

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTIONS 108A(1) AND 31(1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

**Mr Miguel Angel Fernandez Castillo and Ors.**

**v**

**Unite the Union**

**Date of Decision**

**8 March 2017**

**DECISION**

Upon an application by Mr Fernandez Castillo and others ("the claimants") under sections 108A(1) and 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

1. I make the declaration sought by the claimant's that during the 2015 elections of its LE/2000 branch, Unite the Union breached bullet point 5 of the branch balloting protocol by not publishing on the branch website the electoral addresses of any of the candidates.
2. I refuse the claimant's application for a declaration that during the 2015 elections of its LE/2000 branch Unite the Union breached bullet point 10 of the branch balloting protocol by allegedly publishing literature which promoted a candidate in the elections.
3. I refuse the claimant's application for a declaration that during the 2015 elections of its LE/2000 branch Unite the Union breached bullet point 11 of the branch balloting protocol by allegedly permitting the bulk email of material which was critical of one candidate in the election and allegedly damaging to her prospects of success.
4. I refuse the claimant's application for a declaration that during the 2015 elections of its LE/2000 branch, Unite the Union breached paragraph 6.5.4 of Appendix 1 of its rules by allegedly following an unfair procedure in the election for certain of the posts required in these elections.
5. I refuse the claimant's application that Unite the Union breached sections 30(2) of the 1992 Act by allegedly refusing to comply within 28 days to his request made on 11 August 2015 to inspect accounting records of the Union.

### **Enforcement Order**

6. Where I make a declaration that a trade union has breached a rule or rules of the union I am required by section 108B(3) to make an enforcement order on the union unless I consider that to do so would be inappropriate. I consider that it would be inappropriate to make an order in relation to the declaration made in paragraph 1 above, for reasons which are given below.

### **REASONS**

1. Mr Fernandez Castillo is a member of Unite the Union ("Unite" or "the Union"). By an application received at the Certification Office on 14 July 2015, Mr Fernandez Castillo made on behalf of himself and 30 other members of the Union a number of complaints against the Union. By the time a preliminary hearing was held on 25 April 2016 the claimants were Mr Fernandez Castillo and 20 others, namely Anne Charlet, Mr Antonio Larranga Loreto, Ms Christine Coleman, Ms Daniela Vinci, Mr Darren Hamer, Ms Fernanda Murphy, Ms Fiona Mcdougall, Mr Frank Michon, Ms Gail Jones, Ms Karen Mills, Ms Linda Baker, Mr Loizos Christodoulides, Ms Olivia Kerr, Ms Paula Nunez Alvarez, Mr Peer Kessner, Mr Sunday Odesanya, Mr Thierry Dedron, Ms Tracey Ward, Mr Victor Teixeira and Mr Matthew Kilkenny. All the claimants agreed to be represented by Mr Fernandez Castillo.
2. On 25 April 2016 a preliminary hearing and case management discussion was held, this was heard by my predecessor Mr David Cockburn. The decisions reached following that hearing are attached as Annex 1 (D/16-22/16-17). In relation to a preliminary point relating to the relevant rules Mr Cockburn found that:

*'The constitution adopted by the BASSA branch of Unite the Union ("unite" or "the Union") (Branch LE/2000) in 2012 was valid and binding at the time of the alleged breaches.*

*The Balloting Protocol for representatives and BASSA branch elections ("the Balloting Protocol") which appeared on the BASSA website at the relevant time contained rules of the union within my jurisdiction.'*

The outcome of the case management discussions was that Mr Cockburn decided that the complaints made by the applicants that could proceed to a full hearing were:

#### **Complaint 1**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 5 of the branch Balloting Protocol by not publishing on the branch website the electoral addresses of the candidates.

#### **Complaint 2**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 10 of the branch Balloting Protocol by permitting the publication of literature which promoted a candidate, Valdemar Gomes, by publicising his branch work in raising issues faced by workers in Colombia.

#### **Complaint 3**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 11 of the branch Balloting Protocol by permitting the bulk emailing of material which was critical of a candidate, Ms June Freeman, and

damaging to her prospects of success. The bulk emails are those dated 30 April 2015 and 5 May 2015, as they appear on the branch website.

**Complaint 4**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached paragraph 6.5.4 of Appendix 1 of its rules when the branch followed an unfair procedure by applying the experience or qualification requirements in rule 1.5 of the branch rules to the election for the positions of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff.

**Complaint 5**

In breach of sections 30(2)(a), 30(2)(b) and 30(2)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992, Unite the Union failed to comply with Mr Fernandez Castillo's request of 11 August 2015 to Andrew Murray, Chief of Staff, to inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015.

3. A full hearing took place on 23 February 2017. At the hearing Mr Fernandez represented himself and the other applicants. He submitted witness statements from himself, Ms Freeman and Ms Kerr who all also gave oral evidence. The union was represented by Mr Potter of counsel, who was instructed by Mr Neil Gillam of the Union's Legal Department. The union submitted written witness testimony from Mr Andrew Murray, Chief of Staff of Unite the Union, Oliver Richardson, National Officer for Civil Air Transport Unite the Union, Sean Beatty, Chair BASSA Branch LE/2000 and Adrian Smith, Branch Secretary, BASSA Branch LE/2000. Mr Richardson, Mr Beatty and Mr Smith gave oral evidence. Mr Murray did not attend the hearing and did not give oral evidence, I therefore gave his evidence appropriately less weight. There was a 302 page bundle in evidence including the BASSA Branch LE/2000 Constitution effective from 2012 and '*The Balloting Protocol for representatives and BASSA branch elections*' ("the Balloting Protocol"). Additionally the *Unite the Union Rule Book, Effective from Rules Conference 2011 (Updated by the Executive Council to December 2013)* and the BASSA Branch LE/2000 Constitution effective from 2016 were in evidence.

**Findings of Fact**

4. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows.
5. I will rely on the findings made by David Cockburn in his decision following the preliminary hearing at paragraphs 8-14 of that decision which is attached (PH/1/16-17). In those paragraphs he sets out Mr Fernandez' background and relevant findings about the formation and structure of the BASSA Branch LE/2000 and its place within Unite the Union.
6. The branch constitution operated by the branch at the time of the complaints provided at Rule 1 for eight branch officers;

**Branch Chair**

- to be elected by all Branch LE/2000 members.

**Branch Secretary**

- to be elected by all Branch LE/2000 members

Agreements Secretary Worldwide,

- Method of election – either an electoral college comprising the elected representatives from the Worldwide fleet who elect from among themselves or direct election by the relevant membership.
- The position of Agreements Secretary Worldwide can only be filled by a BASSA rep with 3 years concurrent experience.

Agreements Secretary Euro Fleet,

- Method of election – either an electoral college comprising the elected representatives from the Eurofleet and Worldwide fleet elect from among themselves or direct election by the relevant membership.
- The position of Agreements Secretary Worldwide can only be filled by a BASSA rep with 3 years concurrent experience.

Chief of Staff,

- Method of election either elected from among the representatives. Alternatively the Branch Committee may exercise the option to directly elect the position from the applicable membership.
- The position of Chief of Staff can only be filled by someone with at least 3 years experience on the branch committee.

Industrial Director,

- Method of election either elected from among all representatives and committee members. Alternatively the Branch Committee may exercise the option to directly elect the position from the applicable membership.
- The position of Industrial Director can only be filled by someone with at least 3 years experience on the branch committee.

Deputy Industrial Director,

- Method of election either elected from among all representatives and committee members. Alternatively the Branch Committee may exercise the option to directly elect the position from the applicable membership.
- The position of Deputy Industrial Director can only be filled by someone with at least 3 years experience on the branch committee.

Regional Executive General Position.

- Method of election – appointed by the branch committee from amongst the senior representatives.

The electoral period to hold lay office is three years.

7. On 13 April 2015 an email was sent to all members inviting nominations “for the following BASSA branch 1/2000 representative positions for the electoral period Jul 2015 – Jun 2018”.

Branch Chair,  
Branch Secretary,  
Equalities Officer  
LHR Worldwide Reps 16 positions  
LHR Eurofleet reps 11 positions

Industrial Director – 1 position  
Deputy Industrial Director – 1 position  
Chief of Staff – 1 position  
Principal Health and Safety Rep – 1 position  
LHR WW Agreements Secretary - 1 position  
LHR Eurofleet Agreements Secretary – 1 position

The circular states, *“Please fully read the BASSA constitution and the Bassa Website which is in the “us” section for an outline of the criteria and responsibilities applicable to any specific role before applying”*. It goes on to say that *“All nominations must be emailed to Branch Secretary Adrian Smith by 12.00am 1<sup>st</sup> May 2015”*.

8. On 18 April 2015 June Freeman, a BASSA member, emailed Adrian Smith (BASSA Branch Secretary). The email is headed *‘Survey Monkey ‘ballots’*. In the email Ms Freeman raises concerns about the use of Survey Monkey to facilitate consultative ballots on proposed changes in work practices in both the British Airways Worldwide and Euro Fleets.
9. On 30 April 2015 a BASSA Circular headed *‘Democracy hasn’t spoken’* was sent out as an email to all members and posted on the BASSA website. The circular reports Ms Freeman’s complaint about the use of Survey Monkey in the Eurofleet ballot. It goes on to say that the result and the process of the ballot will *“be scrutinised and then verified by an independent solicitor prior to release”*.
10. Following this and on the same day Ms Freeman emailed Adrian Smith, (BASSA Branch Secretary) and Sean Beatty (BASSA Branch Chairman). She refers to the union’s email above and goes on to say *“I thereby request as an act of fairness that you publish in full my unedited email referred to above to all members”*.
11. All of the emails referred to in paragraphs 7, 8 and 9 above were sent before Ms Freeman submitted her nomination for the post of BASSA Branch Chair; this was submitted at 22.48 on 30 April 2015.
12. On 5 May 2015 a BASSA Circular headed *‘Democracy still has not spoken’* was sent out to members via email and posted on the BASSA website. This refers to the Worldwide-bidding consultative ballot and says *“we must also delay the publication of this result until we have been able to have the ballot process verified as accurate and the content of a complaint received”*. The circular goes on to say *“This places the branch in the difficult position of having to publicly refute the allegations (as Worldwide CSD Ms Freeman has asked us to do so) and as was done with some if not all her previous complaints. However, given she has also now declared her candidacy in the upcoming BASSA election must ensure that in doing so, any candidate is not seeking to use this exposure for election gain, particularly as it gives far greater prominence to one candidate above all others”*.
13. On 22 May 2015 a BASSA circular headed *‘BASSA REPRESENTATIVE ELECTION 2015’* was issued. This stated that *“Today the voting papers for the 2015 BASSA representative elections were posted to you the membership. The positions up for election are,*

