

D/6/94

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

**IN THE MATTER OF A COMPLAINT
AGAINST THE NATIONAL ASSOCIATION OF TEACHERS
IN FURTHER AND HIGHER EDUCATION**

Date of Decision:

20 May 1994

Date Reasons for Decision Published:

11 July 1994

Under Section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 I am empowered to make, or refuse to make, a declaration on the application of any person who claims that their trade union has failed to comply with one or more of the provisions of Part I Chapter IV of the Act which imposes a duty to hold elections for certain positions. One of these provisions is that no member shall be unreasonably excluded from being a candidate in such an election.

The application and decision

1. On 29 March 1994 I received a formal complaint from a member of the National Association of Teachers in Further and Higher Education (the Union) alleging that the union had unreasonably excluded her from standing as a candidate in the election for the post of General Secretary. The applicant, who was the President of the union, complained that her nomination had been declared invalid on the grounds that one of the ten members required to sign her nomination paper was not, on 14 March 1994 (the closing date for nominations) an ordinary member of the union.

2. The nominator in question had been deemed to have been in membership up to 1st March 1994, and again from about 21 March 1994 when her full subscription for 1994 was received by the union. However she was ruled by the union not to have been a member on 14 March 1994. Consequently the complainant's nomination had been declared invalid because she had failed to provide 10 members to endorse her candidature as was required by the election procedures published by the union.

3. There was a considerable amount of correspondence and the documentation relating to the election was made available to me. This was by no means a clear cut case and I held a formal hearing on 19 May 1994. The complainant represented herself. The union was represented by Michael Scott of Michael Scott and Co, Solicitors.

4. For the reasons set out below I decline to make a declaration in this case. The parties were informed of this decision on 20th May.

The requirements of the legislation

5. Section 47 of the Act provides:-

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

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

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

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

Sub-sections (1) and (3) are relevant to this case.

The complainant's case

6. The complainant asserted that it was unreasonable for the Returning Officer to reject her candidature just because one of the ten members required to sign her nomination paper was not, on 14 March 1994 (the closing date for nominations), a member of NATFHE. The complainant maintained both that it was not possible for candidates to be absolutely sure about the membership status of individual nominators and that the union was wrong in its interpretation that the Rules and Protocols (procedures) governing the election require this.

7. Prior to the deadline for nominations the complainant had obtained assurances from the nominator in question that she was a fully paid up member. She had no reason to disbelieve this as the person was a member of her own Branch and was well known to her. On this basis it did not seem reasonable to pursue the matter of membership status any further.

8. The nominator believed herself to be a member because when she signed the nomination form she held a membership card with an expiry date of September 1995; she was receiving the union magazine "The Lecturer" throughout the period and until March 1994 had continued to receive voting papers for NATFHE elections. Moreover the nominator had no record of any request for renewal of her 1994 subscriptions nor any warning that she was in danger of ceasing to be a member. Furthermore there was no reason either in her experiences in 1994 or in her history as a member since 1985 to believe that she would no longer be a member past 1 March 1994. Evidence was given that she had paid her subscription late in several previous years and that other members had done so without loss of benefits.

9. The complainant asserted that in any event she had no certain method of checking the membership status of any of her nominators. The nominator in question usually paid her subscription annually by cheque. On the union's own written evidence the nominator had been deemed by the union to be a member up to 1 March 1994 and again from about 21 March 1994 when her full subscription was received. The nominator on finding that questions were being raised about her membership paid her 1994 subscription by cheque on 21 March back dated to 28 February in the belief, and with the knowledge of the union membership records staff, that this would have the effect of wiping out the period of arrears.

10. The complainant put a further argument about the relevant dates applicable to the nominator's membership. Under union rules those members in a category entitled to vote on 31 December were entitled to vote in all elections for members of the executive committee in the ensuing year. Union rules also referred to nomination forms being signed by those entitled to vote in the relevant election. There was no express exclusion for General Secretary elections in the rules. Accordingly on this basis the nominator concerned was in a category of membership entitled to vote on 31 December 1993 and was therefore entitled to nominate and vote for the whole of 1994 notwithstanding any arrears in subscriptions.

11. All these factors together made it difficult to establish whether a nominator was a member or not and in the complainant's opinion made the whole process of checking membership a lottery. In any event had the complainant known that there was a problem with one of her nominators, as the current President of the union, she would have had no difficulty in finding other members willing to sign her nomination form.

