

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION
MADE UNDER SECTION 55(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR Y BAKHSH

v

**UNISON
The Public Service Union**

Date of Decision:

22 December 2005

DECISION

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

- (i) I declare that UNISON (“the Union”) breached section 48(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) by failing to secure that no modifications were made to the election address submitted by Mr Bakhsh in support of his candidature for the election to the Union’s National Executive for the period 2005-2007.
- (ii) When I make a declaration and I am satisfied that steps have been taken by the union with a view to remedying the declared failure, or securing that a failure of the same or any similar kind does not occur in future, or that the union has agreed to take such steps, I am required by section 55(4) of the 1992 Act to specify those steps in the declaration.
- (iii) I am satisfied that steps have been taken by UNISON with a view to securing that a failure of the same or any similar kind does not occur in future. The Union has created an additional post of Elections Co-ordinator. It also intends to extend the period for typesetting and proof reading by a week, to arrange matters so that members of staff engaged in proof reading materials will spend no more than half a day at a time in doing so and to give candidates the opportunity to submit their election addresses in electronic form.
- (iv) I do not consider it appropriate to make an enforcement order.

REASONS

1. By an application dated 13 August 2005 the Claimant made a complaint against his union, UNISON (“the Union”). The application alleged a breach of section 48(4) of the 1992 Act in relation to the elections to the Union’s National Executive Council for 2005/2007. The alleged breach was:

“that in the UNISON 2005 National Executive Elections the election address of Mr Bakhsh, in the Union’s Election of a Male Executive Member, Northern Region, was modified by the Union in breach of section 48(4) of the 1992 Act and that such modification was not with his consent and was not necessary to the method adopted for producing the election address.”
2. The Union conceded that there had been a breach of section 48(4) of the 1992 Act, as alleged. The issue to be determined by me was whether or not to issue an enforcement order under section 55(5A) of the 1992 Act. Mr Bakhsh sought an enforcement order requiring the Union to re-run the election that he had lost.
3. I investigated the complaint in correspondence. As required by section 55(2)(b) of the 1992 Act, the parties were offered the opportunity to be heard and a formal hearing took place on 1 December 2005. The Union was represented by Mr Segal of counsel instructed by Mr O’Hara of Thompsons, solicitors. Mr Nelson, the Union’s Head of Structural Development and Mr Lonie of Electoral Reform Services attended as witnesses for the Union. They each produced a witness statement. Mr Bakhsh acted in person and gave evidence on his own behalf. He did not produce a witness statement. A bundle of documents was prepared for the hearing by my office which contained relevant exchanges of correspondence. At the hearing this bundle was supplemented by a chronology prepared by the Union and skeleton arguments provided by both parties.

Findings of Fact

4. Having considered the oral and documentary evidence together with the representations of the parties, I found the facts to be as follows:
5. The National Executive Council (“the NEC”) of UNISON has 67 members. The NEC elections in 2000 were for a period of office of 3 years but, since 2003, the elections have been for a period of office of 2 years. Each term of office commences after the relevant annual conference, normally in June or July.
6. The structure of the NEC elections is complex. The seats are divided into four constituencies; Regional Representatives, Service Group Representatives, Additional Members Seats and a Young Members Seat. The number of votes a member is entitled to cast will depend on her or his region, service group and age. Mr Bakhsh’s application relates to the Northern Region. He is a Mental Health Nurse in the Healthcare Service Group and is aged over 21. He would therefore be entitled to vote in the elections for Regional Representative,

Service Group Representative and for the Additional Members Seats. In the Northern Region three Regional Representatives are to be elected. These are described as the male seat, the female seat and the reserved seat. Healthcare is one of seven service groups and has three seats allocated to it which are elected nationally. There are also four seats to be elected nationally for the Additional Members' Seats. Young members may additionally vote for a candidate for the Young Member's Seat. Accordingly, a person in Mr Bakhsh's position might have to select ten different candidates in the various constituencies.