**BRANCH CHAIR  
BRANCH SECRETARY  
16 WORLDWIDE REP POSITIONS  
11 EUROFLEET REP POSITIONS”.**

14. I find that the positions of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff were not included in this circular as they had been elected unopposed by virtue of there being only one candidate nominated for each post.
15. On 2 June 2015 a posting was made to the news section of the BASSA website Headed *‘JUSTICE FOR COLOMBIA – UPDATE’*. The circular refers to the role of a Worldwide Fleet representative, Valdemar Gomes, in representing BASSA on a Justice for Colombia delegation to Colombia. Mr Gomes was a candidate for a Worldwide representative position in the BASSA 2015 Elections. The posting made no reference to the elections or that Mr Gomes was a candidate in those elections.
16. On 13 June 2015 a posting was made to the news section of BASSA website headed *‘INJUSTICE FOR WANTING A BETTER LIFE’*. The circular is a report by Mr Gomes of the delegation to Colombia referred to in paragraph 15. The posting does not refer to the BASSA 2015 elections or that Mr Gomes was a candidate in them.
17. On 19 June 2015 Electoral Reform Services released the BASSA 2015 Election Results. The result of the election for Branch Chair shows that Sean Beatty received 1,548 votes and June Freeman 1,414 votes, Mr Beatty was elected.
18. An initial application from Mr Fernandez was received in my office on 14 July 2015. This was initially supported by 30 other BASSA members. Following correspondence with my office the complaint was eventually supported by 20 other BASSA members.
19. On 11 August 2015 Mr Fernandez emailed Mr Andrew Murray, Chief of Staff of Unite. The email is headed *‘Bassa Branch inspection of books request’*. In the email he says *“I would like to request the individual accounting records of subscriptions paid by Bassa members by date from 1 April 2015 to 1 August 2015, please”*.
20. On 21 October 2015 Mr Murray replied to Mr Fernandez email of 11 August. In the email Mr Murray said *“As for your request for access to the individual accounting records of subscriptions paid by BASSA members, I am unsure of precisely what it you are requesting. Unite holds membership records and accounting records. If it is the membership records including the details of subscriptions paid by individuals, I do not believe these are accounting records and consequently we are neither required, under any statutory enactment or Rule of the Union nor indeed, under Data Protection legislation, at liberty to provide these. Any queries concerning same should be raised properly within your branch to which I am sure your newly elected representatives will be happy to respond”*.
21. On 26 October 2015 Mr Fernandez replied to Mr Murray in the email he states *“I wrote to you in 11<sup>th</sup> August 2015 that we would like to inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015*

to 1 August 2015 I find this to be a clear request to inspect the accounting records". He goes on to set out Section 30 of the 1992 Act.

22. Also on 26 October 2015 Karen Mills sent an email to Adrian Smith, BASSA Branch Secretary, in that email she says;

*"We are members of Unite branch 2000/1 (BASSA).*

*We are writing to request access to the accounting records of our Branch in accordance with a member's right under section 30 and 31 of the Trade Union and Labour Relations Consolidation Act 1992 'the 1992 Act'. Section 30(2) (c) provides that at the time of inspection the union is to secure that the members are allowed to take or be supplied with the copies of any records inspected that are required.*

*The relevant period for which we require copies of branch accounts is 2014 to 2015. We look forward to hearing from you in due course.*

*Yours sincerely,*

*Karen Mills*

*June Freeman*

*Peer Kessner*

*Miguel Fernandez*

*Aidan Duffy*

*Anne Charlet"*

23. There follows an exchange of emails between Mr Smith and Ms Mills that end on 20 December 2015 with Mr Smith asking Ms Mills *"Can you please provide me with dates and times for you all to attend the LHR, Unite Bath Road office, to collect the Branch accounts"*. I was told that this offer was not taken up by Mrs Mills or any of the other signatories to the initial request.
24. I find that the request set out in paragraph 22 above was not the same as, or a restating of, the request made by Mr Fernandez on 11 August 2015 set out in para 19 above. The reply sent by Mr Smith referred to in paragraph 22 above does not therefore discharge the union's responsibility in relation to Mr Fernandez' request.
25. Returning to Mr Fernandez' request, on 11 December 2015 Neil Gillam, of Unite's Legal Department, emailed Mr Fernandez. He stated that he had been asked to reply to Mr Fernandez' email of 26 October 2015 to Mr Murray. The final paragraph of his email states:

*"Your correspondence of the 11th of August requested the individual accounting records of subscriptions paid by Bassa members. As Mr Murray explained to you previously, we are not clear at all what you are requesting. The union does not hold individual accounting records for members. The Union holds a membership database. The accounting records of the branch are entirely different. They will not, I understand, show the individual subscriptions paid by members, rather the sums received in any month from British Airways by way of check off. You should make any request relating to branch accounts to the Branch Treasurer who holds these records to whom I have copied this correspondence."*

## **The Relevant Statutory Provisions**

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

### **30 Right of access to accounting records.**

- (1) *A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union.  
In the case of records relating to a branch or section of the union, it is immaterial whether he was a member of that branch or section.*
- (2) *Where such access is requested the union shall—*
- (a) *make arrangements with the member for him to be allowed to inspect the records requested before the end of the period of twenty-eight days beginning with the day the request was made,*
  - (b) *allow him and any accountant accompanying him for the purpose to inspect the records at the time and place arranged, and*
  - (c) *secure that at the time of the inspection he is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he requires.*

### **31 Remedy for failure to comply with request for access**

- (1) *A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer.*

### **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).*
- (2) *The matters are—*
- (a) *the appointment or election of a person to, or the removal of a person from, any office;*
  - (b) *disciplinary proceedings by the union (including expulsion);*
  - (c) *the balloting of members on any issue other than industrial action;*
  - (d) *the constitution or proceedings of any executive committee or of any decision-making meeting;*
  - (e) *such other matters as may be specified in an order made by the Secretary of State.*

- ....
- (8) *The reference in subsection (1) to the rules of a union includes references to the rules of any branch or section of the union.*

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

27. The rules of the Union relevant to this application are as follows:-

### **RULE 6 LAY OFFICE**

....

6.2 *In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council, or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers, with the exception of Area Activists Committees and Regional Political Committees as specified elsewhere in these rules.*

6.3 *The definition of the term "accountable representative of workers" shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (e.g. construction, contracting, leisure, rural etc) in formulating such a definition. It must*



nevertheless include Branch officeholders who are in employment, shop stewards, health & safety, equalities and learning representatives.

6.5 The electoral period to hold lay office shall be three years unless otherwise provided for under these rules.

## **RULE 17 BRANCHES**

17.7 Each Branch shall have for its management a Chair, a Treasurer, an Equality Officer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by show of hands, or by ballot, if so decided by the meeting. The election shall take place and be completed not later than June 30 in each third year, and the elected candidates shall take office the following July for three years. Casual vacancies may be filled at an ordinary Branch meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.

17.8 The Regional Committee shall be required to ensure that branches meet at regular intervals; at a minimum they shall convene an Annual General Meeting of all members. Where a branch fails to convene such a meeting the branch will be suspended and members of the branch shall be allocated to a branch which meets the requirements of rule subject to the right of the branch to appeal to the Executive Council. Branches, shall, with the assistance of the Region advise their members of the venue, time and date of branch meetings, this may be by post or by posting the information on the union's website. It shall be the responsibility of the branch secretary to ensure that up to date information about branch meetings is held by the Union.

17.9 The Executive Council shall issue standing orders to regulate the conduct of Branch meetings and business and may amend the standing orders from time to time. Those standing orders may only be varied in respect of a Branch with the prior approval of the Executive Council. The quorum for a Branch meeting to make a decision on any matter shall be 5 members and all matters should be decided by a simple majority of those voting. If the votes are equal the proposition before the meeting shall fail.

## **RULE 18 WORKPLACE REPRESENTATION**

18.1 At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every 3 years, 1 or more of the following representatives:

18.1.1 Shop stewards/workplace representatives

18.1.2 Safety representatives

18.1.3 Learning representatives

18.1.4 Equality representatives

18.1.5 Environment representatives

The election shall take place and be completed not later than June 30 in each third year, and the elected candidates shall take office the following July for three years.

18.3 The method of election shall be by such means as authorised by relevant guidance which shall be issued by the Executive Council from time to time.

## **Appendix 1 Rule 6 – Lay Office EC Guidance** (The Rules are in bold. The guidance is not in bold)

### **2) EC GUIDANCE - RULE 6: LAY OFFICE**

6.2 In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council or other body of the Union provided for by these rules, the member in question must be an accountable

**representative of workers, with the exception of Area Activists Committees and Regional Political Committees as specified elsewhere in these Rules.**

6.2.1 Only members who are elected to represent workers will be eligible to participate in any body of the union, including any conferences, but with the exception of branch and workplace meetings (which all members can attend) and Area Activists Committees and Regional Political Committees as specified elsewhere in these Rules.

**6.3 The definition of the term 'accountable representative of workers' shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (i.e. construction, contracting, leisure, rural, etc) in formulating such definition. It must nevertheless include branch office holders who are in employment, shop stewards, health and safety, equalities and learning representatives.**

6.3.1 An accountable representative of workers must have been elected by the Unite members at a Unite branch or workplace. The workplace must contain a minimum of three members. The election must comply with the guidance under 6.5.

**6.5 The electoral period to hold lay office shall be three years unless otherwise provided for under these rules.**

6.5.4 Prior to any election, the members in the workplace should be informed of the pending election and invited to volunteer for election or nominate a colleague for election. The precise mechanics of informing the members on the workplace, and dealing with nominations and the election, may vary from workplace to work place, but any such case will be a fair procedure. In the event of dispute the Regional Officer should be contacted and the Regional Secretary should be informed.

6.5.5 In the event of nominations having been invited from the relevant workplace, and only one candidate having been nominated, or volunteered, that candidate may be declared elected unopposed.

### **Appendix 3 Rule 18 – Workplace Representation EC Guidance**

**18.3 The method of election shall be by such means as authorised by relevant guidance which shall be issued by the Executive Council from time to time.**

18.3.1 See also EC Guidance on Rule 6 re Lay Office.

### **THE BALLOTING PROTOCOL FOR REPRESENTATIVES AND BASSA BRANCH ELECTIONS**

- (1) Postal balloting and conduct of elections through the ERBS (or similar organisation) to be continued. An electronic ballot through the ERBS may be utilised if agreed by the branch committee for a by-election.
- (2) All positions for which there are vacancies will be advertised clearly on the BASSA website and any other associated electronic media or publication or notice board. Equal, uniform and consistent prominence given to all vacancies.
- (3) All relevant Rules governing Rep/Branch elections to be publicised to all members no later than 2 weeks prior to the commencement of election process.
- (4) Branch Election Rules (consistent with any Unite Rules and Guidelines) be made available before the election process begins. Such rules to be approved by the Unite chief of staff.
- (5) Candidates' biographical details and elections address to be distributed by the ERBS with voting paper as well as published on the BASSA website.
- (6) Such biographical details and elections address are not to exceed 150 words. They are not to attack any other candidate, member or Officer to the Branch and Union, and are not to contain comments which are likely to cause offence and/or embarrassment to BASSA.

- (7) All electoral addresses to be reviewed by the Branch Secretary (or Chair) and Regional Officer. Only the first 150 words will be published if there is an over run and any offending sections in line with above point they will be edited out entirely.
- (8) Election addresses must be truthful and accurate.
- (9) Proposer and Seconders are required by candidates but will not form part of any published address and may not be advertised.
- (10) No literature other than the biographical details and election address distributed by the ERBS (or similar organisation) and published on the BASSA website is to be permitted. No other distribution or display of such biographical data is permitted.
- (11) No bulk emailing/texting/ mailing/ picture messaging or phone calls or non unique use of social media is permitted.
- (12) No website/facebook/tweet or other social feeds are to be used in campaigning.
- (13) Unique exchanges by text, email, phone and internet forum are allowed.
- (14) Any breach in the rules will be subject to a review by the Branch Secretary (or Chair), Regional Officer and an independent party appointed through the Unite legal director.
- (15) Failure to comply with the Branch Election rules from the opening of nominations to the closure of the ballot will result in candidates being ineligible to stand for this election.
- (16) Any decision reached may be subject to appeal or otherwise. Any appeal is to be notified to the National Officer.