12. The complainant also pointed to other factors which unfairly affected her nomination. The union had not observed the requirement of its rule book that cessation of membership should be notified to the person affected. Furthermore another rule concerning readmission of members who had lapsed through arrears was also not observed by the union. If these rules had been applied it would have lead to a new membership application form being issued to the member thus highlighting that there was a problem. As neither of these rules were carried out by the union it also seemed a reasonable interpretation that the nominator had never ceased to be a member.

13. Furthermore there were examples known to the complainant in previous elections where potential problems had been drawn to the attention of candidates by union headquarters staff who had checked nominations. Problems were thus often rectified providing the nominations were received in good time before the closing date. Also, previous Returning Officers had exercised discretion concerning election procedures, some on the advice of the union solicitor. Examples included election addresses that had been submitted late; candidates who had been allowed to withdraw from an election even though the candidate's name had appeared on the ballot paper and some "tidying up" in the pre-election processes.

14. It was also asserted that the union circular which set out the nomination requirements imposed conditions for candidature which were not required by the union rules. These included the provision for a total of ten nominators rather than two as stated in the rule book. The circular also included a reference to nominators being "fully paid up NATFHE members ... (who) have correctly maintained their membership at the time of nomination". These requirements had no basis in union rules or protocols adopted in relation to the election. The complainant maintained that the union rules should be paramount and could not be overridden by the published procedures. The rejection of her candidature based on the conditions in the union circular was therefore in her opinion ultra vires.

The union's case

15. The union had two main lines of argument:

- (i) that section 47(3) of the Act applies (see paragraph 5). Read as a whole, both the rule book and the procedures which were adopted by the executive committee gave rise to a class of membership debarred from standing as a candidate in the election. Consequently the issue of reasonableness did not arise.

If this argument was not accepted by the Certification Officer the union proposed to rely on the case that:

- (ii) that the complainant was not unreasonably excluded from standing as a candidate.

Candidate excluded on the grounds of class of member

16. The main plank of the union's argument was that the complainant had been excluded from standing in the election on the grounds that she was in a **class of membership** that was debarred from standing in the election by the rules of the union. This exclusion was said to be permitted under section 47(3) of the Act (see paragraph 5) because both the union rule book and the procedures adopted under the rules gave rise to a class of which all such members were excluded.

17. Rule 12.1 of the union stated:

A General Secretary shall be elected in accordance with procedures approved by the National Executive Council ..."

Rule 16.2 states:

"Valid nominations will require, for each candidature, the signed consent (which may not be revoked) of the candidate and of two other members all entitled to vote in the relevant election ...".

In the case of the General Secretary election rule 16.2 did not apply. Procedures and protocols adopted under rule 12 were relevant. These required that ten other members in addition to the candidate were required to sign a nomination.

18. The union argued that the effect of these rules was to create classes of membership of those who could, and could not, be eligible for nomination as candidates in the election. In the case of this election the union argued that the class was defined by rules which required candidates to have:

- (i) sufficient length of service as a member; and
- (ii) a sufficient degree of support.

19. The union maintained that this view of class, and thus its reasons for rejecting the complainant's nomination was supported by previous decisions of the Certification Officer, namely D/2/93 and D/2/87. In the latter case involving the Union of Construction, Allied Trades and Technicians (UCATT), the Certification Officer had said:

"I find it highly improbable that there would ever be a situation in which members were excluded from standing simply and solely in their capacity as members. The likelihood is that a member will be excluded because he is a particular kind of member. The union excludes members from standing for various reasons; if, for

example, they have not been members for long enough, or their subscriptions are in arrears, or they do not live in the region where the election is taking place".

He continued:

"I have considered both arguments and it seems to me clear that, as a class, all Regional Organisers are excluded, by the combined effect of [UCATT's] rule 3.14 and rule 22.1 from standing as candidates in elections for positions on the Executive Council in specified circumstances, ie. where the elections are for positions on the Executive Council which have not been vacated".

20. On this basis the union argued that the measure of support required in the election (and length of service) were analogous cases and the class conditions created by the union for the election complied with Section 47(3) of the Act.

