

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

**IN THE MATTER OF A COMPLAINT
AGAINST THE ASSOCIATION OF UNIVERSITY TEACHERS**

DATE OF DECISION

7 July 1993

INTRODUCTION

1. Under Section 25 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) a member of a trade union who claims that the union has failed to comply with section 24 of the Act may apply to the Certification Officer for a declaration to that effect. Similarly under section 55 a member or a candidate for an election to certain positions may apply to the Certification Officer for a declaration that the union has failed to comply with the requirements of Part I, Chapter IV of the Act.

2. In respect of the above sections of the Act this declaration deals with three applications separately as follows:-

- (i) That in contravention of section 24 of the Act the Association of University Teachers had failed to keep a register of members names and addresses. I call this Application 1: REGISTER OF MEMBERS
- (ii) That in contravention of section 48 of the Act the union had failed in its 1992 election for the post of General Secretary to distribute to each person entitled to vote a copy of each candidate's election address. Application 2: ELECTION ADDRESSES

- (iii) That in the same election in contravention of section 51 of the Act the union had failed to provide everyone who was entitled to vote with a convenient opportunity of doing so. Application 3: VOTING OPPORTUNITIES

Two of these applications were made on 3 February 1993 by a member of the Association of University Teachers (the union) who was also the defeated candidate in the November 1992 election for the post of General Secretary of the union. Following further correspondence the number of applications from the complainant increased to three. The first and third application were the subject of the original complaint - the second was made while my investigations were underway.

3. Initially I thought my correspondence with the parties had given me sufficient evidence to decide on application 2 (Election Addresses) and application 3 (Voting Opportunities). I did though seek to hear the views of the parties on application 1 (Register of Members). Subsequently following their own investigations of the voting issue the union made available to me and thence to the complainant other material which meant it was in my opinion appropriate to give the complainant and the union the opportunity to be heard at a formal hearing on that matter also.

4. The formal hearing of these two applications was held on 14 June 1993. The complainant appeared in person supported by a friend. The union was represented by Jeffrey Burke QC, instructed by Messrs Robin Thompson and Partners. I heard evidence from the union's President Mr Waton and representations from both the union and the complainant.

Decisions

5. After considering all the documentation and the representations made at the hearing I decline to make a declaration in respect of applications 1 and 2 - the duty to keep a register and the duty to distribute election addresses but I have decided to make a declaration on the third application.

6. I set out below the law, the facts and the argument that lead me to these decisions. At the end of the decision I make some observations designed to assist those who's task it is to determine the appropriate remedies.

The complaint

1.1 In the initial correspondence the complainant argued that the union was required by law to set up a national register and that it was not permissible for that register to be fragmented and organised by local branches. He further argued that the union did not have a national register and that the failure to keep such a register had led to a major discrepancy between the number of members sent ballot papers and the number of those recorded as being members of the union.

1.2 At the hearing he accepted that fragmentation to regional level would be permissible where there would be detailed supervision of the register by full time union officials.

The Law

1.3 I shall deal with the matter of the number of ballot papers in considering Application 3. In this section I am concerned only with the issue of whether or not the union satisfied the legal requirement to keep a register of its members.

1.4 The relevant law on this issue is in Section 24 of the Act. The first four sub-sections of which read as follows.

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

(2) The register may be kept by means of a computer.

(3) A trade union shall -

(a) allow any member, upon reasonable notice, to ascertain from the register, free of charge and at any reasonable time, whether there is an entry on it relating to him; and

(b) if requested to do so by any member, supply him as soon as reasonably practicable, either free of charge or on payment of a reasonable fee, with a copy of any entry on the register relating to him.

(4) Any duty falling upon a branch under this section by reason of its being a trade union shall be treated as having been discharged to the extent to which the union of which it is a branch has discharged the duty instead".