7. Each candidate is permitted to submit an election address of no more than 500 words. The rules governing the form, content and time for submission of the election addresses are contained in election procedures agreed by the NEC. The election addresses are submitted to the Union in hard copy. They are then forwarded to the person or firm selected by the Union to be its independent scrutineer. The independent scrutineer copy types them into an electronic format. This process is referred to as typesetting. The electronic versions of the election addresses are then reproduced as books of election addresses. In the 2005 NEC election, Mr Bakhsh, in his capacity as a voting member, was provided with two such books; one of 21 pages containing the election addresses of the ten candidates in the contested elections for the Northern Region and Additional Member Seats and another book of 17 pages containing the election addresses of the eight candidates in the elections for the Healthcare Service Group Seats.
8. In 2005, UNISON conducted a number of national elections and ballots. As well as the NEC elections, there was an election for the position of General Secretary, a political fund ballot and a national industrial action ballot. The Union has a membership of about 1,320,000 and the administrative resources required to conduct so many elections and ballots were considerable.
9. In the 2005 NEC elections, Mr Bakhsh stood as a candidate for the Northern Regional (male seat). His only opponent was a Mr Philip Johnson. Mr Bakhsh was well known in the region. He had served on the NEC for the previous 4 years, having won elections in 2001 and 2003. He had stood for the NEC in 2000 but his particular election had been set aside by the Union's then independent scrutineers, Unity Security Balloting Services ("USB") without any result being declared. Mr Bakhsh was successful in the re-run election, taking up office in 2001. In the 2005 elections Mr Bakhsh had secured nominations from 21 branches. Mr Johnson had secured nominations from 11 branches. Mr Bakhsh gave evidence that he regarded himself as being the favourite to win, having previously succeeded by large margins.
10. The Union distributed the books of election addresses with the voting papers between 4 and 7 April 2005. In the Northern Region 97,926 ballot papers were distributed. Mr Bakhsh's election address, as distributed, was in the following terms:

“BRANCH: North of Tyne Health

Dear Member,

Thank's for reading this. I have represented the Region on the NEC for the last 4 years. I have been a union activist for 20 years and work as a Staff Nurse at Newcastle General Hospital.

Hands off our Pensions

*The Government's attack on our pension rights is one of the most serious issues facing UNISON members. In Local Government they intend to raise the minimum retirement age by 5 years and increase our contributions. In Health they want to raise the minimum retirement age by 5 years and end the final salary scheme. **This will mean UNISON members having to work longer, pay more and receive less.** It's a scandal. Pensions are not a gift, but deferred wages which we have paid into all our working lives. The average local government pension is only £3,800. MPs voted themselves a generous pension scheme - Tony Blair will get a pension of £117,000 a year!*

If re-elected I will continue to fight to defend our pensions. We should extend the pension scheme to all part-time workers.

Equal Pay

*On the NEC I challenged our leaders failure to pursue equal pay claims which had enabled No-Win No Fee solicitors to move in. **The Union** should pursue these claims for every member who is eligible. In health we should follow the example of North Cumbria where UNISON members have recently won tens of thousands of pounds. **If re-elected I will continue to demand the union negotiates equal pay for all our four members.***

Improved service to members

*Many members complain the union doesn't provide them with the service they need. The NEC is overspent on expenses - **we should cut NEC expenses and put the money towards improving services to members.***

No blank cheque for New Labour

UNISON is to give £2.5 million to New Labour. We should withhold this money until they withdraw their threats to our pensions. Our political funds should go to only those candidates who support core UNISON policies.

No to Racism

I am proud to have been part of UNISON's anti-BNP campaign. As a result my house was vandalised by these fascists but this will not stop me campaigning against them spreading the hatred and division in our communities.

Agenda for Change

Whilst this has delivered improvements for some these are still far too many, particularly admin & clerical workers who lose. We need to campaign to ensure all workers benefit.

A union to be proud of

*As a socialist who stands for traditional working class values I believe New Labour has betrayed the very people who elected it. They spend £4 billion on a war in Iraq, but say they cannot afford to pay us decent pensions. I have worked hard on the NEC for every UNISON member. **I want our union to be a union that campaigns for its members, delivers real improvements on a day to day basis, and a union we can all be proud of.***

VOTE BAKSHSH”

11. It subsequently emerged that this version of Mr Bakhsh's election address was different in two respects from the one he had submitted. First, in the paragraph headed "Hands off our Pensions", the words "I Health" should have read "In Health". Secondly, in the paragraph headed "Equal Pay" the words "for all our four members" should have read "for all of our members".
12. The evidence of the Union and its present independent scrutineer, Electoral Reform Services ("ERS") was that these alterations had occurred at the typesetting stage and had not been picked up at two subsequent proof-reading stages; one by employees of ERS and one by employees of the Union. Mr Bakhsh did not allege at the hearing that the errors were anything other than accidental.
13. Mr Bakhsh raised these errors on a number of occasions with both the Union and ERS before the close of voting on 16 May 2005. In a letter to ERS dated 11 May he stated,

"... I wish to make it absolutely clear I will await the outcome of the election, and should it become apparent that these unsolicited and unacceptable changes have affected the outcome of the election then I will be seeking that the election is re-run."

