the Branch may elect. They shall be elected at a Branch meeting by show of hands, or by ballot, if so deciding by the meeting. The election shall take place and be completed not later that December 31 in each alternate year, and the election candidates shall take office the following January for two years. Casual vacancies may be filled at an ordinary Branch meeting but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.

17.11 The Branch chair shall preside over all meetings of the Branch and shall ensure that business is conducted in accordance with the rules and Branch standing orders. If the chair is absent from the Branch meeting, those present shall elect a substitute to take his/her place for that meeting. The chair shall be entitled to vote on all matters to be decided by the Branch but he/she shall not have a second or casting vote. The Branch secretary shall be responsible for the general administration of the Branch including maintaining Branch membership, financial and other records in the manner required by the Executive Council, taking and preserving Branch minutes and conducting all correspondence on behalf of the Branch.

RULE 18. WORKPLACE REPRESENTATION

18.1 At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every 2 years, 1 or more of the following:

18.1.1 Shop stewards/workplace representatives
18.1.2 Safety representatives
18.1.3 Learning representatives
18.1.4 Equality representatives

RELEVANT EC GUIDANCE RULE 6: LAY OFFICE

Guidance to Rule 6.2
Guidance 6.2.1 Only members who are elected to represent workers will be eligible to participate in any body of the union, including any conferences, but with the exception of branch and workplace meetings (which all members can attend).

Guidance to Rule 6.3
Guidance 6.3.1 An accountable representative of workers must have been elected by the Unite members at a Unite branch or workplace. The workplace must contain a minimum of three members. The election must comply with the guidance under 6.5 below.

6.3.2 The range of relevant elected office may be specified by Executive Council guidance in relation to specific rules, however in all cases where the representative has been elected under this guidance to the following roles, such representatives will count as "accountable representatives of workers":

6.3.2.1 Convenor
6.3.2.2 Shop steward (or "workplace representative"/ "father/mother of the Chapel", etc, where such phrases are the local colloquial term for such representative as represents members in bargaining and disciplinary and grievance matters.)
6.3.2.3 Health and safety representative
6.3.2.4 Equalities representative
6.3.2.5 Learning representative
6.3.2.6 Branch Secretary/Treasurer/Chair (where that branch officer is a paid employee of a company or organisation which is not Unite the Union), save with the specific permission of the Executive Council, (taking into account their current employment).

Consideration and Disposal

Complaint One

48. Mr Beaumont's first complaint is as follows:

Complaint One
On or around 28 January, the union breached union rule 6.2 by not allowing Mr Beaumont to stand as a candidate in the forthcoming EC election. Mr Beaumont was at the time a Branch Office holder, he was Branch Secretary of Hounslow and Feltham 1404M.

49. Mr Smith's first complaint is as follows:

Complaint One
On or around 28 January, the union breached union rule 6.2 by not allowing Mr Smith to stand as a candidate in the forthcoming EC election. Mr Smith was at the time a Branch Office holder, he was Branch Secretary of Newcastle Central 1901.

50. Rule 6.2 of the rules of the Union is as follows:

> 6.2 *In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers.*

51. Rule 6.3 of the rules of the Union is as follows:

> 6.3 *The definition of the term "accountable representative of workers" shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (e.g. Construction, contracting, leisure, rule etc) in formulating such a definition. It must nevertheless include Branch office-holders who are in employment, shop stewards, health & safety and equalities representatives.*

52. The EC Guidance to rule 6.3 of the rules of the Union is as follows:

> *Guidance 6.3.1 An accountable representative of workers must have been elected by the Unite members at a Unite branch or workplace. The workplace must contain a minimum of three members. The election must comply with the guidance under 6.5 below.*
>
> *Guidance 6.3.2 The range of relevant elected office may be specified by Executive Council guidance in relation to specific rules, however in all cases where the representative has been elected under this guidance to the following roles, such representatives will count as "accountable representatives of workers":*
>
> *6.3.2.1 Convenor*
> *6.3.2.2 Shop steward (or "workplace representative"/ "father/mother of the Chapel", etc, where such phrases are the local colloquial term for such representative as represents members in bargaining and disciplinary and grievance matters.)*

6.3.2.3 Health and safety representative
6.3.2.4 Equalities representative
6.3.2.5 Learning representative
6.3.2.6 Branch Secretary/Treasurer/Chair (where that branch officer is a paid employee of a company or organisation which is not Unite the Union), save with the specific permission of the Executive Council, (taking into account their current employment).