The unions arguments

1.5 The union explained that it was in effect a federal organisation. There were 80 Local Associations (LA's) each based at a separate university or equivalent institution and having in membership the members of the academic and academic-related staff. Each LA has its own rules and its own clerical/administrative organisation. Subscriptions are paid to the LA and then remitted to the union head office. Each LA collects a separate local subscription from its members. There is one exception to this structure in that there is a central group consisting of members who are no longer employed by a relevant institution but remain members with voting rights. The union did not seek to argue that its branches were unions in their own right.

1.6 Against this background when the 1984 Act required unions to compile and maintain a register of union members the union advised its LA's as to the records they should keep, and offered a subsidy to those installing computers to satisfy this requirement. Following the introduction of the 1988 Employment Act it told them that "In order that the AUT may be able to comply with the Act, all LA's, will need to be in a position whereby on reasonable notice they can supply to AUT HQ or to the independent scrutineer, a complete set of labels for all members eligible to vote in an election ballot giving their names and proper postal addresses".

1.7 I was told that as part of their central function, the union head office had regularly offered LAs advice about maintaining membership records and had "made substantial grants" to associations to computerise records.

1.8 With the irrelevant exception of the Central Group whose records are kept by headquarters it is through the LAs that the union's register of members is maintained.

1.9 The union noted that it had never been established in case law whether a disaggregated register of this kind satisfied the requirement of section 24. They argued however that section 24 (1) of the Act required only that a trade union shall compile and maintain a register; there is no requirement that the register must be kept in one place or in one part. The union submitted that if Parliament had intended that there should be only one central or national register whatever the number of geographic, industrial, membership classes or other organisational division or units of any union or federal structure of a union, then the statute would expressly so have provided.

1.10 Harvey on Industrial Relations and Employment Law volume 2 paragraph M1352, p.M/541, was cited as suggesting that the Act did not require a centrally located register. "A register does not cease to be 'a' register because it is divided into parts". Similarly the Interpretation Act 1978 section 6 was also cited in support of the AUT position in that that Act defines the singular as including the plural unless the contrary intention appears, which it does not in the case in question. In this connection an example which was quoted to me was "The" Land Register which is made up of a number of geographically based registers which form the whole. In the light of this the union felt that it had met the provisions of section 24 (1).

1.11 In support of this contention the union further argued that the primary purpose of section 24 is to enable a member to ascertain whether there is an entry on the register applying to him and to obtain a copy of such an entry. The purpose of the provision is fulfilled by the maintenance of a register at local associations.

Reasons for dismissing the complaint

1.12 Consideration of this complaint requires examining both the law and the practice of the union in relation to the relevant requirement.

1.13 On the question of law I find that there is no express requirement on the face of the statute that the register should be a single register and kept by the union in one place. I do

not accept the union's argument that the primary purpose of section 24 is to enable a member to ascertain whether there is an entry on the register applying to him and to obtain a copy of such an entry. In my view section 24 has as its main purpose to enable a union to better fulfil the statutory requirements found elsewhere in the legislation, particularly those relating to balloting. The right of access to the register is not an end itself but a means to helping to secure an end - namely an accurate register.

1.14 In pragmatic terms that primary purpose will be better fulfilled usually if there is one centrally held properly maintained register - particularly given the provisions of the 1992 Trade Union Reform and Employment Rights Bill (now the Trade Union Reform and Employment Rights Act 1993). Indeed the union has recognised that itself and before my enquiries began had set in hand arrangements to centralize its membership register; arrangements which will mean it has such a register in August 1993.

1.15 Those pragmatic arguments need to be distinguished from the statutory requirement. The statute does not expressly provide that the register must be a single central register. The Interpretation Act tells us that "a register" should be interpreted as embracing "registers". These registers need not be held in the same place as is evidenced by the accepted practice in the case of The Land Register. It is open to a trade union to compile and maintain its register in parts on a geographically or otherwise disaggregated basis if it so wishes.

1.16 I should add that the register must be kept in some schematic way under the direction of the trade union, be readily accessible and be maintained as the register of members names and addresses. The statute requires the register to continue to exist. There needs to be more than the ability to cobble together a list when required. Whilst it may be left to a trade union as to what form its membership register takes the responsibility to compile and maintain the register (my emphasis) rest solely with the union. This responsibility cannot be devolved to regions, branches, local associations or any other body.

