

D/2/90

DECISION OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE UNDER SECTION 5 OF
THE TRADE UNION ACT 1984

IN THE MATTER OF COMPLAINTS AGAINST THE
CONFEDERATION OF HEALTH SERVICE EMPLOYEES

DATE OF DECISION

17 August 1990

DECISION

Under section 5 of the Trade Union Act 1984 (the Act) 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 of the Act. For the reasons set out below, I decline to make a declaration in this case.

The applications

1. On 7 March 1990 I received a letter from a member of the Confederation of Health Service Employees (the union) concerning an election to the union's National Executive Committee of a representative for the union's Number 12 Region (South Yorkshire and East Midlands), which was held in December 1989. I will refer to this member as applicant A. A letter from a second applicant concerning the same election was received on 27 March 1990. I will refer to this member as applicant B. I also received a letter dated 19 March 1990 from a member in Northern Ireland concerning an election to the National Executive Committee of a representative for the union's Number 11 Region (Northern Ireland), which was held at the same time in December 1989. I will refer to this member as applicant C.

The nature of the applications

2. The nub of all three applications was that a number of members did not receive a voting paper and were therefore denied the opportunity to vote.

3. Applicant A's letter alleged that some 500 members of his Branch, the Sheffield Local Authority Branch (Branch 1252), did not receive voting papers and hence were denied their right to vote. Applicant B's letter dated 20 March followed my request to Applicant A for further details. He alleged that he had not received a voting paper himself, and he provided lists signed by 49 members of Branch 1252 who claimed that they had not received voting papers. He also enclosed a letter from the union's general secretary to the branch secretary recording that the branch was thought to have 1216 members of whom the union had addresses for 750, leaving a balance of 464 (sic) for whom addresses were not held. Applicant B stated that he could not understand this, because he believed that every membership application form completed by a new member showed the member's home and work addresses. He also said that a list of the names and addresses of union members working for Sheffield City Council had been obtained from the Council and sent to the union's headquarters by a regional official.

4. Applicant B also complained that in the election some envelopes containing voting papers were sent to hospitals and left in piles on tables in nurses homes to await collection.

5. Applicant A took no active role in subsequent correspondence, leaving the complaint in effect in the hands of Applicant B. In reply to comments from the union, Applicant B emphasised in particular -

(a) that he had joined the union in 1984 and he believed his home address was held by the union; and

(b) that the Sheffield City Council had provided the union with "numerous" print-outs of the names and addresses of members employed by the Council.

6. Applicant C is a member of the union's Muckamore Abbey Branch (Branch 1111) in Northern Ireland. His letter of 19 March 1990 referred to complaints he had made in January 1990 to the Electoral Reform Society and he asked my office to investigate why (as he alleged) -

- (a) many members of the branch did not receive voting papers;
- (b) some members who had left the union received voting papers;
- (c) some members who had joined other organisations received voting papers;
- (d) some members received two voting papers.

He enclosed a list signed by 46 members of the Muckamore Abbey Branch claiming that they had not received voting papers in the election.

The elections

7. I established in correspondence with the Confederation that each of its Regions is entitled to two places on the National Executive Committee. Elections were held for three Regions at the end of 1989. These were the two noted above and Region 3 (North Western). The elections were contested and voting papers were sent out on 27 November 1989, to be returned by 2 January 1990. The Electoral Reform Society (ERS) were appointed as scrutineers under Section 15 of the Employment Act 1988. The ERS were responsible for the dispatch and receipt of voting papers. The election results were declared on 4 January 1990.

The requirements of the legislation

8. The conduct of elections for the members of a union's principal executive committee are governed by the Trade Union Act 1984 (the Act) as amended by the Employment Act 1988. The union have agreed that their National Executive Committee is their principal executive committee. Part I of the Act provides, amongst other things:

Section 1 - "(1) Subject to the following provisions of this Part of this Act, it shall be the duty of every trade union (notwithstanding anything in its rules) to secure -

- (a) that every person who is a member of the principal executive committee of the union holds that position by virtue of having

been elected as such a member at an election in relation to which section 2 of this Act has been satisfied ...".

Section 2 - "(7) So far as is reasonably practicable, every person who is entitled to vote at the election must -

- (a) have sent to him, at his proper address and by post, 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."