## Considerations and conclusions

### Complaint 1

#### Summary of submissions

28. The applicant's Complaint 1 is in the following terms:  
*'During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 5 of the Balloting Protocol by not publishing on the branch website the electoral addresses of the candidates.'*
29. Balloting Protocol bullet point 5 is in the following terms:  
*"Candidates' biographical details and elections address to be distributed by the ERBS with voting paper as well as published on the BASSA website."*
30. At the hearing the union conceded that there had been a breach of bullet point 5 of the Balloting Protocol. I think they were right to do so. Bullet point five is clearly written and its requirement that *'Candidates' biographical details and elections address to be distributed by the ERBS with voting paper as well as published on the BASSA website'*, does not require me to look behind the rule for its spirit or consider alternative interpretations. The union submitted that the fact that the election addresses were not placed on the website was an oversight on their part, and had this been brought to their attention during the election, one that they would have rectified. Nevertheless they accepted that there had been a breach.
31. Given the union's concession I make the declaration that the union breached bullet point 5 of the Branch Balloting Protocol. I now need to consider whether it is inappropriate for me to make an order. At the hearing Mr Fernandez said that in itself this breach did not merit an order for a re-run of the 2015 BASSA Branch Elections. Rather he said that I should consider it along with any other breaches I find and

consider their effect collectively when considering making an order. I can see why Mr Fernandez would want to take this approach and I have had a mind to the overall picture when considering the appropriate remedies. However, I consider that I do need, in the first instance, to consider each alleged breach in isolation.

32. In the case of a breach of bullet point five Mr Fernandez referred me to a 2011 academic paper entitled '*Name Recognition and Candidate Support*'<sup>1</sup>. In essence Mr Fernandez relied on a finding that in some conditions name recognition can increase candidate support. Applying this to the facts of this case he argued that the lack of availability of election addresses on the BASSA website would delay the point at which the names of candidates who were not already Branch Officers or representatives became known to members. He expressed this by saying "*in the event that the addresses were not put up on the website, it is likely that a large number of crew did not have access to any of the statements made by the candidates before the moment of voting*". He emphasised the fact that, by nature of their occupation, many BASSA members are regularly away from their homes and rely for up to date information on the BASSA website rather than printed material sent to their home address. He also referred to the late and non-receipt of ballot packs, including election addresses, by some BASSA members. He did not quantify this. Mr Fernandez conceded that neither he, nor anyone else to his knowledge, had alerted the union to the absence of election addresses on the website during the election period.
33. Against this the union argued that every member who voted had received in their ballot packs the election addresses of all candidates and were therefore in receipt of them prior to voting. Additionally Mr Smith, BASSA Branch Secretary, gave evidence that the up to 200 members who had contacted the union as not having received ballot packs were supplied with these.
34. I accept the union's submission that all of those that voted in the BASSA 2015 Elections had received an election pack that included all of the election addresses. I also accept that the union provided such packs to any member that reported non receipt to them. In the circumstances I find that the union are right to consider the breach of bullet point five to have been an unintended oversight and that all those voting in the election were in receipt of the election addresses. I therefore find that it would be inappropriate to make an enforcement order in relation to this breach.

## **Complaint 2**

35. The applicant's Complaint 2 is set out in the following terms:  
*'During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 10 of the branch Balloting Protocol by permitting the publication of literature which promoted a candidate, Valdemar Gomes, by publicising his branch work in raising issues faced by workers in Colombia.'*
36. Balloting Protocol bullet point 10 is in the following terms:

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<sup>1</sup> Cindy & Kam & Elizabeth J Zechmeister, Vanderbilt University, Paper presented to the Center for the Study of Democratic Politics at Princeton University April 28 2011.

*"No literature other than the biographical details and election address distributed by the ERBS (or similar organisation) and published on the BASSA website is to be permitted. No other distribution or display of such biographical data is permitted."*

### **Summary of Submissions**

37. Mr Fernandez' arguments in relation to this complaint are very clear. He argued that considered overall the Branch Balloting Protocol has the effect of imposing a 'black out' period during the election. During the period of the election he argued that there were exceptions to this blackout and gave as an example the reporting of necessary Branch industrial issues. He argued that the two postings to the Branch website regarding the involvement of the Branch and specifically Mr Gomes in a Justice for Colombia delegation to Columbia did not relate to the ordinary business or industrial business of the Branch and there was no need for these postings to be made during the election period. He drew my attention to the findings of the academic study referred to in paragraph 32 arguing that the publicity given to Mr Gomez could have given him an unfair advantage as a result of the effect of name recognition. Mr Fernandez also referred to the deleting of posts he had made to a BASSA website forum by Mr Gomez on the grounds that these were not allowed under the Balloting Protocol.
38. The union's arguments in relation to this complaint were also expressed very clearly. Mr Potter submitted that the Balloting Protocol, and particularly bullet point 10, was intended to regulate election communications/material. The publication of details of the Colombia delegation was not an election communication. He argued that it was a report on the normal business of the branch and in the case of the Justice for Colombia campaign a part of the campaigning of the union that many members were involved in and that the Branch was proud of its contribution to. He pointed out that although both of the postings about the Justice for Colombia had named Mr Gomez neither had referred to the BASSA Elections. In those circumstances he said that the two postings could not be seen as election communications or material. Rather they should be seen as part of the ordinary business of the branch.

### **Considerations and conclusion**

39. I accept the general proposition put forward by the union that the Branch Balloting Protocol, particularly bullet point 10, seeks to regulate election communications. I further accept that the Branch Balloting Protocol does not have the effect of precluding communications that deal with the ordinary business of the branch, even where these may name a candidate in the on-going elections. However, I take the view that communications that on their face could be described as relating to the ordinary business of the Branch could in some circumstances be seen as election communications and therefore covered by bullet point 10 of the Protocol. In the instances referred to, an explicit reference to the fact that Mr Gomez was a candidate may well have been enough to bring these postings into a category of election communications. Further, and this may be relevant to complaint 3, a communication that on its face relates to a subject other than the election could by virtue of its content be seen as having an intention of impacting on the election and therefore be seen to be in the category of election material.

40. In the case of the two postings in which Mr Gomez is named I do not take the view that these were election communications. I accept the union's view that these communications were published in relation to the ordinary business of the branch and did not relate to the 2015 Elections. I therefore dismiss the claimants complaint 2.

### **Complaint 3**

41. The applicant's Complaint 3 is set out in the following terms:  
*'During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 11 of the branch Balloting Protocol by permitting the bulk emailing of material which was critical of a candidate, Ms June Freeman, and damaging to her prospects of success. The bulk emails are those dated 30 April 2015 and 5 May 2015, as they appear on the branch website.'*
42. Balloting Protocol bullet point 11 is in the following terms:  
*"No bulk emailing/texting/ mailing/ picture messaging or phone calls or non unique use of social media is permitted."*

### **Summary of submissions**

43. The background to this complaint is concerns raised by Ms June Freeman, a BASSA member and candidate for the position of Branch Chair in the BASSA 2015 Elections. The concerns related to the use of an organisation called Survey Monkey to facilitate workplace consultative ballots. Ms Freeman raised her concerns by way of an email to Adrian Smith, BASSA Branch Secretary, on 18 April 2015. In this email Ms Freeman expresses her *'surprise and concern that BASSA has decided to use the Survey Monkey company for any future 'ballots'*. She sets out her concerns about this and goes on to ask Mr Smith for confirmation in a number of areas such as: the anonymity of the ballots, that each person will only be able to vote once, that there would be independent observers and that an independent and impartial tribunal would be appointed in the event of a dispute about the result. This email was sent to Mr Smith and there was no evidence that it was sent out more broadly or made public by Ms Freeman.
44. I understand Survey Monkey to be an organisation that provides online balloting services. I further understand that the BASSA Branch wished to use their services both as they had a good record of delivering high participation in ballots and because they were significantly cheaper than a full postal ballot.
45. The union did not respond directly to Ms Freeman's email of 18 April 2015, rather they sent out an email to members on 30 April 2015. This contained a circular entitled *'Democracy Hasn't Spoken'*, this was also posted on the BASSA website. The overall purpose of the email was to announce a delay in the announcement of the result of the consultation ballot in Eurofleet. The email was sent out to members at 12.21pm on 30 April.
46. The union's view of Ms Freeman's motivation for raising the issues and a perceived need to provide answers to their membership comes through very clearly in the email of 30 April. Among other things it says:

*"Once again we have been challenged on their legitimacy (The Survey Monkey ballots) via a complaint from Worldwide member June Freeman. Ms Freeman's previous complaint needed a full enquiry by Unite, before the results could be released. Despite those previous complaints being dismissed, we still felt it prudent to ensure that our processes was not only open and transparent but most of all seen to beyond reproach. This will ensure that there can be no doubt whatsoever cast on its validity by those who would seek to do so.*

*Members have also complained separately that Ms Freeman's husband (who is not a BASSA member) is openly stating that the result ballot is 'fixed' 'your reps are corrupt and all being paid off by BA' etc etc."*

The circular goes on to say that *"the result and process used will be scrutinised and then verified by an independent solicitor prior to release."*

47. At 20.17 on 30 April 2017 Ms Freeman sent an email to Adrian Smith (Branch Secretary) and Sean Beatty (Branch Chairman) in which she said,

*"I wrote to the Branch Secretary on the 18<sup>th</sup> of April in respect of balloting procedure. Instead of acknowledging or even replying to my communication you have seen fit to publicly name me in an email to members.*

*I thereby request as an act of fairness that you publish in full my unedited email referred to above to all members..."*

48. At 22.48 on 30 April 2015 Ms Freeman submitted her nomination for the position of Branch Chair to Adrian Smith (Branch Secretary) by email.

49. On 5 May 2015 the union issued another email to members, which was also posted on its website. The email was entitled '*Democracy still has not spoken*'. It announced the delay to the announcement of the result of the consultative ballot in the Worldwide fleet. Relevant to this complaint is the following paragraph:

*"This places the branch in the difficult position of having to publicly refute the allegations (as worldwide CSD Ms Freeman has asked us to do) and was done with some if not all her previous complaints. However, given she has also now declared her candidacy in the upcoming BASSA elections must ensure that in doing so, any candidate is not seeking to use this exposure for electoral gain, particularly as it gives far greater prominence to one candidate above all others."*

50. Mr Fernandez argued that both the emails of 30 April and 5 May were direct attacks on Ms Freeman that were intended to damage her chances in the election for Branch Chair. Although he accepted that the email of 30 April email '*Democracy hasn't spoken*' (see para 45) was sent out prior to Ms Freeman formally announcing her intention to be a candidate in the BASSA 2015 elections, he submitted that it was widely known within the union that it was her intention to do so. Mr Fernandez made much of the fact that the union were able to put out what he considered to be an email that was very damaging to Ms Freeman on 30 April. The email of 5 May 2015, sent out after Ms Freeman became a candidate, named her again and refers to "*her previous complaints*". The union went on to deny Ms Freeman the right to respond, or

even have her actual concerns put out to the membership on the basis that she was, by that time, a candidate in the elections.