1.17 The question then arises of how the union's practices measure up to those legal requirements. The evidence adduced in support of the contention reported in paragraph 1.6 above leads to the conclusion that the union established a register within the meaning of the Act. Assurances which I was given at the formal hearing, and which I accept, indicate that

each year the union took reasonable steps to maintain that register. The union's investigation in a number of individual branches, some results of which I saw, suggested that the records were well kept.

Decision

1.18 For the reasons set out above I decline to make the declaration that the union is in breach of section 24 of the Act. By the means explained the union compiled and maintains a register of its members which, so far as is reasonably practicable, is accurate and up to date.

APPLICATION 2: ELECTION ADDRESSES

The Complaint

2.1 On 17 February 1993 the complainant wrote to me alleging that in the election for the post of AUT General Secretary, that some members received two copies of the election address of one of the candidates, and nothing for the other. He subsequently quoted reported individual instances in Belfast, Edinburgh, London and Bangor. He claimed this was in contravention of the requirement to ensure that each person entitled to vote should be sent each candidates election address.

The Law

2.2 The relevant law, section 46 (1) (a) provides that

"a trade union shall secure -

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

Section 46(2)(d) specifies the post of general secretary as one of these positions. One of the requirements to be satisfied in the election is to be found in section 48 of the Act, the relevant part of which reads:

"48. - (1) The trade union shall -

- (a) provide every candidate with an opportunity of preparing an election address in his own words and of submitting it to the union to be distributed to the persons accorded entitlement to vote in the election; and

- (b) secure that, so far as reasonably practicable, copies of every election address submitted to it in time are distributed to each of those persons by post along with the voting papers for the election ..."

The facts

2.3 The ballot was administered by Electoral Reform Ballot Services (ERBS) with the Electoral Reform Society (ERS) acting as the Independent Scrutineer. The union provided ERS with candidates statements and biographical details which the union proof checked.

2.4 I am told (and have seen some relevant documentary evidence) that when the election was underway the union was informed by the Edinburgh LA of an instance of one member receiving two copies of one election addresses and none for the other. The union's head office advice to the LA was that the member concerned should immediately be issued with the statement of the other candidate. (The union later confirmed with the independent scrutineer that this advice was correct). Subsequently another instance at Belfast was reported to the union by a member and dealt with in a similar way. In the correspondence on this the President of the Belfast Association expressed the view that the number of errors was higher than might have been anticipated. As will become apparent in the discussion of the third application, this was not the only hitch affecting Belfast and that may partly explain the President's reaction. Be that as it may the union was in contact with the independent scrutineer in both instances who advised that it should continue to monitor the matter and contact ERS immediately if it became apparent that the problem was widespread. However I was informed that no such situation arose and I have no reason to believe that the problem in London and Bangor was on any significant scale.

Reasons for dismissing the complaint

2.5 The law on this matter does not require that every person entitled to vote must be sent each candidate's election address. If it did a single error could invalidate the election. That was not Parliament's intention which is why the requirement is that the union should, so far as is reasonably practicable, secure that election addresses are distributed to all entitled to vote.

2.6 Although the actual task of distributing the ballot material was delegated to the independent scrutineer it remains the responsibility of the union to ensure that this test is met. In this case it is clear that the union acted promptly and efficiently (in conjunction with the independent scrutineer) in remedying the reported problems of incorrect mix of election addresses. It was confirmed that the members affected were subsequently given the correct papers in time for the election.

Decision

2.7 For the reasons given above I decline to make the declaration that the union failed to satisfy the legislative requirements on the distribution of election addresses.

2.8 In the course of my investigation and hearing it became apparent that a significant number of those entitled to vote in the Open University LA did not receive ballot papers. These individuals will also not have received election addresses but as the distribution of ballot papers is the subject of the third application I have treated the matters separately and reached my decision on election addresses without prejudice to my consideration of the balloting issue. Had I not done so my decision on this election address application would have been different.