The Submissions – Complaint One

53. Mr Atkinson, for both claimants, submitted that both Mr Beaumont and Mr Smith were 'Accountable Representative of Workers' within the meaning of rule 6.2, as defined in rule 6.3. In particular, he argued that rule 6.3 contained a mandatory category of persons who were to be considered 'Accountable Representative of Workers' and that his clients fell within that category by being *'branch office-holders who are in employment'*. He noted that there was no dispute that his clients were both branch office-holders by virtue of being Branch Secretaries and he asserted that they were both 'in employment'. Mr Atkinson submitted that self-employment is a form of employment and that the Union was wrong to consider that being 'in employment' is the same as being an employee. He argued that employment is being in receipt of paid work and that self-employment is a sub-set within that category. Mr Atkinson submitted that he derived assistance for his interpretation from rules 3.2, 7 and 18.1 and from the fact that the rules do not elsewhere make any distinction between members who are employed and self-employed. As to rule 3.2, he noted that the word 'employment' as used in rule 6.3 is synonymous with the word 'working' and did not denote employee status. He also observed that there was a separate category of retired members within the Union, which enabled the Union to provide that retired members as a class were not eligible to be a candidate in EC elections if that was a policy objective. As to rule 7.2, Mr Atkinson pointed out that all members were allocated to an Industrial Sector whether they were employed or self-employed. He argued that this suggested that the phrase 'members in employment' and 'employed' did not exclude the self-employed. He further pointed out the proximity of rule 7.2 to rule 6.3. As to rule 18.1, Mr Atkinson pointed out that the Union permitted self-employed members at a work place to vote for shop stewards and other local representatives and therefore those who are self-employed must be taken to be included within the phrase 'members employed at that work place'. He submitted that looking at the rules as a whole, the phrase 'in employment' meant 'working'.

54. Should I find against his above submission, Mr Atkinson went on to argue that the EC could have defined an 'Accountable Representative of Workers' so as to include the self-employed. He noted that the EC had not done so by having restricted the eligibility of branch officials to the situation where the branch officer *'is a paid employee of a company or organisation which is not Unite the Union ...".* Mr Atkinson submitted that by failing to include those who are self-employed within the definition of

an 'Accountable Representative of Workers' the EC had acted capriciously or perversely and therefore outside the proper exercise of its discretion. He argued that Branch Secretaries were subject to periodic re-election and were therefore accountable. He further observed that both Mr Beaumont and Mr Smith had given uncontested evidence of their representational activities. He also noted that branches were key organisations within the Union structure. In these circumstances Mr Atkinson submitted that both his clients were clearly 'Accountable Representative of Workers'. He went on to argue that employment status was irrelevant to the question of who is an 'Accountable Representative of Workers' using the analogy that one may be a representative of the poor without being poor.

55. Mr Edwards, for the Union, submitted that the policy background to the Union's decision to exclude self-employed branch officials from eligibility in EC elections had been explained at length by Mr Murray and was uncontested. As to the interpretation of the term 'Accountable Representative of Workers' in rule 6.2, Mr Edwards noted that rule 6.3 contained a mandatory category of eligible members which included *'branch office-holders who are in employment'*. He submitted that Mr Beaumont and Mr Smith were clearly not 'in employment' as they were self-employed. He argued that to be self-employed and to be 'in employment' are two very different things, as demonstrated by Mr Beaumont's comment that, *"My employer is therefore me"*. He further argued that the term "self-employment" makes little sense when considered carefully and that, in reality, the claimants are more accurately described as being in business on their own account, not "in employment". To support his interpretation, Mr Edwards referred to the definition of *"employee and related expressions"* in section 295 of the 1992 Act, which includes only those working under a contract of employment. He also referred to paragraph 6.3.2.6 of the EC Guidance which restricts the eligibility of Branch Secretaries to those who are paid employees of any company or organisation. He further commented that to describe those who are self-employed as being 'in employment' would give rise to possible practical difficulties where a self-employed branch officer who did a single day's assignment could claim eligibility by being in business on his/her own account, whilst having no real connection with the world of work.

