

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER  
SECTION 55 (1) AND 108A (1) OF THE TRADE UNION AND LABOUR RELATIONS  
(CONSOLIDATION) ACT 1992**

**Mr M Thompson**

**V**

**National Union of Mineworkers**

**Date of Decisions**

**18 July 2013**

**DECISIONS**

Upon application by Mr Thompson ("the claimant") under section 55(1) and 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

1. I declare that the National Union of Mineworkers ("the Union") breached rule 20.B of its rules by failing to hold the election for the position of Yorkshire Area Agent/Secretary within the timetable for that election published on 22 June 2012
2. I refuse Mr Thompson's application for a declaration that the Union breached rule 20.A of its rules on or about 17 July 2012 when the NEC accepted the nomination of Mr C Kitchen for election to the position of Yorkshire Area Agent/Secretary despite him allegedly not qualifying to stand for the election under rule 5A (i) to (viii).
3. I refuse Mr Thompson's application for a declaration that the Union breached section 47(1) of the 1992 Act on or about 22 June 2012 by allegedly having excluded him unreasonably from being eligible for nomination as a candidate in the 2012 National Secretary election.
4. I refuse Mr Thompson's application for a declaration that the Union breached rules 14.A and 14.F(i) of the rules of the Union on or about 22 June 2012 by allegedly not having conducted the 2012 National Secretary election in line with legislation.
5. I refuse Mr Thompson's application for a declaration that the Union breached rule 14.C of its rules on or about 29 June 2012 by accepting the nomination of Mr C Kitchen for the position of National Secretary when he was allegedly not eligible for full membership of the Union under rule 5A.

**Enforcement Order**

6. Unless the National Executive Committee determines that there shall be no Area Agent/Secretary of the Yorkshire Area of the Union, I order that the Union shall proceed with the election for the Yorkshire Area Agent/Secretary which it commenced on 22 February 2012 and in which nominations closed on 13 May 2012. Having regard to my determination of the membership status of both Mr

Thompson and Mr Kitchen and on condition that Mr Thompson pays any outstanding membership subscriptions from 12 November 2012 in respect of the period of his deemed termination, the election shall proceed on the basis that at the end of nominations the valid candidates were Mr Thompson and Mr Kitchen. The election is to be held in accordance with rule 20.A and rule 20.B of the rules of the Union so that the result of the election is declared no later than 18 November 2013.

## REASONS

1. Mr Thompson first joined the National Union of Mineworkers (the "NUM" or "the Union") in about 1986, upon starting work in the mining industry. He ceased being a member in 1994 or 1995 and was re-admitted as a member in 2006. By an application received at the Certification Office on 15 November 2012 and by further complaints received on 20 December 2012, Mr Thompson made complaints against the NUM of breaches of statute and breaches of the rules of the Union regarding the elections held in 2012 for the position of NUM (Yorkshire Area) Agent/Secretary and the position of National President. Following correspondence with the claimant, five complaints were confirmed by Mr Thompson in the following terms:

### **Complaint 1**

*On or around 17 July 2012 the union breached National Rules 20A and 20B by acting beyond its powers when having agreed an election for the position of NUM (Yorkshire Area) Agent/Secretary on or around 22 June it:*

- a) *postponed the election indefinitely, so preventing Mr Thompson from standing in that election and /or*
- b) *postponed the election until after Mr Thompson appeared before the NEC*

### **Complaint 2**

*On or around 17 July 2012 the union breached National Rule 20A when the NEC accepted a nomination from Mr. C. Kitchen despite him not qualifying to stand for the election for the position of NUM (Yorkshire Area) Agent/Secretary under National Rule 5A (i) to (viii).*

### **Complaint 3**

*On or around 22 June 2012 the union breached section 47(1) of the 1992 Act by unreasonably excluding Mr. Thompson from being eligible for nomination and standing as a candidate in the 2012 National Secretary election.*

### **Complaint 4**

*On or around 22 June 2012 the union breached National Rules 14A and 14F(i) by the 2012 National Secretary election not having been conducted in line with legislation in that Mr. Thompson was unreasonably excluded from being eligible for nomination and standing as a candidate in breach of section 47(1) of the 1992 Act.*

### **Complaint 5**

*On or around 22 June 2012 the union breached rule 14C by accepting the nomination from Mr Chris Kitchen who was not eligible for full membership of the union under rule 5A.*

2. I investigated the alleged breaches in correspondence and a hearing took place on 18 June 2013.
3. At the hearing on 18 June, Mr Thompson was represented by Mr Arthur Scargill. Mr Thompson presented a written witness statement and gave oral evidence. The Union was represented by Mr Harry Eyre of Raleys solicitors. The Union presented

written witness statements by Mr Wilson, President of the NUM, Mr Kitchen, NUM National Secretary and its Yorkshire Area Agent/Secretary, Mr Skidmore, Yorkshire Area Chairman and Mr Hartshorne, Yorkshire Area Vice-Chairman. All four witnesses gave oral evidence. There was also in evidence a 269 page bundle of documents containing correspondence and other documentation as supplied by the parties for use at the hearing, together with the 2011 rules of the Union and the Yorkshire Area Standing Orders. At the hearing Mr Scargill made an application for the late introduction of further documents which he had submitted out of time in the days prior to the hearing. Having considered the documents, I admitted some but not others. I admitted the documents that were exhibited to the statement of Mr Thompson. These were added to the bundle in chronological order. I did not admit those documents relating to Mr Scargill's personal membership status within the Union nor those relating the Union's superannuation fund scheme nor an extract of a presentation that Mr Scargill made to an NUM Conference in 2002 on the basis of their late submission and degree of relevance. Mr Scargill asked that I note his objection to the exclusion of the superannuation fund documents. During the course of the hearing, I admitted by consent a document submitted by the Union, namely the contract of employment of Mr Kitchen as National Secretary of the Union dated 1 June 2012. Each party submitted five legal authorities. Both the Union and Mr Scargill provided skeleton argument.

4. Subsequent to the hearing, I requested that both parties make additional submissions in writing relating only to the membership status of Mr Thompson as a result of a letter to him from the Union of 4 February 2013, in which it was said that he was deemed to have terminated his membership of the Union with effect from 12 November 2012. The parties were subsequently invited to comment on the written submissions made by the other side, which they did by 10 July 2013. During this exchange of correspondence, Mr Scargill applied to have admitted two further written submissions and a further document in relation to a separate point, namely the membership status of Mr Kitchen. I refused this application on the grounds that it was made after the hearing was concluded and it is not in the interests of justice for litigation to be open-ended. Mr Scargill had not sought an adjournment of the hearing on 18 June 2013 when consenting to the admission of Mr Kitchen's contract of employment dated 1 June 2012 and I did not accept that he had advanced sufficient special circumstances to merit the exercise of my discretion to admit this further material.

### **Findings of Fact**

5. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
6. Mr Thompson joined the NUM in 1986 when he first started work at a colliery. He ceased membership in 1994 or 1995 and was re-admitted in 2006. From 2001 he worked at the Maltby Colliery, Yorkshire. On 2 April 2013 the Maltby Colliery closed, although a few employees remain on site. Mr Thompson is currently employed at Hatfield Colliery, Yorkshire, working for a contracting firm. He has been informed that he is no longer a member of the NUM in the circumstances described in paragraphs 39-47 below and, in connection with which I required additional written submissions (see paragraph 4 above).

7. The membership of the NUM has declined considerably from the time when the majority of its rules were adopted. Mr Scargill's skeleton argument refers to a time in 1986 when it had a membership of 104,941 in 18 Areas. In July 2012, the period relevant to this case, the NUM had a total of about 1,800 members. Of those, 1,080 were in its Yorkshire Area. The Yorkshire Area then consisted of three working collieries. Maltby had 350 members, Kellingley had 452 members and Hatfield 270 members. The Union had a branch based on each of these collieries, which were the only three branches in the Yorkshire Area. Since July 2012, not only has Maltby Colliery closed but so has Daw Mill Colliery in Warwickshire, leaving the Union with between 1,000 and 1,500 members. The 2011 rules of the Union describe 10 Areas but Mr Scargill's skeleton argument states that the Lancashire Area ceased to be an Area holding a seat on the NEC in 2013. Notwithstanding the diminution in membership, the NUM still has considerable net assets of about £7 million.
8. This case has demonstrated conflicting factions within the Union. Some of those in elected positions consider that there are elements that seek to destabilise the Union. On the other hand, there are others who consider that the leadership is involved in unacceptable manoeuvrings to retain power.
9. Mr Thompson's complaints concern the elections held in 2012 for the positions of Yorkshire Area Agent/Secretary (which I shall refer to as "Area Agent") and National Secretary. In 2007 Mr Kitchen was elected to both these positions for terms of five years. His position as Area Agent was to terminate on 31 May 2012 and his position as National Secretary on 30 September 2012. As the Area Agent Mr Kitchen was paid a salary out of the budget of the Yorkshire Area (rule 21.B). As National Secretary, Mr Kitchen did not receive payment until he entered into a written contract of employment to perform that function on 1 June 2012. However, by rule 10.C, the Union was to reimburse the Yorkshire Area with one third of the National Officials' rate of pay to compensate the Area for work undertaken on behalf of the Union. It is significant that rule 10.C refers to the National Officials' rate of pay as it was argued that National Officials, being described in the rules as lay officials, could not receive payment from the Union. Rule 10.A defines the National Officials as being the President, Vice President and Secretary. At the relevant time the President was Mr Wilson and the Vice President Mr Thomas.
10. On 21 March 2012, the National Disciplinary Committee of the Union upheld complaints against four officials of the Maltby branch and suspended them for 12 months. This caused strong feelings to be expressed in a number of letters and notes that were posted around the collieries in the Yorkshire Area. These postings were brought to the attention of Mr Kitchen, as Area Agent, but he decided to take no action on them considering that to do so might inflame an already difficult situation.
11. On 26 March 2012, Mr Kitchen circulated the branch secretaries in the Yorkshire Area seeking nominations for election to the position of Area Agent that he was due to vacate on 31 May.
12. On 27 March 2012, Mr Thompson sent a letter by email to the Barnsley Chronicle for publication. The email was headed "From a Disgruntled Maltby Miner". The letter refers to the leadership of the Yorkshire Area as being "*like rats scurrying to*