THE APPLICATION 3: VOTING OPPORTUNITIES

3.1 As indicated in Application 2 the post of General Secretary is one that has to be filled by a ballot satisfying certain statutory requirements. In this third application the complainant sought a declaration from me that the union had not complied with another of those requirements namely section 51 (4) of the Act in that it failed to ensure, so far as was reasonably practicable, that every person who was entitled to vote at the 1992 election for General Secretary was given a convenient opportunity to do so.

The Law

3.2. The legislative requirements relevant to this complaint are set out in section 51 (4) of the Act namely

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

- (a) have sent to him by post, at his home address or another address which he has requested the trade union in writing to treat as his postal address, a voting paper which either lists the candidates at the election or is accompanied by a separate list of those candidates; and
- (b) be given a convenient opportunity to vote by post".

Background and detail of complaint

3.3 In November and December 1992 the union held an election for the post of General Secretary. The complainant was one of two candidates. The successful candidate received 7,088 votes, the complainant 6812 votes. A difference of 276. In making his complaint the complainant pointed out that the scrutineers reported sending out 34,114 ballot papers whereas the most recent membership figure he had showed only 33,635. The discrepancy (479) considerably exceeded the size of the victors majority. He also alleged at that stage that a number of ballot papers had been sent to at least one university (Queen's University Belfast) addressed only to the university and not to any named individual.

3.4 Subsequently on 2 March, while the union was preparing its response to the original complaint the complainant named someone at Queen Mary and Westfield Colleges who had not received a ballot paper. Yet later in the correspondence, when he saw the union's response to the question of the number of ballot papers, the complainant suggested (8 March) that the position could not be confirmed without a breakdown of the number of ballot papers issued to members of each LA.

3.5 The union in preparing its response had already set such an exercise in hand, and on 7th April they wrote to me as follows

"Our initial investigations have covered a number of issues which we think, at first sight, require further explanation. In particular, we have noted a number of significant differences at local association level between our September financial membership figures and the number of labels received in the General Secretary and recent Officer elections. We have immediately put in hand investigations to ascertain the reasons for these differences in eight of our local associations."

It was at this stage that I decided it was appropriate to hold a formal hearing at which the union and the complainant could address me on the subject.

3.6 Then on 26 May the union sent me a set of documents including a table showing, for each LA, membership figures as at September 1992 and the number of postal labels forwarded to head office in the General Secretary election. It was these labels which were used to distribute ballot papers. This table showed that 33,907 labels had been sent and a membership figure of 33,546. But there were, as the union had said, some disturbing differences in relation to individual associations. For example Aberdeen had forwarded 525 labels against a September membership figure of 437, Liverpool 873 against 768, Ulster 741 against 690, Institute of Education 154 against 124, Dundee 362 against 322, Royal Holloway 237 against 162, and Swansea 488 against 425. With one notable exception the significant differences all involved more labels than on the September membership lists.

3.7 The one exception was the Open University where 899 labels were recorded against a membership figure of 1,356.

Jurisdiction

3.8 It will be noted that all of the information in paragraphs 5-7 was provided to me by the union rather than by the complainant. In the papers for the formal hearing the union raised the question of whether a complaint had actually been made about the apparent failure to send ballot papers to a substantial number of members of the Open University LA.

3.9 The union did not press this matter. If they had done so I would have rejected their submissions on the grounds that -

- (i) I was dealing with a general complaint about voting arrangements albeit backed by specific instances
- (ii) The information came to light in response to my enquiries whilst investigating the complaint
- (iii) At an early stage the complainant asked for the sort of information which would have revealed the relevant discrepancy (see para 3.4 above).

If I am wrong on this it would in any event have been open to the complainant or anyone in a similar position to make a new complaint.

The unions response

(a) The general conduct of the ballot

3.10 The union explained their federal structure and the duty of each of 80 LAs to maintain membership records (see application 1).