56. Should there be any doubt about the proper interpretation of the words "in employment" in rule 6.3, Mr Edwards argued that such doubt was removed by the decision of the EC on 25 or 26 January 2011. He argued that its decision to endorse the report of the General Secretary was a conclusive determination that the words "in employment" excluded self-employed members. He derived the finality of this endorsement from rule 14.9.17 which deals with the powers of the EC, which are to include the power to:

> *"decide any question relating to the meaning and the interpretation of these rules or any matter not expressly provided for by these rules which decision shall be binding on all members of the Union."*

On this basis, Mr Edwards argued that my ability to examine the meaning of the words 'in employment' was limited to examining whether the EC had reached a perverse interpretation which was not open to it. He submitted that this plainly was not the case having regard to the evidence of Mr Murray. He also argued that the decision of the EC was consistent with the role accorded to Branch Secretaries by rules 17.7 and 17.11, which confirmed that their activities were connected with the management or administration of branches rather than representational activities.

57. Mr Edwards went on to consider whether the Executive Committee should have exercised its discretion under rule 6.3 to expand the eligibility criteria to include branch officials who are self-employed. He submitted that the Executive Committee's decision at its meeting on 25 or 26 January 2011 was plainly not perverse. He observed that the decision not to extend this category was taken as a matter of principle which related to the exclusion of self-employed branch officials generally, as a class, not as a decision only on the position of certain named individuals. He noted the restricted role given to Branch Secretaries under the rules and the reason for giving them eligibility at all, albeit a restricted eligibility. He further noted that the Executive Committee Guidance had been formulated in 2008, well before the election in question, to deal with policy objectives, not to exclude particular individuals.

Conclusion – Complaint One

58. Mr Beaumont and Mr Smith sought the right to be candidates in the EC elections to be held in 2011. In order to be eligible as a candidate, rule 6.2 of the rules of the Union provides that a member must be an 'Accountable Representative of Workers'. I must determine whether, under the rules of the Union, both or either claimant was wrongly excluded from standing as a candidate for having failed to satisfy this eligibility criterion.

59. The term 'Accountable Representative of Workers' is a vague one and capable of giving rise to argument as to its meaning and application. Accordingly, rule 6.3 purports to give a definition. The effect of rule 6.3 is to provide a mandatory category of members who automatically qualify as being 'Accountable Representative of Workers'. They are *"branch office holders who are in employment, shop stewards, health & safety and equalities representatives"*. Beyond that mandatory category, rule 6.3 provides that the definition *"shall be in the exclusive power of the EC which is empowered to take into account changing industrial realities and the unique nature of some industries ..."*. It is therefore anticipated by rule 6.3 that the EC may not only expand upon the mandatory categories but that it may adopt different definitions (beyond the mandatory) at different times.

60. First, I must consider whether the claimants qualified for eligibility to be candidates in the EC elections in 2011 by virtue of being included in the mandatory category of members in rule 6.3. The sub category in question is that of *'branch office-holders who are in employment'*. It is common ground that both claimants are Branch Secretaries and that, as such, they are branch office-holders. The contested issue is whether they are "in employment" within the meaning of rule 6.3.

61. Mr Edwards seeks to limit my ability to interpret the relevant rules by reference to rule 14.9.17. He submits that the decision of the Executive Committee to endorse the report of the General Secretary effectively limits or ousts my jurisdiction (and the jurisdiction of any judicial body), save to the extent of deciding whether the decision of the Executive Committee was perverse. I reject that submission. Rule 14 vests the government, management and control of the Union in its EC and enables the EC to do such things as are consistent with the rules and objects of the Union. In particular, and without limiting its general powers, the EC is given 17 specific powers. One of these specific powers is *"to decide any question relating to the meaning and interpretation of these rules ... which decision shall be binding on all members of the Union"*. In my judgment, rule 14.9.17 has the effect of making any such decision by the EC binding within the structure of the Union. It does not purport to limit or oust my jurisdiction. Even if the rule did attempt to oust my jurisdiction it would not have had that effect. It would be contrary to public policy if a question of law, such as the interpretation or meaning of a key word or expression, could not be submitted to the appropriate judicial or quasi judicial authority. Accordingly, I find that rule 14.9.17 does not give the EC the final word in this matter and that I must determine the correct meaning of the expression *'in employment'* in rule 6.3.