*find refuge on a sinking ship*". It refers to "kangaroo courts being the order of the day". It refers to the Yorkshire Area leadership "running scared in fear of the loss of their privileged posts and the subsequent return to a working life underground", to "this once proud Union being reduced to a pack of scavengers feeding on the backs of a few remaining miners" and to those who "cling to undeserved jobs with extravagant benefits and salaries at the cost of their already meagre integrities". The Barnsley Chronicle did not publish this letter but it emerged at the hearing before me that it was published in the Rotherham Advertiser in April 2012. Mr Thompson later regretted the intemperate language and tone of this letter but did not resile from his defence of the branch officials who had been disciplined.

13. Mr Hartshorne, the Vice Chair of the Yorkshire Area, found a copy of Mr Thompson's letter posted up at Kellingley Colliery where he works. He stated that it was one of several such postings. He faxed a copy to the Union offices in Barnsley where it was seen by the Area Chairman, Mr Skidmore, who discussed it with Mr Kitchen. Mr Kitchen decided that he would take no action on Mr Thompson's letter as he was told that it had not been published in the Barnsley Chronicle and as Mr Thompson was not an official of the Union. He was one of a number of members who had expressed their disapproval of the disciplinary action in writing.
14. Nominations for the position of Area Agent closed on 13 April 2012. The only nominations were those of Mr Kitchen, who had been nominated by the Kellingley and Hatfield branches, and Mr Whitehead who had been nominated by the Maltby branch. The result of the election was declared by Electoral Reform Services on 14 May. Mr Whitehead had secured 410 votes and Mr Kitchen 293. Mr Whitehead's election was confirmed by the Yorkshire Area Council on 21 May.
15. On 24 May 2012, Mr Wilson, President of the Union, sent Mr Whitehead a copy of the proposed contract of employment for him as Area Agent for signature. Mr Whitehead refused to accept the terms of that contract as they differed from the terms previously enjoyed by Mr Kitchen. In particular, the rate of pay was less. Mr Kitchen was being paid at the rate of £62,006 p.a. and Mr Whitehead's contract provided for payment of £48,993 p.a. The Union maintained that it was the rate of pay that it was obliged to offer to a person upon election by virtue of a resolution of a Special Delegate Conference on 17 January 2002. At a special meeting of the NEC on 30 May 2012 it was decided that if Mr Whitehead did not sign the contract within 14 days he would be deemed not to have accepted it and the election would be re-run, with the duties of the Area Agent being carried out by the Area Chairman and Vice Chairman in the meantime.
16. On 31 May 2012 Mr Kitchen ceased to be the Area Agent but continued in office as the National Secretary.
17. With effect from 1 June 2012 Mr Kitchen entered into a contract of employment with the Union as National Secretary at a salary of £62,006 per annum. The contract was to terminate on the date of the next election of a National Secretary. This important document was not produced by the Union until the afternoon of the hearing.

18. The Union maintained its position with regards to Mr Whitehead. It regarded his refusal to enter into the proposed contract of employment as Area Agent as a refusal of the position to which he had been elected. It therefore considered that there had to be a further election for the position of Area Agent.
19. In the meantime, the Union had begun the process for the election of National Secretary. On 16 May 2012, the National Executive Committee ("the NEC") agreed an electoral timetable and on 31 May Mr Kitchen circulated this to branch secretaries together with nomination forms. Close of nominations was to be on 29 June with the ballot result to be approved by the NEC on 4 September.
20. Mr Kitchen sought the support of the Maltby branch for the position of National Secretary. The Maltby branch met to consider its recommendation for nomination on 18 June 2012. It declined to support Mr Kitchen. Mr Thompson also indicated an interest in standing at that branch meeting but he did not pursue the matter when told that it was a requirement for nomination that the person be an existing member of the current NEC. Instead, the branch sought to nominate Mr Whitehead. In May 2012 Mr Whitehead had stood successfully for election to a position on the NEC and he was due to take up his seat on or about 9 July, when the electoral term of the sitting NEC came to an end. He was not therefore a current member of the NEC at the close of nominations in the National Secretary election on 29 June and his nomination was rejected.
21. The process for the second election for the position of Area Agent began on 22 June 2012. Mr Wilson sent a circular to the branch secretaries in the Yorkshire Area enclosing a timetable and a nomination form. Nominations were to be submitted by 13 July, the NEC was to meet to approve the ballot result on 21 August and the term of office was to begin on 3 September. Nomination forms were to be returned to the President in Barnsley. The National Union and the Yorkshire Area share premises in Barnsley.
22. At a branch meeting on 3 July 2012, the Maltby branch nominated Mr Thompson for the position of Area Agent. The Kellingley and Hatfield branches nominated Mr Kitchen. At the close of nominations on 13 July, they were the only two nominations. As was to be expected, it soon became well known that Mr Thompson and Mr Kitchen were to be the candidates in that election.
23. Upon finding out that Mr Thompson was a candidate in the election for Area Agent, Mr Skidmore telephoned Mr Hartshorne to discuss the situation. They had both been appalled by Mr Thompson's letter to the Barnsley Chronicle of 27 March 2012 and were concerned that he might not be a fit and proper person to be the Area Agent given the importance of this role in the largest Area of the Union. They met with Mr Kitchen who said that he would take the matter up with Mr Wilson, the President. Whilst Mr Kitchen had previously thought it was not appropriate to take any action on Mr Thompson's letter, he considered that the situation had changed significantly upon Mr Thompson being nominated for Area Agent. He gave evidence that there could be a real problem having someone as Area Agent who would have to work with and accept instructions from people he had described as *"rats scurrying to find refuge from a sinking ship"* and *"a pack of scavengers feeding*

*from the backs of a few remaining miners*". It was decided that this matter should be referred to the NEC.

24. The NEC met on 17 July 2012 in accordance with the published timetable to consider the nominations for Area Agent. The President submitted a report which stated that both nominees satisfied the requirements of rule 20.A to be candidates. It stated that both were in full financial membership and had been for at least 12 months prior to nomination and that they had both received nominations of branches the total membership of which together amounted to 30% or more of the total full membership of the Yorkshire Area of 1,080. However, the NEC noted that the nomination forms did not require information about the date of the branch nominations and that whilst this information had subsequently been supplied by the Kellingley and Hatfield branches it had not been supplied by the Maltby branch. The NEC agreed to write again to the Maltby branch to require this information. As this matter does not re-surface, it would appear that the response from the Maltby branch was satisfactory. As a separate agenda item, the NEC went on to consider Mr Thompson's letter to the Barnsley Chronicle of 27 March. The minute relating to this agenda item records that the NEC was appalled at the contents. Mr Whitehead, who had now assumed his seat on the NEC and is a friend of Mr Thompson, commented that it looked like Mr Thompson had written the letter honestly believing in the mis-information he had received and that he, Mr Whitehead, had had a massive awakening at that day's meeting. The member for the North East cautioned against any disciplinary action which might only fuel any bad feeling and recommended that Mr Thompson be asked to come in with his representative to discuss his grievances so the matter could be fully aired. The President said that the Union would await the outcome of Mr Thompson's meeting with the National Officials and *"if the letter is not withdrawn, the Union would be defended by taking him to court but that would be a decision for the NEC"*. The minute of this meeting does not record that any decision was made to stay or postpone the Area Agent election. Mr Kitchen gave evidence that the feeling at the meeting was that there would be no need for this as there would be an early meeting with Mr Thompson and the election would proceed.
25. On the same day, 17 July 2012, Mr Kitchen wrote to Mr Thompson inviting him to a meeting with the National Officials on 26 July to discuss his letter to the Barnsley Chronicle.
26. On 19 July 2012, Mr Thompson wrote two letters to Mr Kitchen. In his first letter, he asked for the proposed meeting on 26 July to be rearranged as the person he wished to accompany him, his branch secretary, Mr Price, was on holiday and also as he would like more time to arrange cover for himself at work. In the second letter (which was not received by the Union until 26 July) Mr Thompson enclosed a statement to the NEC which he asked to be forwarded to it. In the statement, Mr Thompson profusely apologised if any member had taken offence at the nature of his letter of 27 March and stated that if he were to rewrite the letter now it would have a far more conservative tone. He asked the NEC to take into account that it was written at a time of immense emotional tension following the suspension of four of his colleagues from the Maltby branch. He hoped that the statement would be a sufficient response to the concerns of the NEC.