51. Mr Fernandez also submitted that other members of the BASSA Branch had raised concerns regarding the use of Survey Monkey, but these were not named in the emails of 30 April or 5 May as Ms Freeman had been. He suggested that this was because they were not known to be intending to stand or standing in the Branch Elections. At the hearing both Mr Smith (Branch Secretary) and Mr Beatty (Branch Chair) said they had no recollection of any such complaints.
52. In his submissions Mr Potter, for the union, submitted that the purpose of Ms Freeman's email of 18 April 2015 and the concerns it raised were intended to 'throw mud' at the Branch. He went on to say that it was part of a campaign by Ms Freeman and others to take over the Branch. In his evidence Mr Beatty (Branch Chair) referred to Ms Freeman's claims as being '*without any foundation whatsoever*'. He also said that '*these allegations, as you would expect in our social media age, spread like wild fire and people were openly questioning both the conduct of the ballot and the conduct of the representatives*'.
53. It was against this background that the union issued the 30 April '*Democracy hasn't spoken*' email. Had the issue ended here I would have taken the view that the Balloting Protocol was not engaged as at the time this email was sent Ms Freeman had not nominated herself as a candidate in the elections. However, Ms Freeman was again named in the 5 May '*Democracy still hasn't spoken*' email and reference is made to her '*allegations*' and '*her previous complaints*'.

### **Considerations and conclusions**

54. My task is to determine whether Branch Balloting Protocol 11 has been breached. That protocol outlaws '*bulk emailing, /texting/ mailing/ picture messaging or phone calls or non-unique use of social media*'.
55. At paragraph 39, in relation to complaint 2 I have said that I accept the union's general proposition that the Balloting Protocol seeks to regulate election communications. I further accept that the Balloting Protocol does not have the effect of precluding communications that deal with the ordinary business of the branch, even where these may name a candidate in the on-going elections. However, I went on to say that a communication that on its face relates to a subject other than the election could, by virtue of its content, be seen as having an intention of impacting on the election and therefore be seen in a category of election material. Mr Fernandez is clear that the 5 May email, particularly if read in conjunction with that of 30 April, is highly damaging to Ms Freeman's electoral chances and is intended to be. For the union Mr Potter argues that the neither the 30 April email nor the 5 May email are election communications. He submits that the 5 May email deals with the complaints made by Ms Freeman and her issues with the consultative ballots without going into detail. He submitted that the clarifying communication was considered necessary by the Branch Committee to reassure members as to the integrity of the consultative ballots.



56. Mr Potter repeated his submissions made in relation to complaint 2 that the Balloting Protocol was not and is not intended to interfere with or delay the ordinary business of the Branch.
57. I accept, on the balance of probabilities that neither the 30 April or 5 May emails were, or were intended to be, election communications. I found it easier to arrive at this conclusion in relation to the 30 April email due to it having been sent before Ms Freeman had announced her candidacy. The balance in relation to the 5 May email weighs less heavily in the union's favour. I am not convinced that the union needed to refer to Ms Freeman by name; they could have simply referred to the issues raised, that they were being investigated and that the outcome of the consultative ballot would be delayed. By naming Ms Freeman the union, intentionally or otherwise, have invited the reader to recall the 30 April email in which the criticism of Ms Freeman was significant as I set out in paragraph 46 above. This could have been detrimental to Ms Freeman's electoral chances. However, I do not consider that this was the intention of the union. I therefore do not find these communications were election communications. Rather I find that both emails betray perhaps more than was necessary the Branch Officers' irritation at the concerns raised and their view that the issues raised by Ms Freeman were unmeritorious, frivolous and vexatious, as Mr Potter put it at the hearing. The union would do well in the future to consider carefully the content and tone of its communications, particularly when an election is in progress.
58. Having decided that the 30 April and 5 May emails from the union were not covered by the Branch Balloting Protocol it follows that I must dismiss the claimant's complaint 3.

#### **Complaint 4**

59. The applicant's complaint 4 is set out in the following terms:  
*"During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached paragraph 6.5.4 of Appendix 1 of its rules when the branch followed an unfair procedure by applying the experience or qualification requirements in rule 1.5 of the branch rules to the election for the positions of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff."*
60. Paragraph 6.5.4 of Appendix 1 is in the following terms:  
*"6.5.4 Prior to any election, the members in the workplace should be informed of the pending election and invited to volunteer for election or nominate a colleague for election. The precise mechanics of informing the members on the workplace, and dealing with nominations and the election, may vary from workplace to work place, but any such case will be a fair procedure. In the event of dispute the Regional Officer should be contacted and the Regional Secretary should be informed."*

#### **Preliminary consideration – is paragraph 6.5.4 of Appendix 1 of the Unite the Union Rule Book a rule of the union?**

61. At paragraph 52 of his preliminary decision, Mr Cockburn said *"a preliminary issue arises as to whether paragraph 6.5.4 of Appendix 1 of the Unite rules is indeed a rule of the Union. Appendix 1 reproduces the relevant rules and then provides guidance*

*from the EC on the meaning and application of those rules. Guidance does not become a rule simply by being contained in the rule book. However, it is arguable that paragraph 6.5.4 is a rule of the Union by virtue of rule 18.3 which provides that the election of work place representatives shall be by such means as authorised by relevant guidance issued by the EC. Paragraph 18.3.1 of Appendix 3 provides such guidance in the words, "See also EC guidance on rule 6 re lay office".*

62. In his skeleton argument Mr Potter for the union said that it is the union's position that Appendix 1 to the then Rule Book does not contain rules of the union. The guidelines contained therein can be varied by the EC at its own discretion by a simple majority (which is not the case for the rules of the union).
63. Mr Cockburn considered whether the guidance at paragraph 6.5.4 could be said to be a rule of the union by virtue of Rule 18.3. Rule 18 deals with workplace representatives and it is by following the reference in Rule 18.3 to guidance in Appendix 3 and from the reference there to the guidance in Appendix One that Mr Cockburn suggests could point to paragraph 6.5.4 being a rule of the union.
64. In Mr Potter's skeleton argument he refers to Rule 17 which deals with branches, within Rule 17.7 it is said:

*"Each Branch shall have for its management a Chair, a Treasurer, an Equality Officer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by show of hands, or by ballot, if so decided by the meeting".*

There is no reference to any guidance regarding elections within Rule 17, rather it would appear that the method of election is left to the Branch. Mr Potter highlighted this position in his skeleton argument, although did not develop it further in submission.

65. I was aided in considering this position by the witness testimony of Mr Richardson (National Officer for Civil Air Transport). When referring to the positions of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff, he said *'The industrial structure had been and would continue to be distinct from the branch as it needed to deal on a representative basis not with the membership but with the company'*. Mr Richardson went on to explain that such posts would not be found within the union's rule book as in many cases they were more a creature of the negotiating machinery or recognition agreement with the employer. He further said that such positions could in some cases be embedded within the Branch structure, which was the case with the BASSA Branch. On the basis of this it would seem that it is not clear if the requirements of Rule 18 and hence Appendix One apply to the posts in question. Mr Fernandez referred me to a number of Certification Officer decisions that had dealt with whether and on what basis guidance contained in the Appendix to Unite's Rule Book were rules of the union (R Kruger v Unite D/41/10-11, Hicks v Unite the Union No 2 D/32-39/15-16 and Beaumont & Smith v Unite the Union D/50-54/11-12). None of these cases dealt directly with paragraph 6.5.4. However, Mr Fernandez summarised his views by saying that the positions referred to were both Branch Committee members and Workplace representatives,

BASSA being a workplace Branch. Therefore the requirements of rule 6 and hence the guidance contained in Appendix One applied.

66. I'm inclined to agree with Mr Fernandez but for a slightly different reason. During the course of the hearing the union confirmed that the relevant positions are considered by the union to be 'accountable representatives of workers'. This engages Rule 6.3 which is the rulebook basis for the guidance at Appendix One. Paragraph 6.3.1 requires that "*An accountable representative of workers must have been elected by the Unite members at a branch or a workplace. The workplace must contain a minimum of three members. The election must comply with guidance under 6.5*". Paragraph 6.5 includes paragraph 6.5.4. On this basis I find that paragraph 6.5.4 is a rule of the union.

### **Summary of submissions**

67. Mr Fernandez' submissions concentrated on his argument that the procedure adopted for the election of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff was not fair. Mr Fernandez set out the following arguments;

BASSA Branch Rules allow for two methods of election to the posts of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff. The relevant section of the Branch rules at 1.5c, in relation to Agreements Secretary and in similar terms for the other positions, says;

*'An electoral college comprising of all reps and committee members from the Eurofleet and World Wide fleet community shall elect from amongst their own body the positions of Agreements Secretary. Alternatively, the relevant Worldwide and Eurofleet representatives on the Branch Committee may exercise the option to elect the position of Agreements Secretary directly from their respective communities'*.

Mr Fernandez argued that the primary method was by way of an electoral college of the relevant representatives. The alternative method is by way of direct election from the relevant constituency.

Both methods require 3 years' experience on the Branch Committee or as a representative, depending on the role. However, with the Electoral College route the experience requirement is applied after the members have elected their representatives

By applying the alternative method, direct elections, the only people that can be nominated to the disputed positions would be those able to meet the qualifications. That limits the candidacy to someone who was elected to the Branch Committee in the previous election.

By using the alternative method, direct election, the requirement of experience is applied before any representative is elected, the most likely outcome is that the positions will go unopposed.

68. Mr Fernandez also submitted that the union should have been more clear as to the method that had been selected for the relevant elections and that it was not good enough for them to refer members to the Branch Constitution. He also submitted that the method adopted for election by the Branch was so unfair that it was in breach of Unite Rule 2.1.6 which makes it an object of the union *'To promote equality and fairness for all, including actively opposing prejudice and discrimination on grounds of gender, race, ethnic origin, religion, class, marital status, sexual orientation, gender identity, age, disability or caring responsibilities.'*
69. At the hearing Mr Fernandez suggested that one effect of a direct election is that it would discourage candidates coming forward to challenge a candidate who was currently in the role that was up for election. He suggested that candidates were more likely to come forward for roles such as representative that would get them onto the Branch Committee and they would then have the chance to put themselves forward for one of the disputed roles to be elected by electoral college.
70. In its submissions the union set out why the experience requirements were necessary in relation to the relevant posts. The union skeleton set out the need as *'The imposition of an experience requirement in one of the Union's largest branches, with one of the most anti-Union employers is not prohibited by Rule. Also of importance is the fact that experience is regarded as essential for representatives to competently represent workers. This is a highly regulated industry with many collective agreements containing great detail as to the working conditions and practices of our membership. To allow BA to sit opposite a negotiating team that has little or no experience of this would create inequality of bargaining power and be highly detrimental to the membership'*. Moreover the union submitted that there was nothing in the Unite Rule Book that precluded a Branch setting out a relevant qualification or experience as a requirement to hold branch office.
71. In undisputed evidence Mr Richardson stated that within the BASSA Branch at the time of the 2015 elections over 50 people had the necessary requirements to qualify to stand for the disputed positions.

### **Considerations and conclusion**

72. The breach I am asked to consider here is a breach of Appendix One Paragraph 6.5.4. More specifically that of the requirement of having a fair procedure in relation to the disputed elections. As a starting point I am inclined to agree with Mr Cockburn when he said in his preliminary decision that such a *'requirement is so vague that there is an issue as to whether it imposes an enforceable obligation as opposed to being mere encouragement or words of aspiration'*.
73. The evidence provided by the union of the need for its qualifying requirements for some positions within what it calls its industrial structure is compelling. Furthermore those requirements are clearly set out in the BASSA constitution. I accept that the application of experience criteria narrows the field of those who can be nominated drastically, however for the reasons set out by the union I agree that this can be justified.