62. In approaching the interpretation of this rule, I remind myself of the various authorities regarding the interpretation of the rules of a trade union. In particular, I remind myself of the words of Warner J in **Jacques v AUEW (1986) ICR 683**, who stated as follows:

> *"The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they are addressed."*

63. I have firstly considered the ordinary literal meaning of the word 'employment'. With great clarity, but unhelpfully, the Oxford English Dictionary provides two relevant meanings. One refers to *"the state of being employed – the service of another person"*, which favours the Union's interpretation. The other refers to *"paid work – a person's trade or occupation"*, which favours the Claimants' interpretation. It is therefore apparent that the expression "in employment" is ambiguous and requires to be interpreted in its context.

64. I have not found the interpretation of this expression an easy matter. The claimants assert that as a matter of common sense they are plainly 'Accountable Representative of Workers' being branch office-holders who are both accountable and who have some representational role, however limited. However, my task is not to interpret the expression 'Accountable Representative of Workers' in rule 6.2 at large. Rather, I must consider the specific definition in rule 6.3 and in particular the meaning of the words "in employment".

65. The material which supports the interpretation advanced by the Union includes the extensive evidence of Mr Murray as to the policy objective of the rule. This is given credibility by the rules of the former TGWU and AMICUS and supported by Mr Beaumont's comment about the intentions of Mr Simpson derived from his alleged remark concerning *"weekend anoraks"*. Further evidence is found in the Guidance of the EC, which was approved within months of the rules being drafted and being voted upon by the membership. I observe that this Guidance reproduces the mandatory categories of those who are 'Accountable Representative of Workers' which are to be found in rule 6.3 and then adds a further two categories; namely 'convenors' and 'learning representatives'. However, in reproducing the expression *"branch office-holders who are in employment"*, the Guidance uses different words. It refers to *"Branch Secretary/Treasurer/Chair (where the branch officer is a paid employee of a company or organisation which is not Unite the Union) ..."*. In my judgment, this is not an attempt to depart from the meaning of the relevant part of the mandatory category in rule 6.3, but to explain it. Indeed, the EC does not have the power to restrict any aspect of the mandatory categories in rule 6.3. It could not therefore exclude self-employed branch officers if they were comprehended within the expression '*Branch office-holders who are in employment*' in rule 6.3, properly interpreted. Against this background, I observe that paragraph 6.3.2.6 of the Guidance does clearly exclude self-employed branch officials from eligibility as a candidate. This is strong evidence that the view of the EC in both 2008 and 2011 was that the words *"in employment"* in rule 6.3 exclude self-employed branch officials. I have also had regard to such evidence as there is that the general understanding of the membership was that self-employed branch officials were not eligible. Such evidence can be found in the Guidance of the Executive Committee, which is relatively clear on this point, and the evidence that some members, including some members of the outgoing Executive Committee, might have sought nomination if the words "in employment" were found by the EC to include self-employed branch officials.

66. On the other hand, I take into account the fact that there were other self-employed branch officials, besides the claimants, who sought to become candidates. I have also had regard to the claimants' argument that they are so obviously 'Accountable Representative of Workers' that to exclude them from the rule 6.3 definition cannot have been the intention.

Further, they point to other uses of the terms "employed" and "in employment" in rules 3, 7 and 18. They argue forcibly that these words are generally used as meaning "working" or "at work" rather than being restricted to those working under a contract of employment.

67. Having regard to the totality of the evidence and submissions, I find that the correct meaning of *"in employment"* in rule 6.3 is that only branch office-holders who are employed by another party fall within the mandatory category of eligible members to qualify as 'Accountable Representative of Workers'. It is unfortunately not unusual in my experience for the same or similar words in the rules of a trade union to bear different shades of meaning. Whilst it is desirable that each word is given a meaning which is consistent throughout a rule book, there are occasions that to do so would give a particular word a meaning which it was not intended to bear. The words "employed" and "employment" are classic examples of words which are capable of different meanings depending upon the context in which they are used and the intention of the author. I am satisfied that the Union chose to give the relevant words in rule 6.3 a narrow meaning, consistent with its view that branch officers are not typically 'Accountable Representative of Workers' unless involved in a work place by reason of being employed by a company or organisation.