27. Before receipt of the statement of apology, Mr Kitchen replied to Mr Thompson's first letter of 19 July. He agreed to rearrange the meeting with National Officials and asked Mr Thompson to phone the office with convenient dates. The letter went on to state, "*Mr Wilson is of the opinion that the stay on the Yorkshire Area Agent elections imposed by the NEC at its meeting on 17 July 2012 will remain in place until such time as you have met with the National Officials as requested*". This is the first reference in the evidence to such a stay.
28. Following receipt of the statement of apology, Mr Kitchen wrote to Mr Thompson on 26 July 2012 informing him that it was the opinion of the National Officials that a meeting was still required, notwithstanding the statement of apology.
29. Mr Thompson responded to Mr Kitchen by a letter of the same date, 26 July 2012, the tone of which is a departure from his letters of 19 July. He stated that he was not prepared to meet with National Officials under duress and that to make the meeting a precondition for the election to go ahead was 'unacceptable manoeuvring' and 'a part of an elaborate attempt to exclude me from standing in the election'. Mr Thompson asked for an assurance that the election would go ahead without further delay.
30. Mr Wilson wrote to Mr Thompson on 30 July 2012, in response to a letter from him of 27 July. Mr Wilson stated that Mr Thompson was wrong to consider that the stay on the Area Agent election was on account of some outstanding information required from the Maltby branch and that the stay related to his letter to the Barnsley Chronicle. Mr Wilson stated that the way forward agreed by the NEC was that he should meet with National Officials to clarify why he wrote the letter and where the information came from, after which the National Officials were to report back to a special NEC and let them decide what happens next. Mr Wilson commented that the only person holding up the election process was Mr Thompson and that the NEC wished the meeting to take place so that the National Officials could report back and 'we can move forward'.
31. On the same day, 30 July 2012, Mr Wilson sent a circular letter to members in the Yorkshire Area. He referred to his previous circular of 8 June explaining the circumstances in which it had been necessary to conduct a second Area Agent election. He went on to state that, having considered the contents of a letter published by one of the candidates, the NEC had agreed that the individual should meet with the National Officials so that they could report back to the NEC and allow them to decide what happens next. The circular letter concluded by commenting that elections are costly and that accordingly a cautious approach had been adopted to try and ensure that the person elected is willing to take up the position and is a fit and proper person to do so.
32. On 6 August 2012, Mr Thompson wrote to Mr Wilson critical of his circular letter to members which he saw as being an undisguised election address for Mr Kitchen. Mr Thompson considered that Mr Wilson had demonstrated bad faith and stated that he was not prepared to meet with Mr Wilson or Mr Kitchen. Mr Thompson also enclosed an open letter which he later caused to be distributed to members in Yorkshire. In this open letter Mr Thompson stated that what he had written in his



letter to the Barnsley Chronicle "was and remains my view", although colourfully expressed.

33. On 22 August 2012, Mr Wilson wrote to Mr Thompson informing him that, as he was not willing to meet National Officials, the matter would be put to the NEC meeting on 4 September along with the legal advice the Union had taken in regard to his letter to the Barnsley Chronicle.
34. On 28 August 2012, Mr Thompson wrote to Mr Wilson responding to what he considered to be a threat of legal action against him. He stated that he would happily meet with the NEC or the National Officials but only after the Area Agent election had taken place and after all threats of legal action had been dropped.
35. There was a meeting of the NEC on 4 September 2012 by which time the Union had received legal advice that Mr Thompson's letter to the Barnsley Chronicle was defamatory. It was agreed that the Union would take counsel's opinion but that it should also write to Mr Thompson for the last time, asking him to come to the NEC and explain his correspondence. Mr Thompson was to be given 14 days to respond.
36. The meeting of the NEC of 4 September 2012 also noted that Mr Kitchen was the only valid nomination for the position of National Secretary and approved his uncontested election.
37. On 14 September 2012, Mr Kitchen wrote to Mr Thompson inviting him to meet with the full NEC. On 25 September, Mr Thompson responded stating that his position had not changed. He would not meet with the NEC until the threat of legal action was withdrawn and the Area Agent election had taken place.
38. On 1 October 2012, Mr Kitchen took office as National Secretary of the Union pursuant to the 2012 election for that position.
39. On 9 October 2012, Mr Thompson wrote to Mr Kitchen stating that he wished to raise a formal grievance under rule 28 against the NEC, the President and National Secretary. He alleged that they had acted in breach of the rules by not conducting an election for Area Agent in accordance with rules 20.A and 20.B. Mr Thompson stated that his grievance had to be heard by Conference as his grievance was against the NEC and he stated that he expected a Conference to take place within the next 28 days, failing which he would consider the grievance procedure to have been completed and would take the matter to the Certification Officer.
40. Mr Kitchen replied to Mr Thompson on 19 October 2012. He stated that, having discussed the matter with National Officials, it was 'our' opinion that the correct course for Mr Thompson to follow was to meet with the NEC so that they are given a chance to review their decision about the Area Agent election and that rule 28.B(vii) (reference to Conference) would apply if it was not possible to resolve the grievance. Mr Thompson was directed to make himself available at the NEC meeting on 14 November.

41. On 21 October 2012, Mr Thompson wrote to Mr Kitchen stating that his grievance was with the NEC and that it was at an impasse. He refused to meet with the NEC and repeated his call for his grievance to be considered at a Conference.
42. Mr Kitchen responded to Mr Thompson on 23 October 2012. He stated,
- "The National President has ruled that this issue is with the NEC and until the NEC has made any other decision there is no Grievance".*
43. By an application dated 12 November 2012 (received on 15 November) Mr Thompson made this complaint to me. Also on 12 November, Mr Thompson wrote to Mr Kitchen informing him that, having completed the NUM's grievance procedure in rule 28, he had made a complaint to the Certification Officer.
44. At a meeting of the NEC on 14 November 2012 it was agreed that Mr Kitchen's duties as National Secretary should include the administrative functions of the Yorkshire Area.
45. By a letter dated 16 January 2013 my office put Mr Thompson's complaints to the Union.
46. On 25 January 2013, Mr Kitchen wrote to Mr Thompson requiring him to show cause for his failure to follow the Union's grievance procedure in respect of the substance of complaints two to five, as they appear in paragraph 1 above. These are the complaints which seek to question Mr Kitchen's membership status within the Union and to challenge the requirement in rule 14.C that a candidate in the election for National Secretary must be a sitting member of the NEC. Rule 28.A provides as follows,

*"Any member who fails to follow the procedure in rule 28.B, without good cause, shall be deemed to have terminated his/her membership of the Union".*

Mr Thompson responded on 29 January stating that he considered the Union's letter to be a gross interference with the due legal process and a blatant attempt to harass and intimidate him.

47. Following a meeting of the NEC on 4 February 2013, Mr Kitchen wrote to Mr Thompson informing him that the NEC was not satisfied that he had shown good cause for not having followed the rule 28.A procedure and that Mr Thompson was therefore deemed to have terminated his membership of the Union as from the date he submitted his complaint to me, 12 November 2012. The Union sent Mr Thompson a cheque covering the subscriptions he had paid since 12 November.

### **The Relevant Statutory Provisions**

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

#### **47 Candidates**

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

#### **55 Application to Certification Officer**

(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

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

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

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

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

The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.

(5B) Where the Certification Officer makes an order requiring the union to hold a fresh election, he shall (unless he considers that it would be inappropriate to do so in the particular circumstances of the case) require the election to be conducted in accordance with the requirements of this Chapter and such other provisions as may be made by the order.

#### **108A Right to apply to Certification Officer**

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7)...

#### **108B Declarations and orders**

(2) If he accepts an application under section 108A the Certification Officer -

- (i) shall make such enquiries as he thinks fit,
- (ii) shall give the applicant and the union an opportunity to be heard,
- (iii) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made,
- (iv) may make or refuse the declaration asked for, and
- (v) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.