3.11 The union also explained in detail the arrangements adopted for the election of the General Secretary. The salient features of these arrangements were

- (i) Members were informed individually by means of a notice to members of the timing of an election and invited via an 'UPDATE' publication to check that they were enfranchised by ensuring that their details were contained accurately on local registers.

- (ii) Each LA was required to send to head office at the beginning of November a list of all full, honorary, retired and attached members (all of whom were entitled to vote) as at 31 October 1992. A completed membership summary sheet (form Z167) giving total membership by category was to accompany these lists.
- (iii) Between 2nd and 17th November LAs were required to submit to head office a set of fully addressed postal labels of eligible members for use in the despatch of ballot papers. A summary sheet giving the total number of labels enclosed (form LA4768a) was to accompany the printed labels.
- (iv) The labels were forwarded to the independent scrutineer by head office after checking that the number of labels agreed with the total figure on form LA4768a.
- (v) The independent scrutineer used the address labels to despatch the ballot papers to members by post.
- (vi) Photocopies of the labels were kept by the union's head office together with the summary sheets for reference so that any queries could be dealt with during the election.

3.12 As part of this process it should be noted that most members had requested, as is their right, that ballot papers should be sent to their university departmental address. On arrival at the university the ballot papers were then normally delivered to members through the internal distribution system.

3.13 The union pointed out to me that wide publicity was given to this election internally and in addition the election attracted national media interest; all members should therefore have been well aware of the General Secretary election and the need to vote. During the course of the elections the union was notified that 12 members had not received ballot papers. Details of these were passed to ERBS which undertook to re-issue papers together with a declaration to be signed to the effect that those were the only papers they had

received. It is relevant that four of these notifications related to Belfast and one to a member of the part-time Open University branch.

(b) **Belfast**

3.14 When the labels (as at 3.11(iii)) were received from Belfast it was noted that they contained members names and departments only (ie the institution was omitted). The branch immediately agreed to send an additional set containing the university address only, and ERBS agreed that the envelopes for Queen's University, Belfast would carry two labels; one bearing the members name and department, the other the address of the institution.

3.15 During the ballot period it emerged that 140 envelopes had been received at Queen's University bearing only the institutional address. ERBS investigated and discovered that these 140 were duplicates and that they had completed additional ballot paper labels with the full (institutional) address when they realised that incompletely addressed envelopes had been sent out. ERBS were confident that all members at Queen's University, Belfast would receive ballot envelopes individually. It was agreed nevertheless that the Belfast LA should (i) return the incompletely addressed envelopes to ERBS immediately; and (ii) initiate a procedure which included issuing a circular asking members to contact the local association if they had failed to receive ballot material. Four members out of 630 responded to that circular and their details were communicated to ERBS by head office in order that a further set of ballot papers could be sent out (see 3.13 above).

(c) **Membership lists versus ballot labels: General**

3.16 The difference between the number of ballot papers issued and the membership numbers at September 1992 which first roused the complainant's interest and which was carried through in the comparison association by association (para 3.6 above) was explained in terms of a number of factors. First the membership numbers relate to September and the General Secretary ballot was conducted on an October register. Given that the new academic session begins in September/October differences between the October and September figures are to be expected. Secondly the September figures are to obtain for audit purposes the number of subscription paying "financial" members and do not always give details of other members (eg retired members) who may be eligible to vote. The unions internal investigation of discrepancies at the local level confirmed these general explanations.

(d) **The Open University**

3.17 The union carried out its own detailed investigation of what happened here. The form returned with the address labels said there were 889 labels, the number was checked and the form altered to 899. However the form Z167 (see 3.11 above) returned on 29 October set out 873 full-time, 14 retired and 523 part-time members; in total 1410.

3.18 In an attempt to discover from Open University part-time members whether they had received ballot papers, a questionnaire was sent, in April 1993, to those part-time members asking whether they had received a ballot paper in the General Secretary election. The questionnaire named the candidates and included a specimen ballot form.

3.19 The result of the survey was that of 377 respondents, 94 said that they had received a ballot paper, 110 that they had not and 173 did not recall one way or other. From this result the union felt that it was difficult to say what exactly happened but concluded that "It seems possible however, that, in error, either the labels were not printed out or were not sent to head office for those members".