Section 4 - "(1) It shall be the duty of every trade union -

- (a) to compile, by [1 October 1985], and thereafter maintain a register of the names and proper addresses of its members; and
- (b) to secure, so far as is reasonably practicable, that the entries in the register are accurate and are kept up-to-date".

Section 5 - "(1) Any person who claims that a trade union has failed to comply with one or more of the provisions of this Part ... may apply to the Certification Officer or to the court for a declaration to that effect if -

- (a) in a case where the application relates to an election which has been held, he was a member of the trade union at the date when the election was held and is such a member at the time when the application is made ...".

Section 9 - (1) ... 'proper address', in relation to any member of a trade union, means his home address or any other address which he has requested the union in writing to treat as his postal address ...".

9. The ballots held in 1989 were the first fully postal ballots to be held by this union. This followed the repeal on 26 July 1988 of section 3 of the Act, which permitted workplace balloting.

10. It seemed to me that two separate issues arose on these complaints -

- (a) Were the general arrangements for the elections made by the union as regards registration of addresses and dispatch of voting papers sufficient to satisfy the requirements of section 2(7)?
- (b) Even if these general arrangements were satisfactory, was there any failure specifically relating to the particular circumstances of Branch 1252 or Branch 1111?

Region 12 election - general arrangements for distributing voting papers

11. The union answered my enquiries carefully and thoroughly. They explained that all members of Region 12 were entitled to vote in the election. On 25 October 1989, a computer tape with the names and addresses of members in Region 12 was sent to the printers for the preparation and labelling of ballot packs, including voting papers. A total of 13,538 members were included on the tape, being the number for whom home addresses were held on the union's register of members at that time. The "unedited" figure for regional membership at the time was 17,613.

12. The union was concerned about the members who would not receive voting papers because the union held no home address for them on the register. After discussions with ERS a "Freephone" service was established at the union's Head Office. This was to enable members to ring in with ballot queries or to ask to be sent a voting paper by the ERS. The service was publicised by a circular to branches accompanied by posters with a request that these be placed on notice boards in all workplaces. The poster urged members who had not received a voting paper by 11 December to speak to their branch secretary or ring the Freephone number before 21 December. All Freephone calls were logged. 72 calls were received for the three elections, ten from Region 12. None were from the Sheffield Local Authority Branch. The secretary of the branch confirmed in correspondence to the union's head office that posters had been sent round all worksites covered by the branch. She complained that "on very many occasions there was no reply to [the Freephone] number" but there is no reason to suppose the line was not properly attended.

The register of members' addresses

13. The union also explained the steps they had taken to maintain a register of members' addresses. Before the Act was passed, the union's central list of members did not include home addresses. It began recording members' home addresses on a computerised register in 1985. Recently-joined and new members' details were entered on the register. The union felt it would have been an impossible task administratively to go far back through old membership records, many of which would be out of date, to get addresses of existing members. Instead, the union issued re-registration forms, a step which was only partially successful. During 1986 and 1987 all health and local authorities were asked to supply lists of names and addresses of employees from whose pay the union's subscription was being deducted. According to the union the response was disappointing. Many employers claimed that providing the information would breach the Data Protection Act 1984, or that they did not have the time or resources to identify and provide the information requested.

14. In February 1987 all branches were sent full lists of members' names and addresses which showed whose addresses were missing from the register. Branches were asked to confirm the addresses on the register and supply missing addresses. In May 1987 Freepost re-registration forms for distribution to members were supplied in appropriate quantities to each branch. Since then schedules showing missing addresses have been supplied to branches at two-monthly intervals.

15. In May 1989 direct mailing to members using the addresses on the computer was commenced. In preparation for this and for the coming elections a new update form for members was produced and bulk copies sent to branches. The update forms could be returned by Freepost. Additional approaches were also made to employers in the regions where the elections were to be held. Regions were authorised to pay for the information, where necessary, or to ask the employer to include a member's update form in the pay-packet, meeting the costs of this where requested. Overall, however, the union estimates that only 10 per cent of local NHS authorities have ever provided it with lists of members' names and addresses.

16. Despite these difficulties the union claimed considerable success for these measures as a whole. It currently estimates that the membership register contains addresses for 78.6 per cent of a total of about 220,000 members, as compared with 61 per cent at the end of 1988. Returns by the Post Office from wrong or out-of-date addresses have fallen from 5,000 for the first mailing in 1989 to 1,300.