74. Whilst I can understand why Mr Fernandez might have considered that election by way of an electoral college was the primary method of electing the disputed positions, by virtue of it being stated first within the rule, with direct election being set out as 'an option', I do not agree with him. I find that the rule does not give any additional weight or preference to either of the options. I find that the rule gives a discretion to the union as to which option to take. Lastly I accept the unchallenged evidence of the union that direct elections have always taken place in relation to these positions.
75. I simply cannot understand Mr Fernandez' argument that a direct election for posts is somehow more restrictive than an electoral college where the same experience criteria is applied. At the hearing Mr Fernandez seemed to suggest that it may be in some way easier or more attractive to apply for any of the other posts up for election without having to challenge a 'sitting tenant' in a direct election for one of the disputed posts that are the subject of this complaint. Once elected a person could then put themselves forward for election to one of the disputed posts via the electoral college route This would appear to me to be more a point of electoral strategy than a point of fairness.
76. I do not accept that the members of the BASSA Branch were not aware of the system that was to be used to elect the disputed positions. I consider that the invitation for nomination, properly read, makes it clear that the election shall be by the relevant crew, namely by the relevant membership, not by an electoral college. I also accept that the BASSA Elections in 2012 were similarly held by the direct route.
77. For the above reasons I dismiss the claimant's complaint number 4.

### **Complaint 5**

78. The applicant's complaint 5 is set out in the following terms:  
*'In breach of sections 30(2)(a), 30(2)(b) and 30(2)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992, Unite the Union failed to comply with Mr Fernandez Castillo's request of 11 August 2015 to Andrew Murray, Chief of Staff, to inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015.'*
79. Sections 30(2)(a), 30(2)(b) and 30(2)(c) of the 1992 Act provide as follows:  
"(2) Where such access is requested the union shall—  
(a) make arrangements with the member for him to be allowed to inspect the records requested before the end of the period of twenty-eight days beginning with the day the request was made,  
(b) allow him and any accountant accompanying him for the purpose to inspect the records at the time and place arranged, and  
(c) secure that at the time of the inspection he is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he requires."
80. At paragraph 24 above I find that the request set out in paragraph 22 was not the same as, or a restating of, the request made by Mr Fernandez on 11 August 2015 set out in para 19 above. The reply sent by Mr Smith referred to in paragraph 23 above does not therefore discharge the union's responsibility in relation to Mr Fernandez' request.

81. I reached this finding as it was clear to me that the request made by Mr Fernandez on 11 August 2015 was that he wished to see the accounting records of Unite the Union rather than the accounting records of the BASSA Branch, hence the request to Unite's Chief of Staff rather than an officer of the BASSA Branch. The reason he did this, I think, is fairly clear. He was aware that subscription income for BASSA members was paid directly to Unite the Union and only a percentage of that income was then passed onto the BASSA Branch.
82. I find that the union's responses to Mr Fernandez request culminated in an email from Neil Gillam, Legal Department, Unite the Union. Mr Gillam said he has been asked to reply to Mr Fernandez' email of 26 October 2015 to Mr Murray. The final paragraph says:  
*"Your correspondence of the 11th of August requested the individual accounting records of subscriptions paid by Bassa members. As Mr Murray explained to you previously, we are not clear at all what you are requesting. The union does not hold individual accounting records for members. The Union holds a membership database. The accounting records of the branch are entirely different. They will not, I understand, show the individual subscriptions paid by members, rather the sums received in any month from British Airways by way of check off. You should make any request relating to branch accounts to the Branch Treasurer who holds these records to whom I have copied this correspondence."*
83. It is clear that Mr Fernandez did make an application to see what he considered to be accounting records. In the original request he sets this out as *"inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015"*. In correspondence with the union he explained his request further saying in his 26 October 2015 letter to Mr Murray, Unite Chief of Staff, that he wanted to *"inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015"*. In his skeleton argument Mr Fernandez referred to the Certification Officer's decision in Mills v Unite the Union (D/38/15-16) 'the Mills case'.
84. The Mills case related to payments to Branch representatives as 'stand down' payments and expenses. They were payments by the union to individuals. The Certification Officer found that the union had a duty to separately record each payment or remittance that it makes in such a way as to explain its transaction. He went on to make a very specific order that included the following;  
*"Unite the Union is ordered to give the claimant access to the accounting records of the BASSA branch of the Union (LE/2000) which show the individual transactions which together constitute the aggregate amounts that are entered in the quarterly and annual accounts of the branch for the years 2008 to 2013 under the headings 'stand-down' or 'stand-down allowance'. The accounting records are to include the date each payment was made, the identity of the recipient and a brief description of the expenditure category of that payment or other reason for payment in accordance with the accounting conventions of the Union."*
85. The Certification Officer's decision in the Mills case was appealed to the Employment Appeal Tribunal (EAT). Although upholding the decision and dismissing a cross-appeal the EAT did make a point significant to this decision. At paragraph 60 of their

decision the EAT stated: "*we disagree with his [the Certification Officer] observation "that accounting records are those that are created or kept principally for the purpose of accounting". Whether something is an accounting record an objective test is to be applied. It may be that invoices and receipts are retained for the purpose of accounting. They may need to be made available to the auditor for checking the accounts. The fact that documents are kept for the purposes of accounting does not transform them into accounting records within the meaning of TULRCA section 28(1)(a) and (2). The EAT goes on to say at paragraph 61: 'Proper accounting records within the meaning of section 28 are those which are "necessary to give a true and fair view of the state of affairs of the trade union and explain its transactions". It is against the EAT's view of accounting records that I must consider Mr Fernandez' request.*

86. At the hearing the union's witnesses were not able to help me in terms of how membership subscriptions are received by Unite the Union. The union had submitted a witness statement from Mr Murray, Unite Chief of Staff. However, he did not attend the hearing, I was therefore not able to question him on exactly what accounting or other records the union held in relation to membership subscriptions. Mr Gillam, the union's instructing solicitor at the hearing was able to assist me to some extent. It would appear that 10% of the subscriptions Unite the Union receives from BASSA members come via direct debits from individual members. The other 90% comes from British Airways, the subscriptions having been collected via deductions from salary (check-off). Apparently two payments are made each month. One represents the majority of the subscription income from all Unite members employed by British Airways who chose to pay their subscription via check-off. A second payment is the proportion of this income that relates to the 'Branch Secretary's commission'. In order for the union to know which members had paid subscription in any particular month BA also provides the union with a list of national insurance numbers of those members who have paid. The union uses these national insurance numbers to amend their membership records to record who had paid.
87. In such circumstances I take the view that the accounting records of membership subscriptions are the two payments to Unite the Union from British Airways and the records of direct debit payments into the Unite Bank account. I do not take the view that there exists *the individual accounting records of subscriptions paid by BASSA members* as requested by Mr Fernandez on 11 August. The list of National Insurance numbers provided by BA and the individual records of direct debit payments are not in my view accounting records. Rather they are documents or data that allow the union to update its membership records. Should I have reached the view that there did exist individual accounting records I would need to have considered whether it would have been right to give access to what is clearly personal data – the national insurance numbers of members.
88. In *Mills v Unite the Union* D/38/15-16 Mr Cockburn considered the issue of a reasonable expectation of privacy and Article 8 of the ECHR. He contrasted "*the position of a member who claims expenses from a union with the position of someone who is merely a member of a union who seeks to prevent the disclosure to others of the fact of his/her membership. The fact of membership may be a matter of great sensitivity and its disclosure could give rise to significant detriment to the individual. In my view a member has a reasonable expectation of privacy of the fact*

*of membership in most circumstances, even from other union members, and the disclosure of the names of members of a union without their express or implied consent may well engage Article 8”.*

89. I agree with this view and should I have found that the National Insurance numbers of members paying by check-off or the details of members paying by direct debit were accounting records, in that they were ‘necessary to give a true and fair view of the state of affairs of the trade union and explain its transactions’, I would have ordered that such details be redacted.
90. In these circumstances I do not find that the union holds accounting records of the type set out in Mr Fernandez’s 11 August 2015 request. I therefore dismiss this complaint. I could have made an order that the union allow Mr Fernandez access to such accounting records as they have. However, for the vast majority of subscription payments this would have been to two records showing aggregated payments from British Airways, these were the transactions. I do not consider that this would have assisted Mr Fernandez as they were not the records which he said he wished to have access to when he made his request on 11 August 2015.



**Gerard Walker**  
**The Certification Officer**



**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTIONS 108A(1) AND 31(1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

**Mr Miguel Angel Fernandez Castillo and Ors.**

**V**

**Unite the Union**

**Date of Decisions**

**17 May 2016**

**PRELIMINARY HEARING  
AND  
CASE MANAGEMENT DISCUSSION**

Upon an application by Mr Fernandez Castillo and others (“the claimants”) under sections 108A(1) and 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”)

**PRELIMINARY HEARING DECISIONS**

1. I find that the Constitution adopted by the BASSA branch of Unite the Union (“Unite” or “the Union”) (Branch LE/2000) in 2012 was valid and binding at the time of the alleged breaches.
2. I find that the Balloting Protocol for representatives and BASSA branch elections (“the Balloting Protocol”), which appeared on the BASSA website at the relevant time contained rules of the Union within my jurisdiction.

**CASE MANAGEMENT DISCUSSION ORDERS**

3. Following a Case Management Discussion, I decide that those complaints made by the claimant which will proceed to a full hearing are as follows:

**Complaint 1**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 5 of the branch Balloting Protocol by not publishing on the branch website the electoral addresses of the candidates.

**Complaint 2**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 10 of the branch Balloting Protocol by permitting the publication of literature which promoted a candidate, Valdemar Gomes, by publicising his branch work in raising issues faced by workers in Colombia

### **Complaint 3**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached bullet point 11 of the branch Balloting Protocol by permitting the bulk emailing of material which was critical of a candidate, Ms June Freeman, and damaging to her prospects of success. The bulk emails are those dated 30 April 2015 and 5 May 2015, as they appear on the branch website.

### **Complaint 4**

During the 2015 elections of the LE/2000 branch of Unite the Union, the Union breached paragraph 6.5.4 of Appendix 1 of its rules when the branch followed an unfair procedure by applying the experience or qualification requirements in rule 1.5 of the branch rules to the election for the positions of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff.