68. I further note that the EC has been given a wide discretion to define who is to be considered as being an "Accountable Representative of Workers", subject to the mandatory categories found in rule 6.3. The EC has the power to include within that definition branch-officials who are self-employed. It not only did not include such branch-officials when considering its Guidance in 2008 but it also did not do so when re-considering its position in January 2011.

69. Accordingly, in my judgment, the claimants were not eligible to be candidates in the 2011 EC election as they did not fall within either the mandatory category of those who qualified as an 'Accountable Representative of Workers' in rule 6.3 nor within the expanded meaning of that term as contained in the Executive Committee Guidance of 2008, as confirmed in January 2011.

70. For the above reasons I refuse to grant the declarations sought by the claimants that the Union breached rule 6.2 by not allowing them to stand as candidates in the 2011 EC election.

Complaint Two

71. Mr Beaumont's second complaint is as follows:

> The union breached section 47(1) of the 1992 Act by unreasonably excluding Mr Beaumont from standing as a candidate in the 2011 National Executive Committee Election.

72. Mr Smith's second complaint is as follows

> The union breached section 47(1) of the 1992 Act by unreasonably excluding Mr Smith from standing as a candidate in the 2011 National Executive Committee election.

73. Section 47 of the 1992 Act provides as follows:

> ***Section 47 Candidates***
>
> *(1) No member of the trade union shall be unreasonably excluded from standing as a candidate*
>
> *(2) ...*
>
> *(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.*

The Submissions – Complaint Two

74. Mr Atkinson, for the claimants, submitted that the Union could not take advantage of section 47(3) of the 1992 Act. He argued that there was no rule which expressly excluded self-employed Branch Secretaries from standing as candidates for the EC and that rule 6.2, which excluded those who were not 'Accountable Representative of Workers' was insufficient for this purpose. He maintained that excluding members from standing for the EC was a matter of considerable importance and that section 47 required such an exclusion to be explicitly "under" the rules, not merely "in accordance" with the rules (citing **Beaumont v AMICUS (2004) D/3/04 (CO)**). He further argued that persons who were not 'Accountable Representative of Workers' were not a class for the purpose of section 47(3). He maintained that a class for these purposes would more typically be, for example, one that excluded male members from voting in an election for a Women's Officer. Mr Atkinson further submitted that the Union fell foul of the final sentence of section 47(3) in that rules 6.2 and 6.3 allowed the EC to pick and choose individuals who the EC wished to exclude from an election. He compared these rules to those relied upon in the case of **Ecclestone v NUJ (1999) IRLR 166** in which the NUJ purported to exclude Mr Ecclestone from seeking re-election on the basis that only those in whom the NEC had confidence could stand. The High Court found that the NUJ had excluded a class of members which was determined by reference to whom the union chose to exclude, an essentially subjective process. Mr Atkinson further argued that the rules on eligibility generally could involve the Union making decisions on a case by case basis as rule 6.4 required the Union to deal sympathetically with cases where a member's eligibility to stand for election may be affected by employer victimisation.

75. Should he succeed in his submissions with regard to section 47(3) of the 1992 Act, Mr Atkinson submitted that the Union had unreasonably excluded his clients from standing as a candidate, contrary to section 47(1). He argued that not only were the criteria used to exclude the claimants unreasonable but that the manner of their application to the claimants was also unreasonable. As to the unreasonableness of the criteria, Mr Atkinson argued that, as Branch Secretaries, his clients not only held responsible positions but were also accountable to and represented their members. He maintained that it was unreasonable for the Union to discriminate against self-employed Branch Secretaries as against self-employed shop stewards. Mr Atkinson further argued that it was unreasonable to define eligibility on the basis of employment status as employment status is a notoriously contentious and opaque subject. He also maintained that the requirement of employed status could produce arbitrary results where, for example, an agency worker worked alongside an employed person doing identical work. In such circumstances, a person's eligibility to stand for the Executive could be determined by the employer's decision on how the work force should be organised. Mr Atkinson also criticised the Union for not carrying out any investigation to ascertain whether his clients had any personal knowledge of industrial realities. As to the manner in which the exclusion criteria were applied, Mr Atkinson argued that it was unreasonable for Mr Beaumont not to have been given an opportunity to make representations either in person or in writing to the EC which met on 25 or 26 January 2011, especially as the arguments against him were put by the General Secretary and Chief of Staff. As to Mr Smith, it was argued that the merits of his individual case were never considered by the EC.