17. The union showed me Applicant B's membership application form, which is dated April 1984. It gives his present home address. Indeed Item 4 on the union's standard membership form at that time was "Address (private)". I therefore asked the union for a detailed explanation of why it had decided not to go back through past membership records when the address register began to be compiled in 1985. The reply was that with over 200,000 members this would have been administratively impossible at the time. The staff of the membership department were at that time fully occupied with entering up the names and addresses of new members, along with the normal subscription and record work. Temporary additional staff could not be brought in because the computer system then in operation did not have the capacity to accommodate the extra terminals that would have been needed. The union pointed out that its membership turnover is extremely high. 27-30% of its members leave each year, and a similar number join the union. In addition to turnover, inputting addresses from past membership forms would have involved recording many addresses that were out-of-date, because the members had moved since first joining the union.

The Sheffield City Council list

18. Applicant B referred to a list supplied by Sheffield City Council of union members employed by the Council. His branch had forwarded the list to regional office who were believed to have sent copies to Head Office on two, or perhaps three, occasions. The union provided copies of correspondence on this subject, from which it appears that the regional organiser received a list of Sheffield Local Authority employees from the branch in August 1989. She was unsure as to whether a copy was forwarded to Head Office in August but does recall asking another member of staff to forward a copy to the Head Office membership department on her return from annual leave in September. That person stated that a copy was sent in September. However, following an enquiry from the branch secretary in November the regional organiser discovered that the list had

apparently not been received by the membership department. A further copy was sent in early December but again there is no trace of its receipt at Head Office. The list was finally received by the union's Head Office by "fax" early in February 1990, after the election was over.

The names provided by Applicant B

19. Of the 49 names on the list supplied by Applicant B, 29 were not on the register at the time of the election mailing but have been added since. However twelve of the names were on the address register prior to the ballot mailing and should have received voting papers. Of the remainder, the addresses of three had not been known to the union until they received a copy of Applicant B's list from my office. Three others were not members at the time when the election list was run off the computer. The other two names could not be deciphered.

Non-delivery within nurses homes

20. The union explained that letters received in nurses homes are generally delivered to reception and residents are expected to collect them from there. Thus at the time of the ballot a number of envelopes containing voting papers may have been delivered and awaiting collection. I see no basis for finding a breach of the Act on this point because once the voting papers are addressed and in the post the union can have no responsibility for the manner of delivery by the Post Office or the internal mail arrangements at the member's address.

Region 11 election

21. The general arrangements described above applied also to this region, with some differences of detail. Again the union were thorough in answering my various enquiries. Of the 46 names supplied by Applicant C, the union stated that 34 were on the address register at the time of mailing and should have received voting papers through the post. Of the remaining 12 there were four for whom no address was held and three whose identity was in doubt. Another had joined the union after the ballot had closed. Two names were unknown to the union and two were indecipherable. The union claimed that at the mailing date the Muckamore Abbey Branch had a total of 706 members of whom addresses were held for 681. For the Northern Ireland region as a whole 15,570 members were registered of whom addresses were held for 13,084. Of the 72 Freephone calls

received nationally 33 were from Northern Ireland but none were from the Muckamore Abbey branch.

REASONS FOR REFUSING TO MAKE A DECLARATION

22. The question I have to consider is whether the union failed to do what section 2(7)(a) of the Act required, namely to secure so far as reasonably practicable that every person entitled to vote in the election was sent a voting paper, by post to his proper address. The requirement is clearly of vital importance in the scheme of the 1984 Act. However carefully a secret election ballot is supervised and run, its purpose will be frustrated unless, so far as possible, every person who is entitled to vote in the ballot has a chance of voting.