### **Complaint 5**

In breach of sections 30(2)(a), 30(2)(b) and 30(2)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992, Unite the Union failed to comply with Mr Fernandez Castillo's request of 11 August 2015 to Andrew Murray, Chief of Staff, to inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015

## **REASONS**

1. Mr Fernandez Castillo is a member of Unite the Union ("Unite" or "the Union"). By an application received at the Certification Office on 14 July 2015, Mr Fernandez Castillo made on behalf of himself and 30 other members of the Union a number of complaints against the Union. He alleged that the Union had breached its rules in relation to the 2015 BASSA branch election.
2. Following an exchange of correspondence, my office wrote to both Mr Fernandez Castillo and the Union to inform them that I had decided to stay proceedings pending the completion of the internal complaints procedure of the Union. This preliminary hearing was further delayed by a number of the claimants seeking anonymity which applications I rejected. This resulted in the claimants being Mr Fernandez Castillo and 20 others, namely Anne Charlet, Mr Antonio Larranga Loreto, Ms Christine Coleman, Ms Daniela Vinci, Mr Darren Hamer, Ms Fernanda Murphy, Ms Fiona McDougall, Mr Frank Michon, Ms Gail Jones, Ms Karen Mills, Ms Linda Baker, Mr Loizos Christodoulides, Ms Olivia Kerr, Ms Paula Nunez Alvarez, Mr Peter Kessner, Mr Sunday Odesanya, Mr Thierry Dedron, Ms Tracey Ward, Mr Victor Teixeira and Mr Matthew Kilkenny. All the claimants agreed to be represented by Mr Fernandez Castillo.
3. On 8 October 2016, Mr Fernandez Castillo informed my office that he wished to bring a further complaint against the Union under section 30(1) of the 1992 Act.
4. Following extensive correspondence with my office, Mr Fernandez Castillo identified the following complaints which he wished to go forward:-

### **Complaint 1**

During the BASSA Branch LE/2000 elections that were held between 13 April 2015 and 24 July 2015, the BASSA Branch Committee breached the provisions of the Balloting Protocol for representatives and BASSA branch elections ("the Balloting Protocol"). This was for the following reasons:

- (a) In breach of bullet point 2 of the Balloting Protocol, the positions that were vacant were not clearly publicised on the BASSA website and were only published as 'news releases'.
- (b) In breach of bullet point 3 of the Balloting Protocol, the relevant rules of the BASSA Branch Constitution that dealt with and governed the branch elections were not publicised to all members.
- (c) In breach of bullet point 5 of the Balloting Protocol, Electoral addresses were not published on the BASSA website.
- (d) In breach of bullet point 9 of the Balloting Protocol, the candidate to re-election for Branch Chair, Sean Beatty, included in his election address an endorsement for Shaun Loveland as Vice Chair, another candidate who was standing for the position of Representative. In doing so, the Branch Chair included his proposal/seconding of a candidate in his election address. (The Vice Chair position is appointed by the Committee once the Representatives have been elected)
- (e) In breach of bullet point 10 of the Balloting Protocol, bulk emailing was used to publish biographical details of the candidate Valdemar Gomes' work as a Representative, in the context of publicising Branch work in raising issues faced by workers in Colombia.
- (f) In breach of bullet point 11 of the Balloting Protocol, bulk emailing was used by the Committee to campaign against June Freeman, who was one of the candidates to Branch Chair.

#### **Complaint 2**

During the BASSA Branch LE/2000 elections that were held between 13 April 2015 and 24 July 2015, the Union breached Rule 6.5.4. of Appendix 1 Rule 6 - Lay Office EC Guidance of Unite Book of Rules, when the Branch Committee followed an "unfair procedure" in the mechanics of informing the members and the way of dealing with the nominations and the elections. This was so for the following reasons:

- (a) The Committee strictly enforced the Balloting Protocol to the members while not complying with it themselves.
- (b) The Committee applied a Constitution that is neither valid nor legally binding, since it was never properly ratified.
- (c) The Committee did not inform the members about the relevant rules to be applied for the nomination and the elections of candidates for the positions of Industrial Director, Deputy Industrial Director, Chief of Staff and Agreements Secretaries ("the disputed positions")
- (d) The Committee applied such methods that prevented the members from electing their representatives for the disputed positions:

#### **Complaint 3**

During the BASSA Branch LE/2000 elections that were held between 13 April 2015 and 24 July 2015, the Union breached Rule 18.1 of Appendix 3 Rule 18 Workplace Representation EC Guidance when the Branch Committee prevented the members from electing their representatives for the disputed positions.

#### **Complaint 4**

During the BASSA Branch LE/2000 elections that were held between 13 April 2015 and 24 July 2015, the Union breached Rules 6.2, 6.2.1, and 6.3.1 of Appendix 1 Rule 6 - Lay Office EC Guidance when the Branch Committee appointed the disputed positions to people that were not "accountable representatives of workers" since the members had been prevented from electing them.

#### **Complaint 5**

During the BASSA Branch LE/2000 elections that were held between 13 April 2015 and 24 July 2015, the Union breached Rule 18.3 of Appendix 3 Rule 18 Workplace Representation EC Guidance when the Branch Committee did not follow the relevant guidance of the Executive Council as explained in complaints 2 to 4.

#### Complaint 6

On or around 8th July 2015, the Union breached the Fundamental Principle 4) of the T&GWU BASSA Branch 1/2000 Constitution; or should the Certification Officer consider this Constitution to have been legally amended, then the Union breached Fundamental Principle 5) of the 2012 BASSA Branch LE/2000 Constitution, when it did not comply with Mr Fernandez Castillo's request to Mr Adrian Smith, Branch Secretary, to access the BASSA Branch LE/2000 membership database.

#### Complaint 7

In breach of sections 30(2)(a), 30(2)(b) and 30(2)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992, Unite the Union failed to comply with Mr Fernandez Castillo's request of 11 August 2015 to Andrew Murray, Chief of Staff, to inspect the individual accounting records of subscriptions paid by BASSA members between 1 April 2015 to 1 August 2015.

5. On 16 February 2016, I decided to hold a preliminary hearing followed by a case management discussion in order to identify such complaints as would proceed to a full hearing. The Union was informed of the complaints and invited to attend the hearing, which was set for 30 March 2016. The agenda was to be as follows:-
  - a) **To identify which BASSA Branch Constitution was valid and binding at the time of the alleged breaches in 2015. The BASSA Branch LE/2000 Branch Constitution ("the 2012 Constitution"), which was adopted in 2012, or the Transport and General Workers' Union Branch 1/2000 Branch Constitution ("the pre-2012 Constitution") which was in force before the 2012 Constitution.**
  - b) **Whether the Balloting Protocol for representatives and BASSA branch elections ("the Balloting Protocol"), which appears on the BASSA website, contained rules of the Union.**
  - c) **Case management hearing to identify the claimants' complaints and their formulation in a manner that the Union was able to understand and respond to and which were capable of judicial determination and, in the process of doing so, to not accept or strike out any complaints that it is appropriate for me to dispose of in these ways.**
6. Following two postponements, one at the request of Mr Fernandez Castillo and the other at the request of the Union, this hearing eventually took place on 25 April 2016.
7. At the hearing on 25 April 2016, Mr Fernandez Castillo represented himself. Oral evidence for the claimants was given by Mr Fernandez Castillo himself and Ms June Freeman, a BASSA branch member. The Union was represented by Mr Michael Potter of counsel, instructed by Mr Neill Gillam, the Union's in-house solicitor. Oral evidence for the Union was given by Mr Sean Beatty, Chairman of branch LE/2000, and Mr Nigel Stott, Industrial Director of branch LE/2000. Mr Andrew Murray, Chief of Staff of Unite the Union, presented a witness statement but did not give oral evidence. I accordingly gave Mr Murray's evidence appropriately less weight. There were two bundles of documents in evidence at this hearing. The first bundle of 259 pages contained the correspondence and other documentation as supplied by the parties. The second bundle contained 71 pages and comprised those documents that both Mr Fernandez Castillo and the Union had submitted late and which, before

the hearing, I had admitted. . At the hearing, Mr Fernandez Castillo made an application for the late submission of two documents. I admitted one of them (which was added to the second bundle) and rejected the other on the grounds of its lack of relevance to the issues I had to determine. There was also in evidence the current rules of the Union and the 2009 rules of the Union. The Union presented a bundle of authorities which included, *Hicks v Unite the Union (No. 2) (D/32-39/14-15)*, *Rawlins v British Medical Association (D/1-5/07)* and *AB v CD [2001] IRLR 808*.

### **Findings of Fact**

8. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows, in so far as it is necessary or appropriate for me to make findings of fact for this preliminary hearing. I make no finding of fact in respect of those matters which remain to be determined in the complaints at a full hearing.
9. Mr Fernandez Castillo started work for BA or its predecessor in 1999 and at the same time joined the Transport & General Workers Union ("TGWU"), the predecessor union to Unite.
10. Unite has about 1.4 million members and about 3,440 branches. Its branch based at Heathrow Airport for cabin crew is known as the British Airlines Stewards & Stewardesses Association ("BASSA"). It is in the Union's London and Eastern Region. Its official number is LE/2000. BASSA is one of the largest branches in the Union. It has about 8,600 members and the subscription income from its members is in excess of £2 million a year. British Airways has three "fleets" at Heathrow. These are the "Worldwide Fleet", "Euro Fleet" and "Mixed Fleet". The UNITE members in the Worldwide Fleet and Euro Fleet are in the BASSA branch. The members in the Mixed Fleet are in a different branch. The branch constitution currently operated by the branch provides for eight branch officers; Branch Chair, Branch Secretary, Agreements Secretary Worldwide, Agreements Secretary Euro Fleet, Chief of Staff, Industrial Director, Deputy Industrial Director and Regional Executive General Position. The electoral period to hold lay office is three years. This application concerns the branch elections held between 13 April and 24 July 2015. At that election the members of BASSA were to elect 36 lay representatives and branch officers. There were to be elected 16 worldwide representatives, 11 Euro Fleet representatives and 7 of the branch officers together with an Equalities Officer and the Health & Safety Officer.
11. The history of BASSA is long, complex and difficult. Unite was formed by the amalgamation of the TGWU and Amicus in 2007. Prior to 2007, BASSA was a 'brand' name given to the TGWU branch in BA which was made up of cabin crew from the numerous airlines BA had taken over at Heathrow, Gatwick, Manchester, Birmingham, Belfast and Glasgow with representatives from each base. AMICUS members employed by BA were in a further two branches. The major AMICUS branch was based mainly on a group of workers who had broken away from the TGWU in 1989 to form a union known as Cabin Crew 89. This was later absorbed into AMICUS but which continued to be known as Cabin Crew 89. Relations between the branches was, to say the least, not always amicable. Upon the formation of Unite, its inaugural rules provided for two sections which were in effect the former unions which were to continue working under their old rules for the time being. The

task of bringing the two sections together was not an easy one and it was not until 2009 that a single rule book was agreed for all members of Unite. The current rule book is the one that was effective from the Rules Conference 2011, updated by the Executive Council ("EC") to December 2013.

12. Since the formation of Unite in 2007, it has embarked upon a long and difficult process of reorganising its internal structures. This has included the creation, merger or deletion of many branches. The situation at Heathrow was complicated by a long and bitter industrial dispute with BA between 2009 and 2011. During this period the whole focus of the airport membership was on the dispute, rather than any internal reorganisation. One of the reasons the dispute was hard to resolve was that the former TGWU and AMICUS parts of the Union were different bargaining units and had different reporting structures. BA had to seek agreement with seven or eight different lay individuals as well as full time officials. As part of the settlement in 2011, the Union gave assurances that it would streamline its branch and negotiating structure, which the members accepted in a vote in May 2011.
13. It is against this background that the former AMICUS branches and the former TGWU branch came together in or about August 2011. The BASSA members at Gatwick Airport were transferred to another branch which was in fact in another region of the Union. The history of antagonism between BASSA and Cabin Crew 89 was such that the negotiations to bring these branches together were difficult. The former TGWU branch was to have about 80% of the new combined membership but its representatives were sensitive to the concessions necessary for the success of the new combined organisation. Further, the settlement of the industrial dispute required a different structure which moved away from the different convenors and different methods of reporting of BASSA and Cabin Crew 89. BA had insisted upon a single point of ultimate responsibility, which led to the creation of the posts of Industrial and Deputy Industrial Directors. The basic division in the new structure was to be between Worldwide and Euro Fleet, not BASSA and Cabin Crew 89. The post of Chief of Staff and Equality Officer were created. Financial matters were transferred from the Branch Secretary to a Treasurer. Such structural changes went alongside and supplemented the work that was done on the 'soft changes' to bring about changes of attitude, remove hostility and encourage working together.
14. In order to implement this new structure, work began on a new branch constitution. Mr Stott, who was to draft the document, gave evidence that the negotiations to agree this constitution were as difficult as those to settle the major industrial dispute. The objective was to agree rules which would give effect to the settlement of the industrial dispute and were compatible with the Unite rules, as amended in 2011. To achieve this, it was considered necessary that the election of representatives and branch officials in 2012 should be conducted in accordance with the rules which reflected these changes. The new constitution was discussed by the Branch Committee on 5 March 2012, which agreed to seek views on it from their representatives by 14 March so that it could be in operation for the elections to be held in April. The constitution was not put to the members of the branch in a ballot. Mr Stott gave evidence that it was not necessary or feasible to do so. He commented that it was not a requirement of the main Unite rules, which merely provided that branch rules were to be compatible with the Union rules unless the EC permitted otherwise. The feed back on the constitution was put to a full branch meeting on

16 April. The constitution was agreed and published on the BASSA website that day. On 24 April the branch issued its invitations for nomination for election under the branch rules and the 2012 elections were carried out under those rules.