21. The union claimed that the complainant did not fall within this class. She did not have the ten nominations. The fact that the nominating member had continued to receive some benefits after her membership had lapsed was not relevant and was not indicative of continued membership. Membership involved a contract between the union and the person concerned. Both parties were bound by the conditions of membership. If the membership subscription was not paid then there was no contract in force, and the member had no rights under union rules.

22. In rejecting the complainant's nomination the union's Returning Officer had taken advice from her legal advisers and the independent scrutineer. This advice was that the Returning Officer had no discretion to waive the conditions in this instance. The Returning Officer in her evidence said that she had taken the advice into account as well as correspondence she had with the complainant. One such letter said in part "It is not denied that she (the nominator) had not paid the 1994 subscription by 1 March". As 1 March was the date on which membership technically lapsed if subscriptions had not been paid it was clear that the nominator was not a member on 14 March, the closing date for nominations and the complainant had not met the conditions for candidature. The Returning Officer was therefore clear that the complainant's candidature must be rejected. The union stressed that

it had approached the election with great care and the rejection of the nomination had not been taken lightly.

The candidate was not unreasonably excluded

23. The union alternatively submitted that in any event the exclusion of this candidate was not unreasonable in all the circumstances. It was legitimate to reject the complainant's nomination on the grounds that one of her nominators was not a member on 14 March 1994 as this was one of the key requirements to be complied with for candidates in the election. The relevant requirements were given in a union guidance circular which stated:

"3. You must be proposed and seconded by two current ordinary members of the Union and endorsed by a further 8 such members all of whom must be drawn from at least three separate Branches of the Union. Once received at the Electoral Reform Ballot Services Ltd., the nomination is not revocable.

4. **Failure to comply with any of the requirements as set out in the Nomination form will debar your candidature. It is your responsibility to ensure that your nominators are fully paid up NATFHE members or have correctly maintained their membership at the time of nomination".**

24. The union stated that it was a simple matter for prospective candidates to check the membership status of nominators either directly with the union or through the independent scrutineer. The union computer records would for instance have shown whether payment had been received for annual cheque paying members for the current year such as for the nominator concerned and whether she was entered as a paid-up member.

25. If this check had been done it would have shown that the nominator was in arrears of subscription; this would have alerted the complainant that there was a problem or if the check had been made after 2 March that the nominator concerned was no longer a member.

26. The union did not accept that just because the nominator held a membership card expiring in 1995 that she was a member. A member must pay the membership fee to enjoy the rights of membership of the union. Furthermore the complainant was wrong to conclude

that the system of checking membership details was a lottery. Other candidates had not failed in their nomination by this provision including an external candidate who might not be so familiar with the union's administration. It was an error for the complainant not to take precautions to ensure that all of her nominators were members on the date when nominations closed.

27. As part of the established election procedures the membership status of nominators had been checked by the independent scrutineer. This check resulted in queries concerning the nominators of three candidates in the election including the one that lead to the disqualification of the complainant's nomination. These queries were pursued in such a way that the identities of the candidates were not revealed to the union computer records staff carrying out the factual check, or to the Returning Officer, before the complainant was told there was a problem.

28. The union asserted that it could not properly overlook or use discretion in irregularities with the status of nominators. With only 10 nominators required to support a candidate "de minimis" could not apply. However as a further safeguard before rejecting the nomination the complainant had been given the opportunity to challenge the union's own records in case they were not correct. However neither the complainant nor the nominator concerned had disputed that the subscription was not paid until on or around 22 March which meant that the complainant's nomination was invalid.

Reasons for reaching my decision

29. The first question I must consider is whether the union is right to contend that the complainant was excluded from standing for a reason falling within section 47(3). If this is shown it does not matter whether the reasons for that exclusion were reasonable. In order to satisfy 47(3) the exclusion must be "on grounds that he belongs to a class of which all members are excluded by rules of the union".

30. To start with it is necessary to decide whether or not the exclusion of the complainant is by virtue of a rule of the union. In this case the exclusion arises by virtue of interplay of two union rules. The first is rule 5.4.1 which states:

"where an annual subscription is a single payment, membership shall cease forthwith if payment is not made by 1st March".

It was common ground that the nominee who was "ruled" not to be a member, habitually paid her membership in a single payment and had failed to pay that fee by the 1st March. All other arguments about dates on membership cards, the position at 31 December 1993 and continuing benefits are overwhelmed by the fact that the nominator had not paid her dues by the date required in the rules of union if she was to remain a member. On the relevant date under the rules of the union she was not a member.