Mr Bakhsh was told orally by ERS on 15 April and in writing on 26 May that the errors had occurred accidentally and had not been picked up during subsequent proof-readings.

14. The results of the elections were sent to the candidates on Friday 3 June 2005. In the Northern Region 97,926 ballot papers were distributed and 8,273 were returned. In relation to the contest involving Mr Bakhsh, he received 3,729 votes and Mr Johnson received 3,958. Mr Johnson therefore won by 229 votes. There were 586 spoilt ballot papers, but this was not substantially different from the proportion of spoilt ballot papers in other contests in the election.
15. By section 49(3) of the 1992 Act, the terms of a scrutineer's appointment requires that she or he reports to the Union as soon as reasonably practicable after the last date for the return of voting papers. Section 52 sets out what the report shall deal with and provides that the Union shall not publish the results until it has received the scrutineer's report. In this election ERS provided a 13 page report containing the election results, which was signed by Mr Lonie. On the final page, Mr Lonie certified as follows:

"As Scrutinners appointed in accordance with Section 49 of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended), we are satisfied as to each of the matters specified in subsection 52(2) with regard to the election ..."

However, against the election results to the Northern Region (male seat) there appears three asterisks and the words "*please see comments on page 12 of this*

report". A further three asterisks appeared on page 13 of the report under which were the following words:

"In the election for the Northern Region - Male seat, two minor modifications were unintentionally made to the statement of candidate Yunus Bakhsh which appeared in the Candidate's statement booklet accompanying the ballot paper. On the balance of probabilities and given their nature, we do not consider that the outcome of the election was affected by these modifications."

16. Upon receipt of the election results Mr Bakhsh made further complaints to the ERS and the Union, both dated 6 June 2005. In these complaints he specifically referred to there having been a breach of section 48(4) of the 1992 Act.
17. The rules of the Union and the Election Procedures approved by the NEC provide a means of dealing with complaints about the conduct or fairness of an election. Rule D.7 of the Rules of the Union provides that such election shall be conducted in accordance with Schedule C of the rules and any regulations made by the NEC. Paragraph 6 of Schedule C provides as follows:

"The Returning Officer shall determine the validity of any complaint made to her/him about the conduct or fairness of the election, and shall have the right to require an election to be held again in whole or in part if not satisfied that the election complies with the requirements of law and these Rules, and if the Returning Officer considers it reasonable to exercise the right."

The Election Procedure for the 2005 elections provided for a period of 7 days between the close of the ballot and the close of the so called 'complaints period'. It further provided that the election results were not to be announced for a further 12 days, giving sufficient time for the complaints to be investigated.

18. ERS investigated Mr Bakhsh's original complaint to the extent of ascertaining that the error had arisen at the typesetting stage and had not been picked up at the two subsequent proof-reading stages. It did not undertake any further investigation during or after the complaints period. Specifically it made no enquiries in the Northern Region of any branch or official. On 7 June 2005 ERS sent the Union a report on the complaints it had received. This dealt with complaints against both eligibility and about the conduct and fairness of the elections. As to the complaints about eligibility, ERS reported on individual cases and stated that detailed recommendations on changes to the procedures would be provided to the Union shortly. As to the complaints about the conduct and fairness of the elections, ERS reported on four specific cases, three of which concerned unintentional modifications to a person's election address. With regard to the fourth such case, ERS stated that a full report with recommendations would be produced. With regard to Mr Bakhsh, the ERS report stated:

“Yunus Bakhsh

Candidate brought to the attention of the RO the fact that 2 modifications were made to his statement. The candidate stated he was reserving his right to take the matter further once the results were released. In issuing our formal Report the following declaration was inserted.” Having set out the statement quoted above, the report continued: “Subsequent notification was received from the candidate that this ruling was not accepted by him. Our view remains that the result in respect of this contest could properly be certified.”