15. Rule 17.9 of the rules of Unite provides that "The EC shall issue standing orders to regulate the conduct of branch meetings and business ... Those standing orders may only be varied in respect of a branch with the prior approval of the EC." The EC published "Unite Model Branch Standing Orders" in March 2013. These are brief and intended to set minimum standards for the conduct of branch business.
16. On 7 October 2013 a branch meeting considered an email from a member, who complained that the present constitution had not been voted upon by the members. The branch chair, Ms Malone, informed the meeting that the constitution had been passed by the membership at a branch meeting and then ratified by the EC. The new constitution had not in fact been ratified by the EC. Ms Malone later wrote to the Union and Mr Fernandez accepted that the constitution was ratified by its Chief of Staff Mr Andrew Murray on 7 January 2014, under powers delegated to him by the EC.

### **The Balloting Protocol**

17. An issue arose as to the rules under which the election of BASSA representatives and branch officers takes place. There are no detailed provisions setting out such balloting rules in either the main rules of the Union or in the branch constitution. However, the BASSA website has a section dealing with constitutional matters. Within that section there is a 'document' entitled "Balloting Protocol for Representatives and BASSA Branch Elections". An issue for me to determine is whether the contents of this document are rules of the branch (and therefore rules of the Union within my jurisdiction) or merely a code of practice or non-binding guidance. The complete text of the Balloting Protocol is set out at paragraph 35 below.
18. The origins of the Balloting Protocol are in 1995 when the TGWU commissioned a report to be prepared by a committee led by Mr Roger Goodier, a solicitor in private practice, on the internal elections of BASSA. There existed at that time, and at the present, a concern that the elections of BASSA may be corrupted by the actions of BA which it was feared might fund or support certain candidates and provide them with expensively produced literature and the opportunity to distribute it through workplace channels. The so-called Goodier Report produced a number of recommendations which remain the basis of the present Balloting Protocol and which have been applied, in one form or another, in all branch elections since they were made. These elections were as follows:-
  - 18.1 The 2009 Elections. In the invitation for nomination for the branch elections in 2009, it is stated "May we also refer prospective candidates to the Goodier Report, which is accepted by the branch as the agreed procedure/code of practice by which BASSA elections will be conducted ... by submitting an election nomination you agree to be bound by these principles in full ... failure to comply with these rules ... will result in candidates being ineligible to stand for this election".

- 18.2 The 2012 Elections. Similar wording appeared in the invitation for nominations for the branch elections in 2012.
- 18.3 A By-Election in 2014. There was a by-election for the position of Branch Chair in 2014. In the invitation for nominations for that position there was a different formulation. It stated "*Should you wish to view a full copy of the Branch Election Rules, they will be available to prospective candidates directly from the regional official*". It concludes, "*The Balloting Protocol for representatives and BASSA branch elections can be found on the BASSA website under "Us"*". There are three other references in this document to the rules, branch rules or branch election rules under which the election is being run. These appear to be references to the Balloting Protocol. Elsewhere there are repeated the words "*Any member submitting an election nomination will be bound by these principles in full*". A candidate in this by-election, Ms Jane Freeman, sought clarification on whether the rules applicable to this election had been published. The Branch Secretary, Mr Adrian Smith, responded on 4 April 2014 that "*By publishing those guidelines on the BASSA website, we have published them*".
- 18.4 The 2015 Elections. The invitation for nominations in 2015 contained the following passages. First, "*May we also refer prospective candidates to the code of conduct "Goodier Report" which has governed for many years all elections by the branch and is the agreed procedure/code of practice by which Unite branch BASSA 1/2000 elections will be conducted.*" Secondly, it states "*Should you wish to view a full copy of the code of conduct it is permanently available to all members on the BASSA website under the "Us" section and is entitled 'Ballot Protocol for Representatives and BASSA Branch Elections'*". By submitting an election nomination you agree to be bound by these principles in full." Thirdly, it states "*Failure to comply with these rules from the opening of nominations to the closing of the ballot will result in candidates being ineligible to stand in this election*".

19. It was agreed that whilst the substance of what is now the Balloting Protocol has remained unchanged over the years, it has been amended to reflect changes in society; for example to include references to social media, Twitter, Flickr, Facebook and MySpace.

### **The Branch Elections in 2015**

20. The branch issued an invitation for nominations on 13 April 2015.
21. On 30 April 2015 Ms Freeman submitted a nomination for the position of Branch Chair.
22. Also on 30 April 2015 the branch posted an email to members on the news page of its website under the heading "Democracy Has Spoken". It is alleged that this email is critical of Ms Freeman and damaging to her electoral prospects. The branch sent a further email to members which it posted on its website on 5 May under the heading "Democracy still has not spoken" which is alleged to have been deliberately damaging to Ms Freeman's electoral prospects.



23. Mr Sean Beatty also stood for election as branch chair. As part of his 150 word election address he included the following words, *'In the spirit of transparency, should we both be re-elected I have asked Shaun Loveland from Eurofleet to be the new Vice-Chair of BASSA'*. These words are the subject of complaint 1(d) as an alleged breach of bullet point 9. This provides that, *'Proposer and Seconders are required by candidates but will not form part of any published address and may not be advertised'*.
24. On 22 May 2015 voting papers were despatched to members. The positions up for election were stated to be the Branch Chair and Branch Secretary, as well as 16 Worldwide representatives and 11 Euro Fleet representatives. The clear implication from this is that the other seven specific positions listed in the invitation for nominations were uncontested, so no election was required. This is in accordance with paragraph 6.5.5 of Appendix 1 to the rules of the Union. However, the email to members posted on the website gave no express explanation as to why ballot papers were not being distributed for these seven positions.
25. On 16 June 2015 Mr Fernandez made a formal complaint to his full time officer, Mr Matt Smith, about a number of matters. His first complaint related to the decision of the Branch Committee to ballot all members of the relevant workforce for certain positions, as opposed to electing them by means of an electoral college comprising the elected representative of those areas in accordance with rule 1.5 of the branch constitution. The balloting of the whole of the relevant membership is known as "the alternative method", and is also provided for in rule 1.5 of the branch constitution. Mr Fernandez complained that by choosing the alternative method, whilst at the same time keeping the requirement to have three years experience as a representative was unfair as it created a situation in which the pool of candidates is severely reduced and, if there is only one nomination, the membership end up having no participation in the election of their primary representatives. He also complained about a change that had been made to the Balloting Protocol and various alleged breaches of the Protocol itself.
26. On 19 June 2015 Electoral Reform Services ("ERS") reported on the election results. It is unusual for a branch to go to the expense of commissioning ERS to be the scrutineer of its elections. The fact that this branch did so is an indication of its financial strength and the potential controversy of its elections. For the position of Branch Chair Mr Beatty beat Miss Freeman and for the position of Branch Secretary Mr Adrian Smith beat Mr Duffy. Sixteen Worldwide representatives were declared as having been elected. It appears that these results were not announced immediately as complaints had been made about the electoral process. These resulted in the election of the Euro Fleet representatives being re-run.
27. On 29 June 2015 Mr Fernandez emailed Mr Adrian Smith stating, "Under BASSA branch Fundamental Principles 5 I would like to request access to the branch membership database." He had done this to check a discrepancy he had noticed between two sets of ballot results. On 6 May, the result of a consultative ballot conducted by email showed a combined Worldwide and Eurofleet electorate eligible to vote of 8,056 members. He compared this to the ERS figure of members entitled to vote in the election of Branch Chair and Branch Secretary of 8,691, as contained in the ERS report of 19 June.

28. On 14 July 2015 Mr Adrian Smith emailed Mr Fernandez to inform him that the members present at a branch meeting had declined his request for access to the branch membership database.
29. Mr Fernandez commenced this complaint to me by a registration of complaint form dated 14 July 2015.
30. On 24 July 2015 the final results of the 2015 branch elections were announced.
31. On 11 August 2015 Mr Fernandez emailed Mr Andrew Murray, the Union's Chief of Staff, requesting access to certain accounting records of the Union, namely the individual subscription records paid by BASSA members between 1 April and 1 August 2015.
32. On 11 September 2015 Mr Matt Smith wrote to Mr Fernandez rejecting the formal complaint that Mr Fernandez had made on 16 June.
33. On 21 October 2015 Mr Murray emailed Mr Fernandez to reject his request for access to the accounting records he had sought. Mr Murray stated, "If it is the membership records including details of subscriptions paid by individuals, I do not believe these are accounting records". He stated that he was not therefore required to produce nor indeed, under data protection laws, at liberty to provide them.

#### **The Relevant Statutory Provisions**

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

##### **30 Right of access to accounting records.**

- (3) *A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union. In the case of records relating to a branch or section of the union, it is immaterial whether he was a member of that branch or section.*
- (4) *Where such access is requested the union shall—*
  - (a) *make arrangements with the member for him to be allowed to inspect the records requested before the end of the period of twenty-eight days beginning with the day the request was made,*
  - (b) *allow him and any accountant accompanying him for the purpose to inspect the records at the time and place arranged, and*
  - (c) *secure that at the time of the inspection he is allowed to take, or is supplied with, any copies of, or of extracts from, records inspected by him which he requires.*

##### **31 Remedy for failure to comply with request for access**

- (2) *A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer.*

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

- (3) 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).
- (4) The matters are—
- (a) the appointment or election of a person to, or the removal of a person from, any office;
  - (b) disciplinary proceedings by the union (including expulsion);
  - (c) the balloting of members on any issue other than industrial action;
  - (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
  - (e) such other matters as may be specified in an order made by the Secretary of State.
- ...
- (9) The reference in subsection (1) to the rules of a union includes references to the rules of any branch or section of the union.

**The Relevant Rules of the Union**

35. The rules of the Union relevant to this application are as follows:-

**RULE 6  
LAY OFFICE**

...

6.2 In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council, or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers, with the exception of Area Activists Committees and Regional Political Committees as specified elsewhere in these rules.

6.3 The definition of the term "accountable representative of workers" shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (e.g. construction, contracting, leisure, rural etc) in formulating such a definition. It must nevertheless include Branch officeholders who are in employment, shop stewards, health & safety, equalities and learning representatives.

...

6.5 The electoral period to hold lay office shall be three years unless otherwise provided for under these rules.

**RULE 17  
BRANCHES**

...