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

- (i) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

- (ii) *to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.*

(4) *The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.*

## **The Relevant Rules of the Union**

49. The rules of the Union which are relevant for the purposes of this application are:

### **5 MEMBERSHIP**

*It shall be the duty of every member to comply with the Rules, policy and objects of the Union with all directions thereunder.*

#### **5.A Full Membership**

*The following categories of persons are eligible for full membership of the Union and in these Rules the expression "members" means a full member unless otherwise stated.*

*All persons employed in the coalmining industry and its ancillary undertakings.*

- (i) *All persons employed in those sections of Energy industries and such other industries and undertakings or sections thereof, specified by Conference.*
- (ii) *All persons employed by the Union or by an Area including National or Area Officials/Agents.*
- (iii) *All members who become Members of Parliament, Scottish Parliament, Welsh Assembly or of the European Parliament as long as they remain so.*
- (iv) *With the express permission of the NEC, all members formerly employed in any of the above categories and who are temporarily engaged in undertakings or institutions in which the Union does not organise and who continue to pay full contributions.*
- (v) *All members whose employment has been terminated by the employer, where the Union considers that a member has been unfairly dismissed, as long as the member continues to be unemployed.*
- (vi) *All members retiring early on grounds of ill-health, incapacity or sickness as long as the member continues to be unemployed.*
- (vii) *With the express permission of the NEC to include all members victimised as a result of the 1984/85 strike and any future disputes in accordance with Rule 6.G any other person not falling within one of the above categories and who continues to pay contributions.*

#### **5.D Eligibility**

- (i) *A person ceasing to fulfil the qualifications for his or her category of membership shall cease to be a member unless given dispensation by the NEC.*

## **7 GOVERNMENT**

*The government of the Union shall be by conference as provided for in these Rules. In the periods between Conference the NEC shall administer the business and affairs of the Union including the approval of the Financial Report and Accounts in the alternate year to the Biennial Conference. The National Executive Committee shall perform all duties laid down for it by resolution of Conference, and it shall not at any time act contrary to, or in defiance of, any resolution of Conference.*

## **9 NATIONAL EXECUTIVE COMMITTEE**

- 9.M *An Area aggrieved by any decision of the NEC, or any such sub-Committee or individual as aforesaid shall have the right to appeal there from to Conference, whose decision shall be final. The decisions of the NEC upon all matters and business which it undertakes or transacts shall be binding, subject to the directions given by the Conference and subject to the aforesaid right of appeal.*

*An appeal to Conference shall not suspend the operation of a decision of the NEC, nor shall an overruling or variation by Conference of any decision of the NEC invalidate anything done in pursuance of that decision prior to its being overruled or varied.*

#### **10 NATIONAL OFFICIALS**

- 10.A There shall be three National Officials, a President, Vice-President and Secretary. The President, Vice-President and Secretary shall be lay National Officials.*
- 10.B A National Official shall be paid reasonable and proper expenses, as determined by the NEC for doing work on behalf of the Union.*
- 10.C The Union shall reimburse an Area one third of the National Officials' rate of pay to compensate that Area for work undertaken by that Official on behalf of the Union.*

#### **14 ELECTION OF NATIONAL OFFICIALS**

- 14.A The National President and National Secretary shall be elected in line with legislation.*
- 14.B The National President and National Secretary shall hold office for a period of five years.*
- 14.C Each Area shall nominate one candidate for the position of National President and National Secretary, provided that such nomination is confined to a person who is a member of the National Executive Committee in full financial membership and has been for a least 12 months. At the close of nominations, only those candidates shall be eligible for election who have received the nominations of Areas the total membership of which together amounts to 30% or more of the total membership of the Union on the basis of the number of members for which contributions have been paid to the Union for the twelve months ending on the preceding 31<sup>st</sup> December.*
- 14.F Secretary*
  - (i) The Secretary shall be elected as lay Secretary every five years in accordance with 14.A and 14.B.*
  - (ii) The Secretary shall hold office for a period of five years and shall be eligible to be re-elected to the next successive term of office without the need to be a representative member of the NEC at any time prior to, during, or otherwise at the conclusion of the election process*

#### **17 AREAS**

- 17.A The members of the Union shall for the purpose of administration be organised into divisions of the Union to be known as "Areas" listed in Schedule One hereto as amended from time to time.*
- 17.G Each Area and each Constituent Association shall adopt and comply with the Model Rules and any amendments thereto. Each Area which has been transferred its engagements to the Union shall adopt Standing Orders, which shall be the Model Rules (and which shall be included in the term "Model Rules" in these Rules) except to the extent approved by the NEC.*

#### **18 GOVERNMENT OF AREAS**

- 18.A Areas shall have such Area Councils and/or Area Executive Committees (which are in these Rules called "Area Executive Committees") and Area Officials/Agents, and there shall be such Branches in each Area, with such Branch Committees and Branch Officers as may be prescribed by the regulations*

*applicable thereto. Those Areas which have transferred their engagements to the Union shall in addition participate in the National Delegate Meetings in accordance with Rule 8. The administration of any existing funds or contributions collected by an Area in accordance with Rule 6.L for the purpose of provident, welfare or other purpose shall be controlled by the Area who shall have autonomy over such funds.*

- 18.B *All Area Councils/Area Executive Committees, Area Officials/Agents, Branch Committees and Branch Officers shall be subject in all respects to the authority of the Union and shall comply at all times with the directions of the NEC and of Conference. The NEC shall be responsible for unifying the procedures that deal with all matters in all the Areas.*
- 18.E *The Rules of each Area and Constituent Association shall be the Model Rules and any amendments thereto and any such amendment shall automatically become an amendment to the Rules of each Area and Constituent Association on the date of adoption of the amendment by Conference or such other date as Conference may determine. The current National Rules shall be deemed to be part of the Area Rules. Each Area or Constituent Association may have such other Rules in addition to the Model Rules as it may decide provided that no such Rules shall conflict with any National Rules or Model Rules or with the policy of the Union.*

#### **19 AREA OFFICIALS/AGENTS**

- 19.A *Each Area shall have such Area Official/Agents as may from time to time be determined by the NEC*
- 19.B *Area/Officials/Agents shall be subject in all respects to the authority of the Union and shall obey all directions thereof and shall perform such duties as are prescribed in these Rules and laid down from time to time by the NEC. In addition they shall perform any duties or directions imposed by the Area Council/Area Executive Committee. In the event of any conflict or question as to the duties, obligations, rights and entitlement of an Area Official/Agent the matter shall be referred for decision to the NEC or, in the case of urgency to the President. There shall be a right of appeal from the President to the NEC and from the NEC to Conference whose decision shall be final and binding.*

#### **20 ELECTION AND REMOVAL OF AREA OFFICIAL/AGENTS**

- 20.A *When the NEC agree to the election of a Area Official/Agent Branches shall be entitled to nominate one candidate for the position of such Area Official/Agent, provided that such nomination be confined to a person who is a full financial member and has been for at least 12 months immediately prior to the nomination. In the announcement of the invitation to Branches to make nominations Area Council/Area Executive Committee shall publish the membership figures for each Branch in the Area on the basis of the last complete full financial membership figures available. At the close of nominations, only those candidates will be eligible for election who has received the nomination of Branches, the total membership of which together amounts to 30% or more of the total full financial membership of the Area on the basis of the published figures.*
- 20.B *Election of an Area Official shall be by ballot vote of the full financial members of the Area and election of an Area Agent shall be by ballot vote of the full financial members of the relevant district of the Area which shall be taken on the principle of "the transferable vote" as defined in Section 41 of the Representation of the People Act 1918. The NEC may determine that in order to reduce the number of candidates to a reasonable number where nominations exceed six, they shall be sent out for a Branch vote to reduce the number to not less than three candidates*

receiving 50 per cent of the total votes cast. The NEC may prescribe regulations for the conduct of such elections.

- 20.C Area Officials/Agents shall hold office for five years or such other period determined by Conference and the Area Officials'/Agents' contracts of employment from the date on which they are declared elected. They shall be eligible for re-election subject to any provision of their contract of employment or as otherwise specified by Conference or NEC.

## **21 AREA OFFICIALS/AGENTS SALARIES**

- 21.A The salaries payable to the Area Officials/Agents shall be fixed from time to time by Conference upon the recommendations of the NEC.
- 21.B The salaries of Area Official/ Agents specified as full-time by the NEC shall be borne out of the Area budget set by the NEC and/or Area funds of the Area.

## **26 RULES**

- 26.B On any question as to which the Rules (including the Model Rules) or Area Rules do not provide, or on any suggested conflict between Area Rules and these Rules (including the Model Rules), or on any question of interpretation of these Rules (including the Model Rules), the matter shall be referred to the National President who shall make a ruling which shall be final and binding subject to an appeal to the NEC and thence to Conference.