19. The Union initially responded to Mr Bakhsh’s protests by letters dated 9 and 16 June 2005 in which they stated that the Union was awaiting further information from ERS. The Union’s ‘Presidential Team’ met on 18 July to consider a report from ERS on complaints about the conduct and fairness of the elections but this report contained no further information about Mr Bakhsh’s complaint. On 19 July, the Union wrote to Mr Bakhsh informing him that it “... *cannot move to re-run the election*”. It explained that this was in line with legal advice received, having reviewed paragraph 6 of Schedule C of the Rules, the statutory requirements and the decision in **Douglas v. GPMU (1995) IRLR 426**.
20. Mr Bakhsh made this complaint to the Certification Office on a form dated 13 August 2005, following an inconclusive exchange between his solicitors and the Union.

The Law and the Relevant Statutory Provisions

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

S.48 Election address

(4) *The trade union shall secure that no modification of an election address submitted to it is made by any person in any copy of the address to be distributed except-*

- (a) *at the request or with the consent of the candidate, or*
- (b) *where the modification is necessarily incidental to the method adopted for producing that copy.*

S.52 Scrutineer’s report

(1) *The scrutineer’s report on the election shall state ...*

(2) *The report shall also state whether the scrutineer is satisfied-*
(a) *that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election,*

(b) *...*

(c) *...*

and if he is not satisfied as to any of those matters, the report shall give particulars of his reasons for not being satisfied as to that matter.

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.

(2) On an application being made to him, the Certification Officer shall-

- (a) make such enquiries as he thinks fit, and
- (b) give the applicant and the trade union an opportunity to be heard, and may make or refuse the declaration asked for.

(3) If he makes a declaration he shall specify in it the provisions with which the trade union has failed to comply.

(4) Where he makes a declaration and is satisfied that steps have been taken by the union with a view to remedying the declared failure, or securing that a failure of the same or any similar kind does not occur in future, or that the union has agreed to take such steps, he shall specify those steps in the declaration.

(5A) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or more of the following requirements-

- (a) to secure the holding of an election in accordance with the order;
- (b) to take such other steps to remedy the declared failure as may be specified in the order;
- (c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.

Relevant Rules

22. The Rules of the Union which are relevant for the purposes of this application are as follows:

"D.7

Elections

All elections required to be held under these rules shall be conducted in accordance with Schedule C and any regulations made by the National Executive Council.

Schedule C, paragraph 6

The Returning Officer shall determine the validity of any complaint made to her/him about the conduct or fairness of the election, and shall have the right to require an election to be held again in whole or in part if not satisfied that the election complies with the requirements of law and these Rules, and if the Returning Officer considers it reasonable to exercise the right."

A Summary of the Submissions

23. Mr Bakhsh complained that the Union had not taken his complaint seriously from the outset and had not even accepted that there had been a breach of section 48(4) of the 1992 Act until responding to correspondence from the Certification Office. He submitted that the Union had treated his complaint differently from the way it had treated his disputed election in 2000. In that case there had been an allegation that Mr Bakhsh had breached the rules by

soliciting branches and by seeking to use branch facilities to distribute materials. The complaint was investigated in the Region by the then scrutineers, USB, which concluded that if a breach had occurred, having regard to the majority being only 22, “*it could make a material difference to the outcome ...*”. USB recommended that the election be re-run without declaring the result. Mr Bakhsh won the re-run election. Mr Bakhsh complained that, in comparison, ERS had not investigated his complaint at all and that they could not reasonably have concluded that, with a majority as small as 229, the error could not have made a difference. Mr Bakhsh pointed out that he had lost by a mere 3% of the valid votes cast. He contrasted this figure with the 24% difference in the case of **Simms v. Amicus (CO D/2/04)** in which I refused to make an enforcement order. He went on to argue that he would have won if a mere 115 members who had voted for Mr Johnson had voted for him instead. He pointed out that he had received copy letters from seven branches which had written to the Union stating that the error in the election address probably did affect the result. Mr Bakhsh took no point on the first error in which the words “In Health” were transposed as “I Health”. However, he considered the second error was a major change. He pointed out that it appeared in a section headed “Equal Pay” and that this was an issue about which members in the region were extremely concerned, with the Union having only fairly recently changed its policy on giving legal representation. Mr Bakhsh submitted that the error had particular impact as it appeared in the only sentence in that paragraph which was printed in bold. He was of the opinion that members who read the election address quickly or superficially might only read the words in bold and therefore get a wrong impression of him as a candidate. In his view he could have been disadvantaged by this error in one of two ways. First, some members might have been confused, concluding that the sentence was nonsense. These members might decide not to vote for someone who was so careless in his election address. Secondly, some members might have taken the words literally. They might have decided not to vote for someone who demanded equal pay negotiations for only four members. Alternatively they might have misinterpreted his words and understood Mr Bakhsh to be saying that only four members were eligible to make claims for equal pay. In either event, Mr Bakhsh maintained that the error turned his equal pay section into a disadvantage, reflecting adversely on his competence.