3.20 The union drew attention to the fact that since the election no Open University member, even when reminded by the questionnaire, actually complained about not receiving a ballot paper.

(e) **Summary of the Union's case**

3.21 (1) The only evidence that any members who were entitled to vote in the General Secretary election did not receive ballot papers (other than in the case of the isolated member) has, after substantial investigation, been shown to relate to the Open University;

(2) The possibility of a human error in the office of a LA in forwarding names to head office does not establish that the union failed, so far as was reasonably practicable, to ensure that all those entitled to vote were not given an opportunity of doing so. The system set up and operated by the union was sound, efficient and proven; it was designed to ensure and did ensure, so far as is reasonably practicable, that all members were given an opportunity to vote. No system judged by the

standard of reasonable practicability can avoid human error and no higher standard is required. Lord Donaldson in British Railways Board v NUR [1989] ICR 678) at p.684, referred to the difference between "denying someone's entitlement to vote and inadvertently failing to give him an opportunity to vote" (p.683G) and to the fact that "there will be a number of things which inevitably will go wrong" (p.684D).

(3) Whether or not the number who in all probability did not get ballot papers was sufficient to influence the outcome of the election is irrelevant to whether there has been a failure to comply with the provisions of section 51 (4). This was established in the British Railways Board case ((2) above).

(4) All of the Open University members will have known of the election by reason of the steps taken to inform them including local circulation; yet only 1 of the Open University members carried through to head office a complaint of non-receipt and was sent a ballot paper; no Open University member has complained since the election, the result of which was widely announced and was in particular set out in the January editions of the AUT bulletin and UPDATE which are sent to every member.

3.22 For these reasons the union submitted that the evidence demonstrates that so far as is reasonably practicable every member was given an opportunity to vote.

3.23 The union continued that if, contrary to their submissions I concluded that a breach had occurred, I should take account of the nature of the offence and the possible consequences of a re-run election and exercise my discretion not to issue a declaration.

Reasons for making the decision

3.24 In my view this case turns on a judgment of what actually happened in the case of the Open University part-time members and on how far the union's system stands up to the "reasonably practicable" test.

(a) My view on the key facts

3.25 The first question is whether or not Open University part-time members were sent ballot papers in this election. The evidence is conflicting. In response to a very specific

questionnaire sent out to such members some five months after the election 91 (out of 373 respondents) said they had received a voting paper in the ballot for the General Secretary; more said they had not and nearly twice as many could not remember. Against this the union took photocopies of the labels it sent to ERBS to use in despatching ballot papers, and they have not produced copies of any labels relating to Open University part-time members in this election. Moreover the number of ballot papers issued by ERBS is inconsistent with papers having been sent to some 500 Open University part-time members. On this evidence the union itself has concluded that, while they cannot be certain, the most likely conclusion is that Open University part-time members were not balloted. I share that view and have decided on the overwhelming balance of probability that part-time members of the Open University Association were not sent ballot papers in this election.

3.26 The mere fact of the failure to send ballot papers does not mean the union has failed to meet the statutory requirements, which are not that everyone must be given a chance to vote but that the union should take all reasonably practicable steps to ensure that everyone is given such a chance. That question requires consideration of the system the union adopted to see that those entitled to vote got ballot papers.

(b) **Some crucial elements in the union's conduct of the ballot**

3.27 The system the union adopted is set out in para 3.11 above. There are some important features of those arrangements to which I draw attention.

3.28 On 16 October 1992, against the possibility that there would be a contest for the post of General Secretary, the union wrote to all of its Local Secretaries covering three topics. The first was headed: "MEMBERSHIP LISTS: ELECTION OF GENERAL SECRETARY". It contained the following passage in relation to a membership ballot for the position of General Secretary.

"In order to comply with statutory requirements regarding the proper conduct of any such ballot local associations are required to send to headquarters at the beginning of November a list of all full, honorary, retired and attached members as at 31 October 1992, together with a total membership figure. A complete summary sheet should accompany these lists (Z.167 attached)".