## **28 GRIEVANCE PROCEDURE**

- 28.A Any member who fails to follow the procedure in Rule 28.B, without good cause, shall be deemed to have terminated his/her membership of the Union.
- 28.B No member or person claiming under these rules shall make any application to any Court until the procedure established by these Rules is exhausted. Any grievance of any member or person claiming under these Rules or group of members shall proceed as quickly as is reasonably practicable in the following manner unless settled at any stage. The grievance shall be raised with the following and in the following order unless the grievance shall commence at the next bodies listed in which case the grievance shall commence at the next stage.
- (i) the Branch;
  - (ii) the Area Officials;
  - (iii) the Area Executive Committee;
  - (iv) the Area Council;
  - (v) the National Officials;
  - (vi) the NEC;
  - (vii) the Conference whose decision shall be final and binding;

## **CONSIDERATION AND CONCLUSIONS**

### **Complaint One**

50. Mr Thompson's first complaint is as follows:-

"On or around 17 July 2012 the union breached National Rules 20A and 20B by acting beyond its powers when having agreed an election for the position of NUM (Yorkshire Area) Agent/Secretary on or around 22 June it:

- a)postponed the election indefinitely, so preventing Mr Thompson from standing in that election and /or
- b)postponed the election until after Mr Thompson appeared before the NEC"

52 Rules 20.A and 20.B of the rules of the Union provide as follows:

*20.A When the NEC agree to the election of a Area Official/Agent Branches shall be entitled to nominate one candidate for the position of such Area Official/Agent, provided that such nomination be confined to a person who is a full financial member and has been for at least 12 months immediately prior to the nomination. In the announcement of the invitation to Branches to make nominations Area Council/Area Executive Committee shall publish the membership figures for each Branch in the Area on the basis of the last complete full financial membership figures available. At the close of nominations, only those candidates will be eligible for election who has received the nomination of Branches, the total membership of which together amounts to 30% or more of the total full financial membership of the Area on the basis of the published figures.*

*20.B Election of an Area Official shall be by ballot vote of the full financial members of the Area and election of an Area Agent shall be by ballot vote of the full financial members of the relevant district of the Area which shall be taken on the principle of "the transferable vote" as defined in Section 41 of the Representation of the People Act 1918. The NEC may determine that in order to reduce the number of candidates to a reasonable number where nominations exceed six, they shall be sent out for a Branch vote to reduce the number to not less than three candidates receiving 50 per cent of the total votes cast. The NEC may prescribe regulations for the conduct of such elections.*

### **Summary of Submission**

51. Mr Scargill, for Mr Thompson, submitted that the Union had breached rules 20.A and 20.B by postponing the Area Agent election in 2012. Although his skeleton argument did not expressly address this complaint, Mr Scargill commented that the election which had been put in motion by Mr Kitchen's letter of 22 June 2012 calling for nominations had not even been held by the date of this hearing. He further noted that the minutes of the NEC meeting of 17 July 2012 do not record any agreement to stay the election. In Mr Scargill's submission the NEC had no power to resile from the published election timetable or the remuneration arrangements at will. He argued that the decision to stay the election was unreasonable and smacked of manipulation to stop Mr Thompson's election. He observed that at first Mr Thompson was told that his proposed meeting with National Officials was to discuss the Barnsley Chronicle letter and it only emerged later that the election was to be stayed pending that meeting.

52. Mr Eyre, for the Union, submitted that the NEC had the power to stay elections for Area Agents by virtue of rules 7, 9.M, 19.A, 20.A and 20.B. Rule 7 includes the provision that,

*"In the periods between Conference the NEC shall administer the business and affairs of the Union ...".*

Rule 9.M includes the provision that,

*"The decisions of the NEC upon all matters and business that it undertakes or transacts shall be binding, subject to the aforesaid right of appeal".*

Rule 19.A gives the NEC the discretion to determine whether Areas should have an Area Agent. Mr Eyre argued that, if the NEC has the power to determine whether Areas should have an Area Agent, the NEC must also have the lesser power to suspend an Area Agent election. Mr Eyre further argued that by rule 20.A the agreement of the NEC is required for there to be an Area Agent election and that the



NEC agreed to this election at its meeting on 30 May 2012. Mr Eyre also relied on that part of rule 20.B which provides that the NEC may prescribe regulations for the conduct of Area Agent elections as a basis of its power to stay such elections. In Mr Eyre's submission, the NEC had an unfettered discretionary power to stay an election as long as to do so was neither against a decision of Conference nor legally perverse. He maintained that there was no relevant decision of Conference which prevented the postponement of the election in question and that, in the circumstances of this case, the NEC's decision to do so was manifestly reasonable. He noted that the NEC felt the need to be cautious following the problems with the first Area Agent election in 2012. He also observed that Mr Thompson's letter to the Barnsley Chronicle was extremely offensive and that having regard to the importance of the position of Area Agent, the NEC were reasonable to consider that Mr Thompson potentially had a character or personality that could damage the Union if he was elected. Mr Eyre submitted that the NEC must have a residual power to determine if a candidate is a fit and proper person to stand in an election as otherwise, for example, a nominee who was known to be guilty of fraud would be entitled to stand for and be elected to a position with responsibility for the Union's funds. In any event, Mr Eyre argued that it was Mr Thompson's own failure to comply with the NEC's reasonable request for a meeting that led to the delay in the election process. He noted that the rules impose no time within which an Area Agent election must be completed. Mr Eyre finally went through each sentence of rules 20.A and 20.B, submitting that the Union had complied with each obligation within those rules. As to the absence of any NEC minute authorising a stay of the Area Agent election, Mr Eyre submitted that such authority is to be implied from the Union's subsequent behaviour and, in particular, the reference to the stay imposed by the NEC in Mr Wilson's letter to Mr Thompson of 24 July 2012. He added that it may not have been considered necessary for there to be a formal stay as it was not envisaged that Mr Thompson would refuse to meet with the National Officials.

### **Conclusions – Complaint One**

53. The premise upon which this complaint is made is that, on or about 17 July 2012, the NEC decided to postpone the election that was initiated by the call for nominations made in Mr Wilson's letter to Yorkshire Area branch secretaries of 22 June. The first issue of fact for me to consider therefore is whether the NEC made such a decision on or about 17 July.
54. Mr Wilson's letter to branch secretaries of 22 June 2012 enclosed a nomination form, a timetable for the election and a copy of rule 20 of the rules of the Union. On the election timetable, against 17 July, it is stated, "*NEC meeting accept nominations are in order*". At the NEC meeting of 17 July the President, Mr Wilson, tabled a statement which declared that both candidates satisfied rule 20.A in that they were both full financial members, had been in financial membership for at least 12 months prior to nomination and both had received the nominations of branches, the total membership of which together amounted to 30% or more of the total membership of the Yorkshire area. Mr Wilson's statement goes on to recommend that the ballot should proceed in line with the timetable.
55. There is no record in the minutes of the NEC meeting of 17 July 2012 that Mr Wilson's above statement was considered and his recommendation adopted. However, the minute does contain a heading "Election of Yorkshire Area Agent".

Under that heading the first sentence reads, "*The President said that the meeting had been called primarily to ratify the nomination for the election of Yorkshire Area Agent*". The remainder of the minute under that heading deals mainly with the failure of the Maltby branch to respond to correspondence from the Union which appears to have asked for the date of the branch meeting at which Mr Thompson had been nominated. The only agreement that is recorded under this heading is an agreement to send a letter to the Maltby branch setting out again what information is required and giving 7 days to reply. This particular minute goes on to record Mr Wilson as having said that the NEC would have to consider Mr Thompson's letter to the Barnsley Chronicle under a later agenda item and will have a decision to take about the credibility and fitness of the candidate based on that letter. He went on... "*but that is a separate issue at this stage which is about the procedure that has been used to nominate*". Accordingly, on the face of the minute, the NEC did not ratify the nominations for the election of Area Agent at that meeting.

56. A later agenda item at the NEC meeting of 17 July 2012 is headed "Letter sent by M Thompson". The content of that minute is summarised at paragraph 24 above but it concludes with the following sentence, "*The President said the Union would await the outcome of the National Officials meeting with M Thompson and if the letter is not withdrawn the Union should be defended by taking him to court but that would be a decision of the NEC*". Accordingly no decision relating to the Area Agent election is recorded under this agenda item either.
57. In dealing with the NEC meeting of 17 July 2012, Mr Wilson's witness statement concludes, "*Under the circumstances, it was decided that the election for Yorkshire Area Agent should not proceed until this matter (i.e. Mr Thompson's letter to the Barnsley Chronicle) was resolved*". Mr Kitchen's witness statement does not deal with what was agreed under this agenda item. However, in cross-examination Mr Kitchen stated that whilst the NEC discussed suspending the election no decision was taken as it was considered that a meeting with Mr Thompson would take place and the timetable could still be met.
58. On the same day as the NEC meeting, 17 July 2012, Mr Wilson wrote to the Maltby branch seeking the additional material required by the NEC. His letter concludes by stating that if information is not received within 7 days Mr Thompson's nomination would be declared non acceptable. It would appear that the information requested was furnished in time as this issue was not raised again. Significantly, however, Mr Wilson's letter does not refer to a postponement of the Area Agent election.
59. Although Mr Kitchen wrote to Mr Thompson on 17 July 2012 inviting him to a meeting with the National Officers on 26 July, Mr Kitchen's letter also does not refer to any postponement of the Area Agent election.
60. The first reference to the postponement of the Area Agent election appears in a letter from Mr Kitchen to Mr Thompson of 24 July 2012 in which Mr Kitchen states, "*Mr Wilson is of the opinion that the stay on the Yorkshire Area Agent elections imposed by the NEC at its meeting on 17 July 2012 will remain in place until such time as you have met with the National Officials as requested.*"

61. In the meantime, Mr Thompson had discussed the NEC meeting of 17 July with his friend Mr Whitehead, who was by then a member of the NEC. Mr Thompson wrote to Mr Wilson on 27 July stating his understanding that the stay on the election process was only in relation to the outstanding information required from the Maltby branch and that the meeting he was to attend was to be with NEC members not National Officials. Mr Wilson responded to this letter on 30 July. He stated:

*"You are wrong in regard to the NEC's decision to stay the Election, your letter to the Barnsley Chronicle because of its content and serious allegations against this Union and members of it was discussed and appropriate way forward was agreed, this included the National Officials meeting with yourself in order to clarify why you wrote the letter and where the information came from. The National Officials were then to report back to a Special NEC the outcome of the meeting and let them decide what happens next".*

62. On the evidence before me, I find, on the balance of probabilities, that no decision was taken by the NEC on 17 July 2012 to postpone the Area Agent election from the published timetable. In my judgment, the NEC specifically did not agree to stay the Area Agent election until Mr Thompson met with the National Officials. Although I find that the NEC did not formally ratify the nominations that it had been called to consider, I find that the reason that it did not do so was its decision to write again to the Maltby branch, an issue which was soon resolved. The only material before the NEC relating to the rule book requirements for nomination was that of the President who had declared that both candidates satisfied rule 20.A and recommended that the ballot should proceed in line with the timetable. In my judgment, the decision to postpone the election for Area Agent was taken by the National Officials after the NEC meeting of 17 July and before Mr Kitchen's letter to Mr Thompson of 24 July, where any reference to a stay of the election first appears in any written form.