24. For the Union, Mr Segal conceded that there had been a breach of section 48(4) of the 1992 Act but submitted that it would be inappropriate for me to exercise my discretion to make an enforcement order requiring the Union to re-run the election. He argued that the appropriate test for me to apply in deciding whether to exercise my discretion is whether, on the balance of probabilities, the admitted breach affected the outcome of the election. Mr Segal argued that Mr Bakhsh had put a single sentence under a microscope and given it a significance that it could not bear in context. He submitted that the sentence should be seen in the context of the election address as a whole and that the election address should be seen in the wider context of the contest with Mr Johnson. Examining the election address as a whole, Mr Segal pointed out that Mr Bakhsh had made his position on equal pay very clear. He had devoted a separate paragraph to this subject and had stated expressly that

“the Union should pursue these claims for every member who is eligible”, as well as referring expressly to members “in Health”. In this context Mr Segal submitted that the error was obviously a misprint and that it was not credible that anyone might have thought that Mr Bakhsh was committed to only the claims of four members. In the broader context, Mr Segal observed that Mr Johnson’s election address put forward a completely different platform to that of Mr Bakhsh. Mr Johnson referred to himself as being a true Labour supporter and that his priority would be to faithfully represent the wishes of members *“not those of any outside factions or political parties”*. He further observed that Mr Johnson did not refer in terms to equal pay. Counsel contrasted this with Mr Bakhsh’s election address which referred to himself as being *“a socialist who stands for traditional working class values”* and his belief that *“New Labour has betrayed the very people who elected it”*. He further contrasted Mr Johnson’s platform of being *“committed to UNISON’s constitution, objectives and policies”* to Mr Bakhsh’s statement that he challenged the Union’s leadership failure to pursue equal pay claims and his belief that any NEC expenses should be cut. Further, Mr Segal submitted that there was no evidence that any member had been confused by the error. He noted that the seven letters of complaint sent by branches to the Union were from branches that had nominated Mr Bakhsh and which would be naturally supportive of him. He noted however that even these branches did not state that members had not voted for Mr Bakhsh because of the error, still less did they state that members had transferred their votes to Mr Johnson for this reason. In addition, Mr Segal argued that I should take into account the fact that the error was accidental and the fact that steps were being taken to prevent a recurrence of any similar error. Mr Nelson gave evidence that the Union had created the additional post of Election Coordinator and that it intended to extend the period for typesetting and proof-reading by a week; to arrange matters so that members of staff engaged in proof-reading materials would spend no more than half a day at a time in doing so and to give candidates the opportunity to submit their election addresses in electronic form.

Conclusions

25. The Union concedes that Mr Bakhsh’s election address was modified in breach of section 48(4) of the 1992 Act and that I should accordingly make a declaration to that effect. The remaining issue for me to determine is whether I should exercise my discretion under section 55(5A) to make an enforcement order requiring the Union to re-run the election.
26. Section 55(5A) of the 1992 Act is structured so as to require me to make an enforcement order should I make a declaration, unless I consider that to do so would be inappropriate. This formulation grants me a wide discretion but one which must not be exercised perversely. In the case of **Simms v. Amicus** (supra) I had express regard to whether the breach of section 48(4) had an affect on the outcome of the election, having regard also to the steps the Union proposed to take in future statutory elections. These are clearly important factors in deciding whether to exercise my discretion to make an enforcement order but each case must be determined on its own facts. I must not fetter my own discretion and I must have regard to the entirety of the evidence before