3.29 For reasons which will become clear below I shall refer to this form as Z167E (E being for elections).

3.30 The second item in the union's circular was headed: "POSTAL ADDRESS LABELS FOR MEMBERS". It read:

"Please note that local associations will be asked to submit to headquarters between 2 and 17 November 1992 a set of fully-addressed postal labels for local association members (excluding postgraduate members) for use in the event of a membership ballot for the post of general secretary. A separate circular on this matter, enclosing a form which must be completed and returned with the address labels, will be issued shortly".

3.31 The separate circular was duly despatched on 2 November asking for the labels and for a summary sheet (LA4768a) to accompany the labels.

3.32 The third item in the circular was headed "REMINDER - FINAL MEMBERSHIP LISTS: 1991-92 SESSION". The key element of that item read:

"Local associations are reminded to forward to headquarters as soon as possible their final membership lists for the 1991/92 session (excluding post-graduate members), as they stood at 30 September 1992, together with the final total membership figure at the end of that session. A complete summary sheet (Z.167) should be sent with the final lists".

I shall refer to this summary sheet as Z167F (F being for Financial members).

3.33 If these three requests were all met, and I have no reason to doubt that they were substantially met, when the labels to be used for balloting were received by the union the union would have three ways of checking them. First by comparing the number of labels received with the total on the form accompanying them (LA4768a). Second by comparing them with the total shown on Z167F and third by comparing with the total shown on Z167E.

3.34 The union explained to me that, as had been its practice over the years, it only carried out the first check. Only after the election and when the possibility of a complaint was at least being rumoured did it check with the totals on Z167F. Because these totals were collected for a different purpose, excluded some categories of members who were entitled to vote and related to September rather than to the October date to which the ballot was linked, the union was not initially concerned at the overall discrepancy. It was only when it looked at them on an association by association basis that it became concerned.

3.35 At no stage before, during or after the election was any comparison made between the totals on Z167E and the number of address labels sent out. The union argued that Z167E and the information attached to it was to be used to investigate and deal with queries arising in the course of the election about entitlement to vote and non-receipt of ballot papers.

3.36 Had there been a check between the Z167E and the LA4768a in relation to the Open University it would have revealed a total of 1,410 on the former and 899 on the latter (after the minor amendment mentioned in 3.17). The difference between these figures was such that a comparison of the national totals from the two sets of forms should have revealed it. Similarly the problems with the Open University part-time members may have come to light if a check with the labels, or the information with Z167E, had been made when the one complaint was received in the union's head office. That check was not made for the unfortunate, but understandable, reason that the person who reported not having a ballot paper was personally very well known in head office as someone who should have received one.

(c) **Application of the "reasonably practicable" test**

3.37 I now have to form a view on whether what the union did satisfies the obligation on them to do what was reasonably practicable to ensure that all those entitled to vote were given an opportunity to do so. I accept that I must judge the situation as it existed before and during the balloting process. The size of the majority is irrelevant as to whether or not an offence has occurred. So I should add, for similar reasons, is it irrelevant whether or not those not getting a chance to vote felt aggrieved.

3.38 I accept a great deal of what the union says. The evidence, other than that relating to the Open University, suggests that the union took the usual and sensible steps to ensure that those entitled to vote got a ballot paper. It publicised the election, it encouraged members to check they were enfranchised, and it sent ballot papers (with a check to avoid double voting) to those who said they had not got one. These arrangements could have been improved by publicising to members what they should do if they did not receive a ballot paper, but in general I accept that what the union did in this regard was adequate to deal with the trivial mishaps that occur in any election.

3.39 Where I find the union to have failed is in not using the information it had which would have prevented a whole category of members being excluded when a particular institution failed to send a full set of labels (or when such a set went astray in the post). It had the information to prevent the lapse which occurred but its system - apparently consciously - avoided its use. In Lord Donaldson's terms, see British Railways Board case (3.21(2)), this was not an inadvertent failure.