63. By rule 20.A an election for a position as Area Official/Agent may only take place "when the NEC agrees". By rule 19.A each Area shall have such Area Official/Agents "as may from time to time be determined by the NEC" and by rule 20.B "the NEC may prescribe regulations for the conduct of such elections". I find that the intention and effect of these rules is that the NEC has overall authority over the elections for Area Agent. There are separate Standing Orders for the Yorkshire Area but rule 18.E provides that the national rules shall be deemed part of the Area rules and no such rules shall conflict with the national rules. As one would expect, the national rules generally prevail. I was not shown any specific regulations promulgated by the NEC for this election but it appeared to be common ground that such regulations as existed were the timetable and nomination forms enclosed with Mr Kitchen's circular letter to branch secretaries of 22 June 2012 inviting nominations. I find that these documents were issued with the authority of the NEC. Accordingly, any revision of the timetable of the election required the consent of the NEC. As I have found that the decision to postpone the election timetable was not made by the NEC, I find that it was made improperly in breach of the regulations provided for in rule 20.B.

64. In view of this determination, it is not necessary that I consider whether the NEC acted reasonably in its supposed postponement of the election as I was invited to do. Had it been necessary for me to address this issue I would have decided that the NEC did have the power to amend the electoral timetable but that, in so doing, it was required to act in good faith and not come to a decision which was legally perverse.

On the facts of this case, I would have grave reservations about the power of the NEC to have amended the timetable with a view to the potential disqualification of Mr Thompson from standing on the grounds of the NEC's subjective view of his 'fitness to stand'. The fitness of a person to stand for office is ordinarily to be determined by the electorate. For those currently in office to set themselves up as a gatekeeper in this way is unattractive both legally and democratically. In this case, however, there was no lawful decision to suspend the election and Mr Thompson was not disqualified from standing. The formal position remained as it was at the close of the NEC meeting of 17 July 2012.

65. For the above reasons, I find that the Union breached rule 20.B of its rules by failing to hold the election for the position of Yorkshire Area Agent/Secretary within the timetable for that election published on 22 June 2012. I do not find that the facts of this case disclose a breach of rule 20.A.

#### **Enforcement Order – Complaint One**

66. When I make a declaration I am required by section 108B(3) of the 1992 Act to make an Enforcement Order unless I consider that to do so would be inappropriate. In this case I consider that it is appropriate that I make an Enforcement Order. In doing so, I have had regard to the situation in which the Union currently finds itself. The NEC did not make a final decision on the nominations, although the President had submitted a statement that each candidate met the requirements for nomination in the rules. Further, the Maltby Colliery has now closed and the Union has written to Mr Thompson to inform him that he is no longer a member of the Union. Mr Scargill submitted that I should make an order declaring Mr Thompson to have been elected, on the basis that there were only two nominations and the nomination of Mr Kitchen had to be discounted as he did not qualify for nomination under the rules as he was not a member of the Union at the relevant time. However, I have found in Complaint Two that Mr Kitchen was a member of the Union at the relevant time and accordingly I find that he was validly nominated for the position of Area Agent. In these circumstances the appropriate starting point for an enforcement order is, in my judgment, that the election should continue from the point that it had previously reached, namely the close of nominations. The problem with such an order is that Mr Thompson has been deemed by the Union to be no longer a member. It is on this issue that I requested further submissions from the parties after the conclusion of the hearing. In order to decide upon the appropriateness of any enforcement order, I must determine the legality of this 'deemed termination of membership'.
67. The starting point for my consideration of this issue is that for a union to impose a detriment on someone for having commenced legal proceedings is at best extremely unattractive and at worst void as being contrary to public policy. Despite my request for further submissions, no authorities were put to me on the question of public policy. I have therefore examined the facts firstly on the uncertain basis that rule 28.A is legally effective. In this connection I observe that rule 28 is headed 'Grievance Procedure' and looks to the method by which the grievance of 'any member or person claiming under these rules' is processed. In my judgement this rule operates, to the extent that it is effective at all, on those issues which lay within the discretion of the various decision making bodies or office holders of the Union. It does not operate on a complaint that the Union is acting in breach of its rules. In these circumstances not even a resolution of Conference can offer an appropriate remedy without a

change to the rules themselves. Mr Thompson made five complaints to me and the Union appears to accept that he raised a grievance about the first complaint, namely the postponement of the Area Agent election. In its letter of 25 January 2013 the Union only asked Mr Thompson to show good cause in relation to the other four complaints to me. These complaints in essence relate to Mr Kitchen's membership status within the Union and the lawfulness of the requirement in rule 14.C that a candidate in the election for National Secretary must be a sitting member of the NEC. In my judgment, these are pure issues of law and not issues appropriate for a grievance procedure. Accordingly, they are not issues which need be submitted to an internal procedure before resort to the legal system. The issues upon which rule 28.A may bite are issues of mixed fact and law, such as an alleged perverse exercise of a discretion. In such cases there may be sound public policy reasons for permitting the Union an opportunity to review its previous decision but even then the possibilities for abuse would need to be carefully considered. Accordingly, I find that the deemed termination of Mr Thompson's membership is ineffective and that, upon payment by him of any subscriptions due in respect of the period of deemed termination from 12 November 2012, Mr Thompson is to be treated as a full member of the Union with no break in membership in 2012/2013.

68. When I invited the parties to make further submissions to me in writing on this point, the Union raised for the first time an argument that Mr Thompson was in any event not entitled to membership in 2012/2013 for a different reason. The Union argued that Mr Thompson had ceased to pay subscriptions in 1994 and was removed from the Union's database some seven months later. I was informed that Mr Thompson only rejoined the Union in 2006 when he sought its support in a personal injury claim. It was further pointed out to me that the rules at the relevant time (the 2002 rules) provided that a person shall only be re-admitted to membership upon payment of a fee not to exceed the arrears. On these facts, the Union argued that, as Mr Thompson did not pay any arrears of membership on re-joining, he was not legitimately re-admitted to membership in 2006. In responding to this new argument, Mr Scargill submitted that Mr Thompson re-joined the Union in 2006 following advice from Mr Kelly, the then branch secretary at Maltby, without any request from the Union that he should pay arrears of contributions. He noted that rule 6E of the 2002 rules provides that a person shall only cease to be a member for having fallen into arrears if a request has been made for payment. He further noted, from his extensive experience of the Union, that he knew of no case where a miner who rejoined the Union had been requested to pay arrears of contributions. He observed that in recent years the Union had been increasingly mindful of the need to recruit new members and he was unaware of any former members having been asked to pay off arrears before being readmitted in more recent times. Mr Scargill further argued that, having accepted contributions from Mr Thompson since 2006, the Union was now precluded from seeking to implement the rule about arrears, particularly as no request for payment had been made. Mr Scargill also relied upon the Limitation Act 1980 and the concept of estoppel by convention.
69. In my judgement, rule 6.F of the 2002 rules of the NUM does not impose a requirement that a former member must pay the whole of his or her arrears before being entitled to rejoin the Union. The relevant extract provides as follows,

"Any person formerly a member who has ceased membership under this Rule shall only be readmitted to membership upon payment of a fee not to exceed the arrears".

By virtue of this rule the amount to be paid is not quantified. It is expressed only as being a fee. It follows therefore that the Union must determine the amount of the fee, subject to the cap imposed by the rule. In these circumstances the member is not to know how much is to be paid until a request for payment of the fee is made. Accordingly, it is to be implied into the rule that the mandatory prohibition from re-admittance to membership is only to apply where a request for the payment of a fee has been made and not satisfied. On the information before me, I find that Mr Thompson was not requested to pay off his arrears between 1994 and 2006 or any other fee before rejoining and that accordingly he was not prohibited from re-admission by rule 6.F of the 2002 rules, as alleged by the Union. In any event, I also find that by accepting his subscriptions since 2006 the Union is now estopped from denying his membership, having regard in particular to the examination of his membership position by Mr Wilson in July 2012 which resulted in Mr Wilson being able to declare in a document for the NEC on 17 July that Mr Thompson was then a full financial member and had been for at least 12 months immediately prior to nomination.