me. In my approach to section 55(5A) I am assisted, by analogy if not directly, by the following passage in Halsbury's Laws, under the heading of "Validity of and Irregularities at Elections". In the different context of local government and parliamentary elections it is suggested that such elections are not to be declared invalid by reason of any act or omission of the Returning Officer "if it appears to the tribunal having cognisance of the question that the election was so conducted to be substantially in accordance with the law as to elections that the act or omission did not affect its result." The quotation continues "Where breaches of the election rules, although trivial, have affected the result, that by itself is enough to compel the court to declare the election void even though it has been conducted substantially in accordance with the law as to elections. Conversely, if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not".

27. On the facts of this case, it is common ground that both errors in Mr Bakhsh's election address were accidental. They were caused by the faulty transposition of the text of his hard copy into an electronic format and they were not picked up at two subsequent proof reading stages; one carried out by employees of ERS and one by employees of the Union. It is also common ground that the first error, the mistyping of "I Health" for "In Health", could not have had any bearing on the outcome of the election.
28. The issue that I must determine is whether the second error was such that I should order the election to be re-run. This appeared in the following paragraph of Mr Bakhsh's election address:

Equal Pay

*On the NEC I challenged our leaders failure to pursue equal pay claims which had enabled No-Win No Fee solicitors to move in. **The Union** should pursue these claims for every member who is eligible. In health we should follow the example of North Cumbria where UNISON members have recently won tens of thousands of pounds. **If re-elected I will continue to demand the union negotiates equal pay for all our four members.**"*

It is common ground that the penultimate word "four" was not in the original election address submitted to the Union by Mr Bakhsh and that its inclusion was a breach by the Union of section 48(4) of the 1992 Act.

29. Mr Bakhsh stated at the hearing that he would not have sought an enforcement order if he had lost the election by 24% of those voting or 3,678 votes, as in the case of **Simms v. Amicus** (supra). However, he asserted that the facts of this case require a different result. He pointed principally to the fact that he lost by only 3% of those voting or 229 votes.
30. The narrowness of Mr Johnson's victory gives considerable weight to Mr Bakhsh's application. However, the voting figures alone are not conclusive. I must also have regard to the nature of the error and consider whether, on the balance of probabilities, the error did have an affect on the election result, having regard to all the circumstances of the case.

31. In considering this matter I find that Mr Bakhsh is well known to members of the Northern Region. He had stood in the 2000 election, which had to be re-run. He won that re-run election in or about 2001 and was subsequently re-elected in 2003. The 2005 election is therefore the fourth election for the NEC that he has contested in the Northern Region and his fourth election address. I further find that the issue of equal pay was an important one for many members of UNISON in the Northern Region at the time of this election and that there was considerable discussion within the Union about its attitude to pursuing equal pay claims to tribunal, against a background of outside solicitors actively offering their services directly to members.
32. Mr Bakhsh argued that potential supporters may either not have voted at all or may have voted for Mr Johnson because of the erroneous inclusion of the word “four” in his election address. He has, however, produced no evidence of any member who fell into either of these categories. The letters sent by the seven branches of the Union requesting that the election be re-run were expressed in general terms. The most specific letter was that from the Branch Secretary of the Gateshead Health Branch dated 16 June 2005 which referred to a number of members asking about the meaning of the phrase. It is not suggested that these or any other members did not vote or voted for Mr Johnson because of the error. I also take into account that these requests were received from branches which had nominated Mr Bakhsh and may therefore be presumed to have been sympathetic to him.
33. The argument that Mr Bakhsh’s potential supporters may have voted for Mr Johnson because of the mistake in his election address carries particular significance as it required only 115 members to have done so to have affected the result of the election. In examining this issue, however, I accept the Union’s argument that the differences between the two candidates was so demonstrable from their election addresses that it is highly improbable that any member or significant groups of members would have switched allegiance and voted for Mr Johnson because of the error.
34. Mr Bakhsh conceded that there was no proof that 229 members did not vote for him because of the error in his election address but he argued that this was a possibility which could not be discounted. He advanced his case in the alternative. First, he submitted that some members may have taken his statement literally and found it unacceptable that he was only demanding that the Union negotiate equal pay for four members. Alternatively, and as a more likely proposition, he submitted that the sentence as published would not have made sense to the vast majority of members who would therefore have been confused or thought him not competent to prepare a coherent election address. I find that no sensible reading of the relevant paragraph by a member of the Union in the Northern Region could lead to the conclusion that Mr Bakhsh was demanding that equal pay be negotiated for only four members. The issue was well known to affect many thousands of members in the Northern Region who were being courted by outside solicitors. Mr Bakhsh had been the region’s representative on the NEC for the past 4 years and was clearly a supporter of equal pay, as demonstrated by the earlier sentence in his election address that, “*The Union should pursue these claims for every member who is*