23. However, it is necessary to start by observing that the union is not required to guarantee the delivery of a voting paper to every member who is entitled to vote. That would be unrealistic. The point was made clearly by Lord Donaldson MR in British Railways Board v NUR [1989] ICR 678. That case concerned a strike ballot where it was alleged that 200 or more workers out of about 60,000 had not been supplied with voting papers. His Lordship said (at p.684) -

"The question which then arises is: Is there sufficient evidence to justify us in ... holding ... that there was a failure "so far as reasonably practicable" to provide all the members entitled to vote with an opportunity of voting? I am bound to say that I do not think there is. It seems inevitable where you have a balloting operation of this size conducted in an industrial context that there will be a few people whose names ought to be on a list but which are not on a list, perhaps because they have changed jobs; there will be a few people who have not notified changes of address or whose voting papers, if sent by post, may go astray; there will be a number of things which inevitably will go wrong. Indeed, if the situation had been that the union claimed to produce evidence that every one of the entitled members had received a voting paper and returned it, I think that the court would have been justified in looking very carefully at that evidence to see whether something had not been fiddled.

It just does not happen like that in real life, and that, of course, was recognised by Parliament when it used the words 'so far as ... reasonably practicable.'

The Court of Appeal approved the efforts made by the union in that case to deliver voting papers and rejected the alleged irregularity as being de minimis.

24. Of course, that case concerned section 11(6) of the Act which differs from section 2(7) in a number of ways, not least in permitting "semi-postal" balloting. In particular, infringement of section 11(6) is likely to render the union liable to an injunction and possibly substantial damages. There is no mechanism for remedying the actual infringement once the strike has been called. By contrast, Part I of the Act envisages the making of an enforcement order by the court (though not by me), unless such an order would be inappropriate. Such an order need not involve re-holding the election, or any particular contest within it. It could, for example, relate to the procedure for holding future elections. For this reason it could in certain circumstances be correct to interpret Part I as requiring a declaration in a case where a relatively small number of votes had miscarried, whereas an identical case might be held to be de minimis in the context of section 11. Having said that, Lord Donaldson's observations are undoubtedly of general relevance to complaints about election ballots.

Region 12 election

25. I am satisfied that Applicant B and a number of others in his branch did not receive voting papers to which they were entitled. Of these, twelve were on the address register and should have received voting papers through the post. One can only speculate why they did not do so. It may have been problems in the printing of labels or in dispatch or in postal delivery. The union is required by law to entrust delivery to the Post Office, and supervision of printing and dispatch to the independent scrutineer, which was in fact the ERS, a body highly experienced in this field. These cases of non-receipt seem to me to fall within the scope of Lord Donaldson's observations above. I do not think that they demonstrate a failure on the part of the union.

26. This leaves a balance of at least 32 people in this branch who did not receive voting papers because there was no address for them on the register. Indeed, the true number must have been a good deal higher. This is obviously a matter of serious concern, and I have given it careful thought. It seems to me that the question which section 2(7)(a) of the Act requires me to consider is what steps were reasonably practicable for the union to take in the circumstances. My conclusion is that the union did all that was required of it.

27. I was impressed by the union's account of the efforts it made between 1985 and 1989 to compile and maintain a comprehensive register of members' proper addresses. This is not a simple matter. Although the duty is placed by the Act on the union itself, it is only achievable with the co-operation of others - for example employers, the union's branch officials and, where a change of address occurs, the individual member. In the present case it appears that the union had proper addresses for some 77% of the members of Region 12 at the time of the election.

28. However, despite the general picture thus provided I have been particularly concerned with the point that Applicant B would almost certainly have received a voting paper if the union had, at any time between 1985 and 1989, gone back through existing membership records to trace the home addresses of members whose addresses were not held on the computer. On the face of it, given the statutory definition of "proper address", if the union has access to a record of a member's home address it is not entitled to ignore this source and rely on the member's own initiative in a re-registration process. Where there are gaps, past records would appear to be one obvious recourse.

29. On the other hand, the test of reasonable practicability involves deciding whether a particular step would involve disproportionate time, trouble or expense in view of the benefit likely to be gained. In this case I note in particular the limitations on computer capacity which did not allow a separate up-dating exercise to be pursued with temporary staff while the normal records and administration were processed by existing staff. I also note the very high membership turnover rate, which would have meant that many of the membership details held in 1985 were already out-of-date. It also meant that a very substantial effort was required to enter the details of the thousands of new

members joining every year. The union were entitled to pay regard to the need for the addresses to be, as far as possible, up to date at the time the register was prepared. It was for a combination of these reasons that the union decided to ignore old membership records. The union claims to have achieved an address register level approaching 80% of the membership, and I have no reason to question this figure. It is not ideal, but even if it had arranged matters differently I doubt whether, under the constraints, the union could have done better.