70. In all the circumstances of the case, I consider that the appropriate Enforcement Order to remedy the breach is as follows. I order that, unless the National Executive Committee determines that there shall be no Area Agent/Secretary of the Yorkshire Area of the Union, the Union shall proceed with the election for the Yorkshire Area Agent/Secretary which it commenced on 22 February 2012 and in which nominations closed on 13 May 2012. Having regard to my determination of the membership status of both Mr Thompson and Mr Kitchen and on condition that Mr Thompson pays any outstanding membership subscriptions from 12 November 2012 in respect of the period of his deemed termination, the election shall proceed on the basis that at the end of nominations the valid candidates were Mr Thompson and Mr Kitchen. The election is to be held in accordance with rule 20.A and rule 20.B of the rules of the Union so that the result of the election is declared no later than 18 November 2013.

### **Complaint Two**

71. Mr Thompson's second complaint is as follows:-

*"On or around 17 July 2012 the union breached National Rule 20A when the NEC accepted a nomination from Mr. C. Kitchen despite him not qualifying to stand for the election for the position of NUM (Yorkshire Area) Agent/Secretary under National Rule 5A (i) to (viii)"*

72. Rule 20.A of the rules of the Union provides as follows:

*"20.A When the NEC agree to the election of a Area Official/Agent Branches shall be entitled to nominate one candidate for the position of such Area Official/Agent, provided that such nomination be confined to a person who is a full financial member and has been for at least 12 months immediately prior to the nomination. In the announcement of the invitation to Branches to make nominations Area Council/Area Executive Committee shall publish the membership figures for each Branch in the Area on the basis of the last complete full financial membership figures available. At the close of nominations, only those candidates will be eligible for election who has received the nomination of*

*Branches, the total membership of which together amounts to 30% or more of the total full financial membership of the Area on the basis of the published figures”*

### **Summary of Submissions**

73. Mr Scargill, for Mr Thompson, submitted that Mr Kitchen did not qualify to stand in the election for Yorkshire Area Agent as he did not satisfy the requirement in rule 20.A of being a full financial member at the date that nominations closed, 13 July 2012. Mr Scargill argued that membership was determined by rule 5.A and that Mr Kitchen did not fall into any of the stated categories at the relevant time. He accepted that Mr Kitchen was the National Secretary throughout the relevant period and noted that he had been the Yorkshire Area Agent until 31 May 2012, when his period of office expired without having been re-elected. Mr Scargill accepted that whilst Mr Kitchen was employed as an Area Agent he qualified for membership of the Union under rule 5.A(iii), but he maintained that when Mr Kitchen's contract of employment as Area Agent terminated on 31 May his membership of the Union also terminated. Mr Scargill submitted that in order to qualify for membership under rule 5.A(iii) a person must have a contract of employment with the Union or an Area and that Mr Kitchen did not have such a contract after 31 May. Mr Scargill further submitted that, on the proper construction of rule 5.A(iii), it was not sufficient for Mr Kitchen to have been the elected National Secretary at the relevant time as the rule only applied to National Officials who were employed by the Union or by an Area. As to the contract of employment produced by the Union at the hearing by which Mr Kitchen was employed as National Secretary from 1 June 2012, Mr Scargill argued that any such contract was null and void as it conflicted with rules 10.A, 13.A and 14.F(i). He noted that rule 10.A provides that the President, Vice President and Secretary "shall be lay National Officials" and that rule 13.A begins with the words, "the lay secretary/treasurer shall ..." and that rule 14.F(i) also contains a reference to the lay Secretary. Mr Scargill stated that the rules were amended to include the word 'lay' in 2002 to prevent National Officials being employed in the capacity of National Officials, even though they could be employed contemporaneously by the Union in some other capacity. He also observed that an attempt to have the word 'lay' deleted from the rules was withdrawn from the agenda of the Biennial Conference in 2012. He also argued that the NEC could not just decide to employ a National Secretary as the person holding that position had to be elected.
74. Mr Eyre, for the Union, submitted that Mr Kitchen was a member of the Union at all relevant times in accordance with rule 5.A. He stated that it was common ground that Mr Kitchen was employed by the Union as its Yorkshire Area Agent until 31 May 2012 but went on to argue that Mr Kitchen continued to be a member after that date and was a member on 13 July at the close of nominations for the Area Agent election. Mr Eyre made three main submissions in support of his case. First, he argued that, properly understood, rule 5.A(iii) enabled three categories of person to be eligible for membership; (a) those employed by the National Union, (b) those employed by an Area and (c) National or Area Officials/Agents. In his submission the reference to National or Area Officials/Agents would be unnecessary if Mr Scargill was correct as the requirement of employment would be sufficient to give eligibility to those Officials/Agents who were employed. Mr Eyre maintained that these additional words were meant to give eligibility to National or Area Officials/Agents even if they were not employed. Secondly, Mr Eyre relied upon the contract of employment he produced at the hearing, whereby Mr Kitchen was employed as National Secretary from 1 June

2012. He rejected Mr Scargill's submission that the contract was null and void on the basis that the word "lay" in rules 10.A, 13.A and 14.F(i) were not meant to prevent National Officials being employed by the Union but to stop those positions being held by persons who were members of a profession. The word lay was to be contrasted with professional. Thirdly, Mr Eyre submitted that Mr Kitchen was entitled to be nominated for the position of Area Agent by virtue of rule 20.C which provides that Area Agents shall be eligible for re-election.

### **Conclusions – Complaint Two**

75. Mr Thompson alleges that the Union breached rule 20.A of its rules by having accepted the nomination of Mr Kitchen for the position of Area Agent despite him not being qualified to stand. In particular, Mr Thompson alleges that Mr Kitchen was not a full financial member of the Union at the time nominations closed on 13 July 2012. Full membership of the Union is to be determined under rule 5.A. The particular provision in question is rule 5.A(iii) which provides as follows:

5.A(iii) *All persons employed by the Union or by an Area including National or Area Officials/Agents*".

76. At the relevant date, 13 July 2012, it is common ground that Mr Kitchen's employment as Area Agent had ceased. Mr Kitchen had sought re-election as Area Agent earlier in 2012 but had been defeated by Mr Whitehead on 14 May. Mr Whitehead did not take up the position of Area Agent for reasons that it is not necessary for me to analyse and a further election was initiated on 22 June. On these facts, I find that Mr Kitchen was not able to take advantage of rule 20.C and claim automatic eligibility for re-election in the later election as he was not the person who had been last elected as Area Agent. That person was Mr Whitehead. Accordingly to qualify for nomination Mr Kitchen has to establish that he was a full financial member within the meaning of rule 5.A.

77. In construing the rules of a trade union it has frequently been held that it is not appropriate to approach them as one would a commercial contract or tax statute. One of the most commonly quoted examples of this approach is that of Warner J in **Jacques v. AUEW (1986) ICR 683**. He said at page 692:

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

78. At all relevant times Mr Kitchen was and remains the National Secretary of the Union, a position to which he was first elected in 2007. I must determine whether his position as National Secretary qualified him for full membership of the Union, without further consideration of his employment position. On an initial consideration of rule 5.A(iii), it appears that the expression "including National or Area Officials/Agents" is merely intended for the avoidance of doubt. The rule clearly applies to staff members employed by the Union and, it can be argued, the additional words make it clear that elected officials who are also employees can also be members. However, on Mr Scargill's analysis, National Officials cannot be employed in the capacity of National Officials as they are described as "lay National Officials" in rule 10.A and



elsewhere in the rules. If this is correct, I have asked myself what purpose is served by the reference to National Officials in rule 5.A(iii). Beyond that, I have asked myself how rule 5.A(iii) would be understood by the readership to which it is addressed. Is it to be said that someone who has worked in the industry and been a member of the Union for many years and subsequently served the Union as National Secretary since 2007 is not eligible for membership? Such an interpretation appears counter intuitive. The position can be further tested by supposing a miner is elected to this very important position and has to give up his job at a colliery to devote sufficient time to his new role. Is that miner to be no longer eligible for membership of the Union? I observe that in practice the National Secretary has also been the holder of a paid position within the Union, such as the Yorkshire Area Agent, and so retains eligibility for membership as an employee of the Union. But this practice might not always be the case. I find that the retention of the reference to National Officials in rule 5.A(iii) after the introduction of the word "lay" in the description of National Officials in rule 10.A in 2002 gives support to a construction of rule 5.A(iii) that qualifies National Officials for membership of the Union whether or not they are employees. That construction is also supported by the fact that anyone seeking election as a National Officer must have been a member of the Union and it would appear odd that if, once elected to a very senior position in the Union, that person lost membership of it if he found he had to leave his employment in the industry to perform his new role satisfactorily. In my judgment, the correct construction of rule 5.A(iii) is that National Officials of the Union retain eligibility for membership whether or not they are employed by it.