76. Mr Edwards, for the Union, submitted that the Union could rely on the defence provided by section 47(3) of the 1992 Act. In his submission, those members who were not 'Accountable Representative of Workers' belonged *"to a class of which all the members were excluded by the rules of the Union".* He argued that they were a class in that, in accordance with the definition in the Oxford English Dictionary, they were *"a number of individuals possessing common characteristics*". He further argued that the EC had correctly approached this issue on two levels. He noted that they had first considered whether self-employed members were included within the mandatory categories within rule 6.3. Having concluded that they were not '*branch office-holders who are in employment*', the EC then considered whether to include them in its Guidance, using its power in rule 6.3 to define the term 'Accountable Representative of Workers'. Mr Edwards submitted that in considering this issue the EC was not considering which particular individuals may or may not be excluded but the definition of a class of members. He argued that rule 6.3 did not enable the EC to pick and choose individuals to be excluded from an election and therefore did not fall foul of the last sentence of section 47(3). He submitted that rules 6.2 and 6.3 were not

rules which provided for such a class to be determined by reference to whom the Union chooses to exclude.

77. Should I find that the Union cannot avail itself of section 47(3) of the 1992 Act, Mr Edwards submitted that the exclusion of Mr Beaumont and Mr Smith on the basis that they were self-employed branch officers was reasonable within the meaning of section 47(1). He referred to the origins and policy objectives of rules 6.2 and 6.3. He referred to the decision of the EC in its 2008 Guidance not to extend the category of eligible branch office holder to those who are self-employed. He referred to the essentially administrative functions of branch secretaries under the rules which, he argued, distinguishes them from work place representatives. Mr Edwards further argued that the exclusion of self-employed members involved the application of objective criteria, which reflected the reasonable expectations of the members as to who would be permitted to stand in elections for the EC. He maintained that the criteria did not allow the picking and choosing of individuals. He further submitted that given the nature of the branches of which Mr Beaumont and Mr Smith were the Branch Secretaries, neither could be said to be representative of workers in any meaningful sense.

Conclusion – Complaint Two

78. I must first consider whether the Union can avail itself of section 47(3) of the 1992 Act by which the exclusion of a member from standing as a candidate is deemed to be "not unreasonable" if certain criteria are fulfilled. The first criterion is that the claimant must have been excluded *"on the grounds that he belongs to a class of which all the members have been excluded by the rules of the Union".*

79. In considering this provision, I note that the class to which reference is made need not be a class established for some other purpose by the rules of the union, such as the members of a particular region, sector or trade. There is no such restriction in the statute. In my judgment, the class is to be determined in accordance with the ordinary literal meaning of the word. In the case of **Re NATFHE (1994) D/6/94** the then Certification Officer referred to the definition in the Oxford English Dictionary as being in the following terms:

> *"A number of individuals (persons or things) possessing common attributes, and grouped together under a general or "class" name; a kind, sort, division"*

I would add, however, that the common attributes which qualify a person for membership of that class must be capable of objective determination. A potential member must be able to establish that he or she is within or outside the class at the relevant time. In most cases this will be when the member is considering whether to stand as a candidate. In other cases, such as where the rules require a candidate to obtain a minimum number of branch nominations, the relevant time may be the close of nominations.

80. I further note that the exclusion of the class must be by the rules of the union. In that connection, I adopt my comments in **Roberts v National Association of Schoolmasters Union of Women Teachers (2007) D/31/07**, as follows:

> "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."