31. The second question which arises is whether the requirement that each nominee had ten nominators was a rule of the union. The union produced a document entitled "Election Procedures and Protocols General Secretary Election". This had been circulated to branches. These "procedures and protocols" were made by the national executive committee under the authority of rule 12.1. That rule states:

"a General Secretary shall be elected in accordance with procedures approved by the national executive committee, which shall provide inter alia, that the period of office shall be for five years".

32. At paragraph 2.1 of the "procedures and protocols" it states:

"valid nominations will require the signed consent (which may not be revoked) of the candidate and of 10 ordinary members who must be drawn from at least three separate Branches of the Association".

33. Are these "procedures and protocols" rules of the union? Paragraph 12.1 gives the national executive power to "approve procedures" for election of General Secretary. Procedures adopted under rule 12.1 are adopted under the rules of the union. "Rules" in my

judgement is to be interpreted as not only meaning those expressly stated in the rule book. For example, a rule might be established by long standing custom and practice. I am also satisfied that rules approved under the rules of the union (by whatever name they are called) should also be treated as rules for the purposes of section 47(3). To do otherwise would be to limit the effect of rule 47(3) to express rules stated in the rule book. These procedures were adopted under rule 12.1 and as such seem to me to satisfy the definition of "rule".

34. But that is not the end of the matter. I must now go on to consider whether the procedures adopted under 12.1 are valid rules of the union because the complainant claims they conflict with the express rules of the union set out in rule 16. In particular the complainant stated that rule 16.2 which requires nominations for each candidate to be signed, with the candidate's consent and two other members entitled to vote in the relevant election, applies to the General Secretary election.

35. Rule 16 is headed "National Executive Council Elections. Rule 16.1 states that the regular elections for **officers and representatives** shall be held annually and those elected shall take up office at the close of the annual national conference. It should be noted that the General Secretary is an official and not an officer or representative of the union. What I am asked to decide is whether what follows in 16.2 applies only to officers and representatives on the national executive committee or to all members (without exception) of the executive committee and therefore to the General Secretary. Rule 16.5 is also pertinent to this matter as it gives a national executive committee power by standing order to determine protocols and additional procedures relating to the election process.

36. There is always a temptation to construe the rules of a union as though they were the pages of a statute. This has to be resisted because they are not drafted as such. Both myself and my predecessors and indeed the courts have on many occasions looked at the wording of rule books where there are inconsistencies. In this case the wording of the rules might have been clearer. This is not a case however where the intention of the rules is obscure. I am satisfied that rule 16 does not generally apply to the conduct of elections for the General Secretary because the rule book makes special provision for this in rule 12. Although rule 12 gives no power to the executive to pass "protocols" in respect of the general secretary election, I think this is a slip. In any event, I am not convinced that there is a significant

difference between what might not be covered by "procedures" but would be covered by "protocols". In my judgement the procedures and protocols adopted under rule 12 are valid. I am therefore satisfied that paragraph 16.2 of the procedures and protocols does not conflict directly with rule 16.2. It follows that I am satisfied that the complainant was excluded under rules of the union.

37. Even so this is not the end of considering whether or not a candidate is properly excluded under 47(3). I now have to determine whether these rules create "a class". The union submitted that there were two tests to be satisfied in order to fall within the class claimed, namely, length of service and the sufficient degree of support.

38. The submission was made that a class was merely a club of individuals who satisfied any common tests and that the rules of the union created such a club. Under that interpretation of rule 47(3) the logical conclusion would be that anyone excluded under the rules of the union would fall within a class. The union did not dispute this but argued that I had an inherent power (stemming from the Wednesbury reasonableness rules) to exclude an absurd or unreasonable class created in this way.