79. The Union argued that Mr Kitchen's membership position was put beyond doubt by the contract of employment he entered into as National Secretary on 1 June 2012 but which was not produced by the Union until the afternoon of the hearing. The late submission of this document is curious given its existence for over 12 months and its central importance to the case. It was submitted that, by this contract, Mr Kitchen plainly came within rule 5.A(iii) as an employee of the Union. However, Mr Scargill repeated his point that rule 10.A provides that the National Secretary shall be a lay National Official. Looking beyond rule 10A, it can be seen that rule 10.B provides for a National Official to be paid proper and reasonable expenses and rule 10.C provides that the Union shall reimburse an Area one third of the National Officials rate of pay to compensate the Area for work undertaken by that Official on behalf of the Union. Read together, these provisions support a construction of the rules that a lay National Official is not to be directly employed by the National Union, whilst accepting that a person in such a position may be employed by an Area (in an elected or unelected position) and that the Area shall be reimbursed one third of the National Officials rate of pay. As an aside, I note that there would appear to be a National Officials rate of pay, even though National Officials are to be "lay". It would seem that this rate of pay is to be used only for calculating the amount of reimbursement to be given to an Area. On any construction of rule 10, I find that the rules do not provide for the National Union to enter into a contract of employment for the payment of its lay National Officials and that accordingly Mr Kitchen cannot rely upon his contract of employment dated 1 June 2012 as the basis of his entitlement to membership of the Union. I reject the Union's submission that the only effect of the word 'lay' is to exclude a person with a professional qualification from being a National Official.

80. Although the National Union may not enter into a contract of employment for the payment of its lay National Officials I was informed that Mr Kitchen had been employed in part to perform the administrative functions that would have been performed by the Yorkshire Area Agent, if one had been in post. The Union at both National and Area level clearly has the authority to enter into contracts of employment where the rules do not provide otherwise and Mr Kitchen's employment in any capacity other than that of a lay National Official does not appear to be inhibited by the rules. Equally, Mr Kitchen is clearly entitled to payment for the work he performs, other than as a lay National Officer, under an express or implied contract.
81. For the above reasons, I find that the Union did not breach rule 20.A of its rules on or about 17 July 2012 when the NEC accepted a nomination for election to the position of Area Agent from Mr Kitchen as he qualified for full membership of the Union under rule 5.A(iii).

### **Complaint Three**

82. Mr Thompson's third complaint is as follows:-

*"On or around 22 June 2012 the union breached section 47(1) of the 1992 Act by unreasonably excluding Mr. Thompson from being eligible for nomination and standing as a candidate in the 2012 National Secretary election"*

83. Section 47(1) and 47 (3) of the 1992 Act provides as follows:-

#### **47. Candidates**

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

*(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.*

### **Summary of Submissions**

84. Mr Scargill submitted that Mr Thompson attended a meeting of his branch on 18 June 2012 and was told that he could not seek nomination as the National Secretary as rule 14.C provides that nominations are restricted to current members of the NEC. As Mr Thompson was not a current member of the NEC, he did not ask for his name to go forward. Mr Scargill submitted that as there are less than 10 members on the NEC this requirement excludes 99.3% of the membership of the Union from seeking nomination and that any requirement that has this effect must be unreasonable within the meaning of section 47(1) of the 1992 Act. Mr Scargill further argued that the Union could not rely upon section 47(3) of the 1992 Act as it is not possible to say that 'all members other than those on the NEC' are a class for the purpose of that subsection. Mr Scargill submitted that to exclude ordinary members from standing in the election for the position of National Secretary was so unreasonable as to defy description.
85. Mr Eyre, for the Union, submitted that it was not unreasonable for nominations for one of the most important positions in the Union to be restricted to those currently on

the NEC. He argued that members of the NEC had secured their position by election and had developed the knowledge and experience necessary to do the very important job of National Secretary. He further argued that the requirement to be a current member of the NEC fell within section 47(3) of the 1992 Act and the exclusion of those not on the NEC was therefore deemed to be reasonable.

### **Conclusions – Complaint Three**

86. The starting point of section 47 of the 1992 Act is that all members of a trade union should have the right to stand as a candidate in any statutory election. However, it is recognised within section 47 that there may be legitimate restrictions on that right. Firstly, a union may exclude a person's nomination if to do so is not unreasonable. Secondly, the members of the Union may collectively decide upon exclusion criteria if those criteria are set out in the rules of the Union and meet the requirements of section 47(3). Such exclusion criteria are deemed to be reasonable. They are given legitimacy by having been agreed by the members in the rules creation/revision process.
87. I accept Mr Eyre's submission that the position of National Secretary within the NUM is an important one and that the members of the Union have a considerable interest in ensuring that a person elected to that position is up to the job. Accordingly, I accept that some exclusion criteria may be reasonable. For example, it is not contested that the criterion that candidates must have been in financial membership for 12 months is reasonable. The National Secretary of the Union may be required to have some experience of it. However, any such criterion or condition must balance the right of all members to seek nomination against the reasonable needs of the Union in having an appropriately qualified National Secretary. The conditions imposed must be proportionate.
88. Unfettered by section 47(3) of the 1992 Act, I would have found it unreasonable for the pool of potential nominees for the position of National Secretary of this Union to be restricted to 9 or 10 persons. However, I find that rule 14.C does establish a class of members, all of whom are excluded from nomination by the rules of the Union; namely those not on the NEC. The identity of those in the class is readily and objectively ascertainable at the time nominations are invited. I further find that this is not a rule which provides for such a class to be determined by reference to whom the Union chooses to exclude. Accordingly I find that the Union may rely upon section 47(3) to uphold its condition that candidates for the position of National Secretary must be members of the NEC. That condition is deemed not to be unreasonable by section 47(3).
89. For the above reasons, I refuse Mr Thompson's application for a declaration that the Union breached section 47(1) of the 1992 Act on or about 22 June 2012 by allegedly having excluded him unreasonably from being eligible for nomination as a candidate in the 2012 National Secretary election.

### **Complaint Four**

90. Mr Thompson's fourth complaint is as follows:-

*"On or around 22 June 2012 the union breached National Rules 14A and 14F(i) by the 2012 National Secretary election not having been conducted in line with legislation in that*

*Mr. Thompson was unreasonably excluded from being eligible for nomination and standing as a candidate in breach of section 47(1) of the 1992 Act".*

91. Rules 14.A and 14.F(i) of the rules of the Union provide as follows:-

*14.A The National President and National Secretary shall be elected in line with legislation.*

*14.F Secretary*

*(i) The Secretary shall be elected as lay Secretary every five years in accordance with 14.A and 14.B.*

92. It was common ground that these complaints would succeed if I find that the Union had conducted the election for National Secretary otherwise than in line with legislation. The breach of the legislation which was alleged is a breach of section 47(1) of the 1992 Act.

93. I have found that the election for National Secretary was not conducted in breach of section 47(1) of the 1992 Act and accordingly it has not been established that the election was conducted other than in line with legislation.

94. For the above reason I refuse Mr Thompson's application for a declaration that the Union breached rules 14.A and 14.F(i) of the rules of the Union on or about 22 June 2012 by allegedly not having conducted the 2012 National Secretary elections in line with legislation.

### **Complaint Five**

95. Mr Thompson's fifth complaint is as follows:-

*"On or around 22 June 2012 the union breached rule 14C by accepting the nomination from Mr Chris Kitchen who was not eligible for full membership of the union under rule 5A*

96. Rules 14.C of the rules of the Union provides for as follows:-

*14.C Each Area shall nominate one candidate for the position of National President and National Secretary, provided that such nomination is confined to a person who is a member of the National Executive Committee in full financial membership and has been for a least 12 months. At the close of nominations, only those candidates shall be eligible for election who have received the nominations of Areas the total membership of which together amounts to 30% or more of the total membership of the Union on the basis of the number of members for which contributions have been paid to the Union for the twelve months ending on the preceding 31<sup>st</sup> December.*

### **Summary of Submissions**

97. Mr Scargill submitted that by rule 14.C any person who sought nomination for the position of National Secretary had to be a full financial member of the Union at the close of nominations. He argued that at the close of nominations for the position of National Secretary on 29 June 2012, Mr Kitchen was not a member of the Union in accordance with rule 5.A(iii). In making good this submission, Mr Scargill relied upon the same detailed submissions that he had made in connection with Mr Thompson's second complaint in relation to the Yorkshire Area Agent election.

98. Mr Eyre, for the Union, similarly relied upon the same submissions he had made in answer to Mr Thompson's second complaint.

**Conclusions – Complaint Five**

99. I find that the issues to which this complaint gives rise are identical to those in Mr Thompson's second complaint. Adopting the reasoning and conclusions to which I came in Mr Thompson's second complaint (see paragraphs 74-80), I find that Mr Kitchen was entitled to full financial membership of the Union on 29 June 2012.

100. For the above reasons, I refuse Mr Thompson's application for a declaration that the Union breached rule 14.C of its rules on or about 29 June 2012 by accepting the nomination of Mr Kitchen for the position of National Secretary when he was allegedly not eligible for full membership of the Union under rule 5.A.



**David Cockburn**  
**The Certification Officer**