81. Accordingly, even if there is a class of members all of whom are excluded by the rules of the union, I must go on to consider whether the union is prevented from relying upon section 47(3) by reason of the last sentence of that sub-section. This states that *"a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded"*. In such a case, I must disregard the rule and proceed to a determination of reasonableness under section 47(1).

82. In my judgment the intention of the proviso in the last sentence of section 47(3) of the 1992 Act is to prevent unions picking and choosing individuals for exclusion from relevant elections. A classic illustration of the use of this proviso is found in **Ecclestone v NUJ** (see above). The union argued that it could exclude candidates in whom its NEC did not have confidence. The High Court found that the membership of this excluded class was to be determined by reference to whom the union chose to exclude and that this "essentially subjective method" fell foul of section 47(3). Union rules which enable members to assess objectively by reference to a rule or rules whether or not they are excluded from standing as a candidate are unlikely to be caught by this proviso. However, different factual situations test this relatively straight forward application of section 47(3). I deal below with two such situations.

83. First, the rules of a union may delegate to its NEC the power to make procedural rules for the conduct of a relevant election, including the eligibility of candidates. In such a situation I may have to determine if the electoral procedure devised by the NEC is in law a rule of the union by virtue of express or implied incorporation. Not all procedures adopted by an NEC become rules of the union. If there is no express or implied incorporation, such procedures may remain mere administrative

directions. However, if the procedure takes effect as a rule, I may have to determine if it excludes a class of members. If so, I may have to determine if it is a rule which provides for that excluded class to be determined by reference to whom the union chooses to exclude. Exceptionally, such a class may be chosen in bad faith so as to exclude a particular individual or individuals. If that is established on the facts of a case then clearly the rule must be disregarded. However, where such a rule is approved by a union at its General Meeting or Annual Conference, often by a special majority, there may well be difficulties in establishing bad faith on the facts. In **Roberts v NASUWT** (see above) I commented as follows:

> "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."

84. Secondly, a class of excluded members may be defined by a rule which is ambiguous, as in the present case, and the rules provide that it is for the NEC to further define that class. In such a case, I must again determine what are the rules of the union, whether the rules exclude a class of members from standing as a candidate in a relevant election and whether the proviso in section 47(3) applies, so as to require me to disregard the rule.

85. Applying the above analysis to the facts of this case, I have considered whether the members of the Union who are not 'Accountable Representative of Workers' are a class, in the sense that they are a number of individuals possessing a common attribute and grouped together under a general heading. If this expression had not been further defined in rule 6(3), I would have strong doubts if a class described in such vague terms could constitute a class for the purposes of section 47(3). The edges of the class are so imprecise that a member who was considering whether or not to stand as a candidate might reasonably not know if he or she fell within it. However, rule 6(3) provides a minimum content to the class. An 'Accountable Representative of Workers' must include *"Branch office-holders who are in employment, shop stewards, health & safety and equalities representatives"*. Whilst there has been debate as to the proper meaning to be given to the phrase 'in employment' (which I have resolved), I find that this mandatory category of eligible members is sufficiently precise and objectively determinable as to be a class within the meaning of section 47(3). Difficulties emerge, however, as the rules give the EC 'an exclusive power' to expand upon the mandatory categories. I must therefore ask myself if any extended definition given by the EC becomes a rule of the Union and, if so, whether the combination of rules 6(2), 6(3)

and the EC's extended definition is *"a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded".*

86. In my judgment, the power of the EC to define what is an 'Accountable Representative of Workers' contained in rule 6(3) has the effect of incorporating into the rules the definition that is determined by the EC. Accordingly any further categories decided upon by the EC to supplement the mandatory categories become as much a part of the rules of the Union as the mandatory categories themselves. To find otherwise would leave an obvious lacuna in the rules.