eligible". Any sensible reading of this paragraph would establish that Mr Bakhsh was aware of the importance of the issue of equal pay and was demanding further Union support for all relevant members. The overwhelming likelihood is that the offending sentence, when read in context, would be found to be anomalous. Indeed, in cross-examination, Mr Lonie conceded that the sentence as published was a nonsense. It is therefore necessary to consider whether this sentence would on the balance of probabilities have affected the result of the ballot. In my judgment there may well have been some members who declined to vote for Mr Bakhsh for this reason but not one such member has been produced and I find that it is unlikely that there are more than a handful who fell into this category. Mr Bakhsh's election address is a well reasoned and well written document. I find that it is extremely unlikely that any significant group of members would have concluded from reading that address, including the offending sentence, that Mr Bakhsh lacked literacy skills. Those who noticed the anomaly, which two sets of proof readers had failed to detect, are much more likely to have dismissed it as an error than have given it such weight as to be the decisive factor on whether or not they should vote or for whom.

35. I have found Mr Bakhsh's case difficult to decide because he was defeated by such a relatively small majority. In such cases even relatively minor defects in the electoral process could affect the result. However, it does not follow that any breach of the electoral process in such circumstances requires the ballot to be re-run. Mr Bakhsh properly conceded that he could not have made such an argument in relation to the words "I Health". The issue to be determined by me is not whether the defect could conceivably affect the result, but whether, on the balance of probabilities, the defect did affect the result. This requires a judgment to be made, balancing the nature of the defect against the winning margin in the context of all the facts. Each case must be considered individually. In my judgment, on the facts of this case, the modification made to Mr Bakhsh's election address did not, on the balance of probabilities, affect the result. I also take into account the steps taken by the Union and those which they intend to take to secure that any similar problem does not recur.
36. For the above reasons I do not consider it appropriate to make an enforcement order.

Observations

37. The procedures of UNISON for dealing with complaints from members about its statutory elections are designed to remove any decision to re-run a flawed election from the "political arena" and to place it with its chosen independent scrutineer. The independent scrutineer must be a person appointed by the Union and be qualified in accordance with the Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993. Such persons are to be taken as being both independent and expert. In this case Mr Bakhsh's complaint was correctly directed to the independent scrutineer by the Union. By the time the results were declared on 3 June 2005, it was clear to ERS that there had been a breach of section 48(4) of the 1992 Act. Mr Bakhsh's

election address had been modified without his consent. Nevertheless, the report which ERS were required to make to the Union stated:

"As Scrutineers appointed in accordance with section 49 of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended), we are satisfied as to each of the matters specified in sub-section 52(2) with regard to the election ..."

Section 52(2)(a) of the 1992 Act requires the report to state whether the scrutineer is satisfied "*that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election*". On the facts of this case, ERS could not have been satisfied that there had been no breach of section 48(4). Its statement to the contrary is at best misleading. When this point was put to Mr Lonie, he explained that his report included a paragraph explaining the nature of Mr Bakhsh's complaint and the conclusions of ERS on it. He stated that he intended his endorsement of the election to be qualified by this paragraph, although upon reflection, he accepted that his endorsement should have made express reference to the breach of section 48(4). When exercising my discretion whether or not to make an enforcement order in these or similar circumstances, I would ordinarily give weight to the views expressed by an approved and expert independent scrutineer as to the likelihood of a defect having affected the result. In this case I gave no weight to the conclusion of the scrutineer that the outcome of this election had not been affected as I considered that the statement that the election had satisfied each of the matters in section 52(2) had undermined the credibility of the report.

David Cockburn
The Certification Officer