3.40 The union had a form, Z167E relating to October and to all members (excluding postgraduate students who had no vote) and not just to financial members. The circular requesting it said the information it summarised was needed "in order to comply with statutory requirements regarding the conduct of any ballot for the general secretary post". In spite of this the union system did not involve checking the number of labels against the number of members on a return made for electoral purposes.

3.42 I found the union's explanation that this information was collected solely to deal with queries during the balloting process unsatisfactory. The form and associated list provided a very reasonable and practicable way of avoiding substantial errors of the kind which occurred in this case. It was not used in that way.

3.43 Nor am I persuaded by the argument that the system had worked satisfactorily at previous elections. We do not actually know if that is true. The problems with this election only came to light after considerable probing they may - I put it no stronger - have occurred before. Moreover the existence of a fundamental weakness in a system may only be revealed when a particular set of circumstances occurs. That does not imply that it would be

unreasonable and impracticable to eliminate that weakness particularly, as in this case, where the corrective action was so simple and straightforward.

3.44 The only outstanding issue I have to deal with is whether, having found that the union failed to do all that was reasonably practicable to give those entitled to vote a chance to do so, I should exercise any discretion I may have whether or not to make a declaration.

3.45 I believe that in the circumstances of this case it is appropriate for me to make a declaration.

Declaration

3.46 For the reasons set out above I declare that in the election of its General Secretary held in November/December 1992 the Association of University Teachers failed to do all that was reasonably practicable to ensure that all members who were entitled to vote were given a convenient opportunity to do so. As a consequence its General Secretary does not hold office by reason of an election satisfying the requirements of Part I, Chapter IV of the Trade Union and Labour Relations (Consolidation) Act 1992.

Observations

3.47 It is not for me to prescribe any particular remedy but to record what steps the union has taken or has agreed to take to remedy the declared failure or to avoid similar breaches in the future. I am also empowered to make written observations on any matter arising from, or connected with, the proceedings.

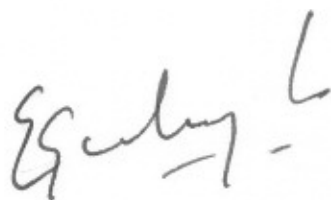
3.48 The decision on whether or not the ballot should be re-run falls to be taken by the union, or by order of the High Court on application by the complainant or any other member of the union.

3.49 It might be helpful to the union, to any potential applicant and to the High Court if I record a number of facts and observations which seem to me relevant.

- (i) A breach of the statutory balloting requirements undoubtedly occurred in the election held in November/December 1992, and part-time members of the Open University Local Association were not sent ballot papers;
- (ii) If a new ballot satisfying the legislation is not held it will be open to any member of the union to seek redress in the High Court;
- (iii) The breach was a combination of a likely failure of the Open University LA to send labels to the union in respect of around 520 members, and of the union not having and operating its systems in such a way as to check that they received enough, and only enough, labels to ensure that, apart from de minimis errors, those entitled to vote were sent a ballot paper;
- (iv) I am satisfied that there was no intention on anyone's part to disenfranchise these or any other group of members in this election;
- (v) The failure only came to my attention as a result of the union being open and frank with me about something which emerged from its internal, detailed investigation of the matter of the original complaint to me but which was not detailed in that complaint;
- (vi) I note that none of those who did not receive ballot papers and were reminded of this by the union's questionnaire complained that they had been disenfranchised.
- (vii) The number who in all probability were not sent ballot papers (523) exceeded by some way the winning candidates majority (276). However to have overturned that majority if all of the 523 had voted, 76% would have had to have

- (viii) The union has in hand arrangements for establishing and using a central register of members. This register will be available in August 1993.

3.50 As indicated above I make these observations not in any way to qualify my declaration but as points which might be helpful to those whose responsibility it is to determine the correct remedy for the breach which I found.

A handwritten signature in black ink, appearing to read 'E G Whybrew', with a large, stylized flourish extending upwards and to the right.

E G WHYBREW

Certification Officer

7 July 1993