30. The union, nevertheless, sensibly took the additional step for the 1989 elections of arranging the poster campaign and the Freephone service to cater for those members who were not on the register.

31. Having weighed all of these points very carefully I have come to the conclusion that, in its general arrangements for the election, the union took all steps reasonably practicable to ensure that everyone entitled to vote had a voting paper posted to his or her proper address.

The Sheffield City Council's list

32. As to the particular matter of the Sheffield City Council's list, it is alleged that this list, relating to Branch 1252, was twice sent to the union's Head Office. There is a straight conflict of evidence here: the regional organiser says the list was sent in August or September 1989 and again in December, while the Head Office says that no copy was received until the "faxed" copy in February 1990. The matter is unsolved. Any evidence of manifest carelessness or neglect of duty by an official of the union which led to the list being ignored would certainly have pointed to a breach of the union's duty under the Act. However, there is no indication of any kind as to how the list miscarried. It may have been wrongly addressed, or lost in the internal mail, or even lost in the post. In the circumstances, I think it would be wrong to declare a failure by the union.

Region 11 election - Northern Ireland

33. I turn to the complaint by Applicant C. The union raised no objection to this complaint on grounds of jurisdiction, but before I can make any decision on

it I must be satisfied that it falls within my jurisdiction under section 5 of the Act.

34. Section 22(b) of the Act provides, among other things, that Part I shall not apply to Northern Ireland. However, this is an election held by a union which has its Head Office in Great Britain and carries out the vast majority of its activities here. Its principal executive committee also meets in Great Britain. There can be no doubt that the obligation in section 1 applies to the union in relation to all members of its principal executive committee.

35. Section 2(13) of the Act (as amended by the Employment Act 1988) provides that if the union has chosen to give overseas members entitlement to vote in a Part I election then the provisions of subsections 2(5) to 2(8) are to apply in respect of these members. By section 9(1) of the Act a member of the union in Northern Ireland is an "overseas member" within the meaning in section 2(13). It is obvious that the members of Region 11 were given entitlement to vote in the election for a representative of that region, and I am therefore satisfied that the union was under an obligation to observe the requirements of section 2(7) with regard to the election in Region 11.

36. The only remaining question is whether Applicant C is entitled to present a complaint to me under the 1984 Act. Does "member" in section 5 include an overseas member who has been accorded entitlement to vote? I think it must. Given that Parliament intended to give overseas members the conditional protection of section 2(5) to (8) which section 2(13) clearly provides, I find it impossible to believe that it did not intend that they should have a right to complain when those provisions were infringed. Who could be better placed to know of the infringement or have more interest in its being rectified? I think section 22(6) has to be seen as a general limit on the territorial extent of the legislation and not as overriding these more detailed provisions.

37. As to the particular details of the complaint concerning the Region 11 election, the current addresses of 30 of the 46 members who signed Applicant C's list were already on the register at the time of the election. It is odd that so many voting papers appear to have failed to arrive in the normal course of the post, but for the reasons indicated earlier I do not think that this

necessarily shows a failure on the part of the union. Of the remainder only four were definitely not on the register.

38. The case of delivery of two voting papers to one member seems to have been due to a mistake in record keeping, with one member being recorded as having the address of somebody else with a similar name. The cases of past members receiving voting papers can mostly be explained by the inevitable lapse of time that must occur before past members are removed from the register, though in one case the member left three years ago and was clearly overlooked. Overall it seems to me that these cases are of an everyday kind which fall within the scope of Lord Donaldson's observations mentioned earlier. They do not justify a declaration.

Observations

39. Although I have not made a declaration I think I should record my concern on one issue. In the present case I have accepted the union's argument that it was not reasonably practicable to go back through past records to compile an up-to-date register. But the obligations on the union amount to a requirement, so far as reasonably practicable, to have a registered address for every member. It will always be difficult to ensure that a register is fully up-to-date, taking account of resignations, changes of address, new members and so on, but persistent gaps where no address is held should be a particular matter for concern. Where a union holds no registered address for a member, that member is effectively denied a vote in a postal ballot. There is likely to come a time when further progress on this union's register cannot best be achieved without making some use of past records to fill those persistent gaps. The union should give this point serious consideration.