87. As to the proviso in the final sentence of section 47(3), I was troubled by the apparently wide discretion given to the EC to define who is an 'Accountable Representative of Workers'. I asked myself if this gave the EC the power to pick and choose individuals who it wishes to exclude. I have concluded that it does not. The power given to the EC by rule 6(3) is not one which requires or enables individual cases to be submitted to the EC for decision as to whether that individual or those individuals are 'Accountable Representatives of Workers'. The job given to the EC is limited to deciding upon additional categories of persons who are 'Accountable Representatives of Workers'. Once the EC decides upon an additional category or categories of eligible persons those categories become part of the rules of the Union and fall to be tested as to whether they, together with the mandatory category, constitute a class within the meaning of section 47(3). This analysis is consistent with the facts of the present case. Contrary to the belief of the claimants, the EC did not consider their individual positions and decide to exclude them as known 'trouble makers'. Rather, the EC considered the categories of those who fell within the definition of an 'Accountable Representative of Workers'. It decided, using its powers under rule 14.9.17, that self-employed branch secretaries do not fall within the meaning of *'branch office-holders in employment'* in rule 6.3; a decision which I have found to be correct. It further decided against exercising its discretion to extend its own Guidance to include self-employed branch secretaries within that definition. Whilst this agenda item arose out of the decision of the administration to provisionally exclude Mr Monkton and Mr Beaumont, the fact that the problem was raised in this way does not taint the nature of the decision made by the EC. That decision related to categories of membership not to the characteristics of individuals. In my judgment, therefore, rules 6(2), 6(3) and the EC Guidance, read together, do not provide that the definition of the class to be excluded as a candidate in relevant elections is determined by whom the Union chooses to exclude. Further, I do not find that the Union acted in bad faith by deliberately targeting the claimants under the guise of considering the correct interpretation of the rules.

88. Accordingly, I find that the Union is able to rely upon the provisions of section 47(3) of the 1992 Act and I refuse to make the declaration sought by the claimants that the Union breached section 47(1) by

allegedly unreasonably excluding them from standing as a candidate in the 2011 EC elections.

89. Should I be wrong about the application of section 47(3) of the 1992 Act I have also considered the reasonableness of the claimants' exclusion within the meaning of section 47(1).

90. In considering reasonableness, I have had particular regard to the importance of members being able to stand for election in a democratic organisation. The denial of the ability to stand for election is a serious matter. On the other hand, a union is a voluntary association and it may by its rules determine how its internal democracy should operate, subject to relevant legislation. The claimants make a strong case that as Branch Secretaries they are 'Accountable Representative of Workers'. However, that is a case based on the ordinary meaning of those words. The rules of the Union give those words a special meaning and I have found that, in accordance with that meaning, the claimants are not 'Accountable Representative of Workers'. I have considered the evidence relating to the origins of rule 6.2 and 6.3 and the further consideration of those rules by the EC when adopting its guidance in September 2008. Whilst some members may dislike these rules and consider them unreasonable, the 2007 General Rules (upon which the amalgamation was approved) required such rules to be included in the new rules. The new rules, which were adopted in 2008 after a membership ballot, included rule 6.2 and 6.3. Furthermore the definition of 'Accountable Representative of Workers' was considered by the EC in September 2008 and confirmed in January 2011. I further accept that the policy which underpins those rules, as explained by Mr Murray, is a legitimate one that could be held by a union, acting reasonably. Having regard to the submissions of both parties, I find that the rules in accordance with which the claimants were excluded from standing in EC elections were reasonable.

91. I have also considered whether the rules in question were fairly applied to the claimants. They assert that they should have been given the opportunity to make individual representations to the EC to make good their point that they were 'Accountable Representatives of Workers'. I disagree. The argument put forward on behalf of the claimants misses the point. The EC was not reaching a decision on the facts of their individual cases, the degree to which they were accountable or the amount of representative work they undertook. The EC was reaching a decision on the more general question of whether branch office-holders who are self-employed fall within the definition of 'Accountable Representative of Workers' in rule 6.3 and/or the EC's own Guidance and, if not, whether the Guidance should be extended to include them. These general questions did not require the EC to hear submissions by all those who may be affected by them. The EC was considering a question of general policy (albeit with consequences for individuals) and not the circumstances of any particular individual. Accordingly I find that the manner of application of the rules in question to the claimants was reasonable.

92. Having regard to all the circumstances of this case, including the reason for the claimants' exclusion from standing as a candidate in the 2011 EC election and the manner in which their exclusion was determined, I would have found that the claimants were not unreasonably excluded from standing as a candidate in breach of section 47(1) of the 1992 Act.

David Cockburn
The Certification Officer