39. I am not sure I have such a power but I am clear that I do not need it in this case.

40. It seems to me that if Parliament had intended "class" to have the wide meaning ascribed to it by the union it would have said so, or indeed it would not have mentioned 'class' at all but relied on the reference to union rules to define who could be excluded without the question of reasonableness being considered. Section 47(3) requires a rule of exclusion to apply to a class of member and not merely be a rule of the union. The Oxford English Dictionary defines class (for our purposes) as follows:-

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

41. A class therefore requires some inherent quality, for example the type of member (ordinary, associate), length membership or type of membership. In this sense it seems to me that the requirement to have ten nominees is a procedural rather than inherently a class

characteristic. This view gains weight from the fact that the questions of eligibility and nomination for candidature were clearly distinguished by the union in its document on Election Procedures and Protocols. Under the heading "Eligibility" four categories of people were identified viz members of NATFHE, current officials of NATFHE, current officials of other TUC affiliated trade unions, persons qualifying by a combination of the above. In each case there was a five year service qualification and candidates were required to provide the Returning Officer with evidence of eligibility. Then under a separate heading "Nomination" came the requirement for the signed consent of ten ordinary members of the Association. In the case of this election the eligibility criteria determine classes of people who can stand; nomination procedures are those arrangements to which all classes have to adhere. As such the procedural requirement to have 10 nominees does not fall naturally into what I would consider to be the normal meaning of "class" in section 47.

42. The approach adopted by the union of creating a class by adding an inherent characteristic to a procedural characteristic does not in my view succeed. The class here is length of service in particular roles. There are certain members who clearly have that experience and those who do not. This can be readily ascertained. They do not place themselves in that class or remove themselves from that class by satisfying the procedural requirement.

43. It follows that the union's submission about section 47(3) fails.

44. I must now determine whether the union has been able to show that the exclusion of this candidate was not unreasonable (under section 47(1)). This has not been easy to decide. In my judgement the test for me to apply is not whether I would have excluded the candidate, but whether the action taken by the union in this case fell within the possible responses which a union acting reasonably could have taken.

45. I am satisfied that the rule which terminates membership for non-payment of dues is, of itself, not unreasonable. I am also satisfied that the requirement placed on candidates to obtain ten nominations from members is also not beyond what a reasonable union might decide. Yet the joint operation of two such rules might be capable of being unreasonable.

The fact that a union slavishly applied its rules in this context will not always mean that it has acted reasonably. It must also have regard to the statutory provisions.

46. The timing of this election was unfortunate. The nomination period spanned the date on which annual payers' membership lapsed if they were late with their payments. This could mean they were members when they nominated someone but not on the date selected to determine the validity of their status as nominators. The election also came earlier in the year than the time at which union staff traditionally checked on and chased late annual payers. The combined effect of these two factors meant that annual payers were particularly liable to be "out of benefit" and therefore invalid as nominators.

47. The way which these nomination and due payment requirements worked meant that a potential candidate such as the complainant, who was the then President of the union, was excluded although there could be no doubt that there was a substantial degree of support from the general membership for her candidature.

48. Similarly the nominator had no grounds for believing that she was out of benefit at any time before nominations closed. (There was though some evidence that a reminder about subscriptions had been sent by the union but not received by the nominator). Moreover no one concerned had any clear instruction that the crucial date for deciding the membership of a nominator was that on which nominations closed. That date had been spelled out as the critical one as far as valid candidature was concerned but not in relation to valid nominators.

49. In the case of minor technical problems with other national executive elections, for instance infringements is the length of election addresses, the union had an arrangement whereby a minor slip did not lead to a candidate being disqualified. There was some evidence that in previous executive elections the union had informal devices for allowing a "tidying up" of nominations if there were technical shortfalls.

50. However this was a strongly contested General Secretary election in which the view was taken by the union that the rules had to be applied fully and equally to all candidates. I was assured, and heard convincing evidence, that care was taken to check that facts leading to disqualification were correct and that no one who might have a "political" interest in the

outcome knew in advance which of the candidates were the three about whom there was some doubt.

51. The union's Returning Officer said in evidence that once it was agreed that one of the complainant's nominators was not valid she felt she had no discretion and had to rule out the candidate. When the complainant appealed to her that the decision offended natural justice and equity, she felt that this argument was irrelevant. Justice and equity in the union's view required impartial and strict adherence to the nomination rules.

52. I have a great deal of sympathy with the position of both parties in this case. I can well understand the complainant's sense of grievance; there were undoubted weaknesses in the system. It is not, however, for me to say what I would have done in the circumstances but to judge whether what the union did was within the range of possible reasonable responses to the circumstances. On balance I find it was and therefore dismiss the complaint.

E G WHYBREW
Certification Officer