17.7 Each Branch shall have for its management a Chair, a Treasurer, an Equality Officer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by show of hands, or by ballot, if so decided by the meeting. The election shall take place and be completed not later than June 30 in each third year, and the elected candidates shall take office the following July for three years. Casual vacancies may be filled at an ordinary Branch meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.

17.8 The Regional Committee shall be required to ensure that branches meet at regular intervals; at a minimum they shall convene an Annual General Meeting of all members. Where a branch fails to convene such a meeting the branch will be suspended and members of the branch shall be allocated to a branch which meets the requirements of rule subject to the right of the branch to appeal to the Executive Council. Branches, shall, with the assistance of the Region advise their members of the venue, time and date of branch meetings, this may be by post or by posting the

information on the union's website. It shall be the responsibility of the branch secretary to ensure that up to date information about branch meetings is held by the Union.

17.9 The Executive Council shall issue standing orders to regulate the conduct of Branch meetings and business and may amend the standing orders from time to time. Those standing orders may only be varied in respect of a Branch with the prior approval of the Executive Council. The quorum for a Branch meeting to make a decision on any matter shall be 5 members and all matters should be decided by a simple majority of those voting. If the votes are equal the proposition before the meeting shall fail.

## **RULE 18**

### **WORKPLACE REPRESENTATION**

18.1 At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every 3 years, 1 or more of the following representatives:

18.1.1 Shop stewards/workplace representatives

18.1.2 Safety representatives

18.1.3 Learning representatives

18.1.4 Equality representatives

18.1.5 Environment representatives

The election shall take place and be completed not later than June 30 in each third year, and the elected candidates shall take office the following July for three years.

18.3 The method of election shall be by such means as authorised by relevant guidance which shall be issued by the Executive Council from time to time.

### **Appendix 1 Rule 6 – Lay Office EC Guidance**

(The Rules are in bold. The guidance is not in bold)

#### **2) EC GUIDANCE - RULE 6: LAY OFFICE**

**6.2 In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers, with the exception of Area Activists Committees and Regional Political Committees as specified elsewhere in these Rules.**

6.2.1 Only members who are elected to represent workers will be eligible to participate in any body of the union, including any conferences, but with the exception of branch and workplace meetings (which all members can attend) and Area Activists Committees and Regional Political Committees as specified elsewhere in these Rules.

**6.3 The definition of the term 'accountable representative of workers' shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (i.e. construction, contracting, leisure, rural, etc) in formulating such definition. It must nevertheless include branch office holders who are in employment, shop stewards, health and safety, equalities and learning representatives.**

6.3.1 An accountable representative of workers must have been elected by the Unite members at a Unite branch or workplace. The workplace must contain a minimum of three members. The election must comply with the guidance under 6.5.

**6.5 The electoral period to hold lay office shall be three years unless otherwise provided for under these rules.**

6.5.4 Prior to any election, the members in the workplace should be informed of the pending election and invited to volunteer for election or nominate a colleague for election. The precise mechanics of informing the members on the workplace, and dealing with nominations and the election, may vary from

workplace to work place, but any such case will be a fair procedure. In the event of dispute the Regional Officer should be contacted and the Regional Secretary should be informed.

6.5.5 In the event of nominations having been invited from the relevant workplace, and only one candidate having been nominated, or volunteered, that candidate may be declared elected unopposed.

### **Appendix 3 Rule 18 – Workplace Representation EC Guidance**

**18.3 The method of election shall be by such means as authorised by relevant guidance which shall be issued by the Executive Council from time to time.**

18.3.1 See also EC Guidance on Rule 6 re Lay Office.

### **THE BALLOTING PROTOCOL FOR REPRESENTATIVES AND BASSA BRANCH ELECTIONS**

- (1) Postal balloting and conduct of elections through the ERBS (or similar organisation) to be continued. An electronic ballot through the ERBS may be utilised if agreed by the branch committee for a by-election.
- (2) All positions for which there are vacancies will be advertised clearly on the BASSA website and any other associated electronic media or publication or notice board. Equal, uniform and consistent prominence given to all vacancies.
- (3) All relevant Rules governing Rep/Branch elections to be publicised to all members no later than 2 weeks prior to the commencement of election process.
- (4) Branch Election Rules (consistent with any Unite Rules and Guidelines) be made available before the election process begins. Such rules to be approved by the Unite chief of staff.
- (5) Candidates' biographical details and elections address to be distributed by the ERBS with voting paper as well as published on the BASSA website.
- (6) Such biographical details and elections address are not to exceed 150 words. They are not to attack any other candidate, member or Officer to the Branch and Union, and are not to contain comments which are likely to cause offence and/or embarrassment to BASSA.
- (7) All electoral addresses to be reviewed by the Branch Secretary (or Chair) and Regional Officer. Only the first 150 words will be published if there is an over run and any offending sections in line with above point they will be edited out entirely.
- (8) Election addresses must be truthful and accurate.
- (9) Proposer and Seconders are required by candidates but will not form part of any published address and may not be advertised.
- (10) No literature other than the biographical details and election address distributed by the ERBS (or similar organisation) and published on the BASSA website is to be permitted. No other distribution or display of such biographical data is permitted.
- (11) No bulk emailing/texting/ mailing/picture messaging or phone calls or non unique use of social media is permitted.
- (12) No website/facebook/tweet or other social feeds are to be used in campaigning.
- (13) Unique exchanges by text, email, phone and internet forum are allowed.
- (14) Any breach in the rules will be subject to a review by the Branch Secretary (or Chair), Regional Officer and an independent party appointed through the Unite legal director.
- (15) Failure to comply with the Branch Election rules from the opening of nominations to the closure of the ballot will result in candidates being ineligible to stand for this election.
- (16) Any decision reached may be subject to appeal or otherwise. Any appeal is to be notified to the National Officer.

### **Preliminary Hearing**

36. The first issue for me to determine at this preliminary hearing was put to the parties in the following terms:

**To identify which BASSA Branch Constitution was valid and binding at the time of the alleged breaches in 2015. The BASSA Branch LE/2000 Branch Constitution (“the 2012 Constitution”), which was adopted in 2012, or the Transport and General Workers’ Union Branch 1/2000 Branch Constitution (“the pre-2012 Constitution”) which was in force before the 2012 Constitution.**

37. Mr Fernandez submitted that the relevant branch constitution at the time of the alleged breaches in 2015 was the one entitled “Transport & General Workers Union Branch 1/2000 Branch Constitution”. He argued that a new branch was not created in 2011 with the merger of the former TGWU and the former AMICUS branches but rather the AMICUS members were transferred into the existing former TGWU branch. Accordingly, he maintained that the provisions of the former TGWU branch constitution had to be complied with in order to effect the amendments required by the main rules of the Union, as amended in 2011, and the settlement of the industrial action. Mr Fernandez referred in particular to the rules which required any amendment to be by a two thirds majority at a biennial general meeting and subject to the approval of the branch in a postal ballot and the approval of the Regional Committee. He argued that as this procedure had not been followed, the branch rules that came into existence in 2012 were null and void.

38. Mr Potter, for the Union, submitted that a new branch had come into existence in 2011, which was comprised of the members of the former TGWU branch and the former AMICUS branches. He noted that, after the formation of Unite in 2007, there remained two distinct sections of the merged union which were allowed to continue operating under their former rules, pending the assimilation of those sections under a single rule book. He further observed that whilst Unite achieved a single composite rule book in 2009, the branches at Heathrow and Gatwick Airports were locked in a bitter industrial dispute between 2009 and 2011 and only addressed this matter in 2011. He argued that the solution that was adopted was the creation of a new branch which brought together the former TGWU and AMICUS branches but which excluded the members at Gatwick and introduced a new internal structure to satisfy the requirements of the settlement of the industrial dispute. Accordingly, he submitted that there was no requirement to satisfy the rules regarding amendment, contained in the rules of the former TGWU branch, as those rules fell away on the formation of the new branch. He also noted that it was common ground that the new rules had been ratified by the EC under delegated powers.

### **Conclusion – Preliminary Point 1**

39. It is the claimant’s submission that the correct analysis of relevant events is that in or about 2011 there was a transfer of members from Cabin Crew 89 to the former TGWU branch and that the combined membership continued to operate under the rules of the former TGWU branch. This is a straightforward view of what occurred and has some support in the documentation. However, I find that the situation that existed after the conclusion of the industrial dispute in 2011 was much more complex. The absorption of the former Cabin Crew 89 members into the old TGWU branch is not compatible with what I have been told about the continuing antipathy between

some members. Indeed, Mr Stott, who was a good witness, gave evidence that it was like beginning again at year zero and likened the old and new situation to being as dramatic as the difference between the years BC and AD. On the evidence before me, I find as a matter of fact and practical reality, that what the parties intended and what occurred was the merger of the former TGWU and AMICUS branches to form a new combined branch in which the interests of both sides were to be respected. It was to be a new start, which would not have occurred if the former AMICUS members were to have been merely absorbed into the more numerous and powerful BASSA branch.

40. Accordingly, in my judgement, the constitution of branch LE/2000 negotiated in 2011 and 2012 and published on 16 April 2012 is the constitution of a newly created branch which belatedly followed the amalgamation of the TGWU and AMICUS. This branch replaced the former TGWU and AMICUS branches. I find that it was under the rules of this constitution that the 2015 branch elections should have been conducted, as indeed they were.

41. The second issue for me to determine at this preliminary hearing was put to the parties in the following terms:

**Whether the Balloting Protocol for representatives and BASSA branch elections (“the Balloting Protocol”), which appears on the BASSA website, contained rules of the Union.**

42. Mr Fernandez submitted that by section 108A(8) of the 1992 Act, the rules of a Union for the purposes of section 108A include references to the rules of a branch of the union. He accepted that the recommendations made in the Goodier Report were imprecise and not extensive but contrasted these with the Balloting Protocol which he described as being concise and containing a more comprehensive set of direct prohibitions and obligations. He further observed that non-compliance with the Balloting Protocol carried with it the sanction of disqualification from that election and so the Balloting Protocol would be understood by members as being rules of the branch. He noted that the Union itself had referred to the Balloting Protocol as rules and/or branch rules for the election and that bullet points 3, 14 and 15 of the Balloting Protocol also refer to those provisions as being rules. Mr Fernandez stated that he was unaware how the Balloting Protocol had come into existence but that it had never been put to the branch members in a ballot. He observed that the balloting protocol had first appeared on the branch website for the by-election for Branch Chair in 2014. He further observed that in 2012 Mr Matthew Kilkenny had been disqualified from an election for an alleged breach of the Goodier principles but shortly afterwards reinstated as a candidate in that election. He asserted that others had done or refused to do things on the basis that they may be disqualified from a particular election for having breached the Balloting Protocol. He argued that the Goodier principles had evolved from being guidance at the beginning into being rules by the time of the 2015 branch elections. Mr Fernandez submitted that it was unfair for the Union to tell members that the Balloting Protocol contained rules that they must comply with and then argue in these proceedings that they are not rules.

43. Mr Potter, for the Union, submitted that the Union rules governing branch elections are rules 17.7 and 17.8 and that paragraph 6.5.4 of Appendix 1 of the Union rules gives relevant guidance, whilst not in itself a rule for the purposes of section 108A of the 1992 Act. He argued that the Balloting Protocol is mere guidance or a code of good practice, not rules of the Union. He observed that its purpose is to avoid unfairness in branch elections and to comply with the rules of the Union. He noted that it is regularly revised and so the regular application of the Goodier principles and/or the Balloting Protocol has not given rise to a rule of the Union by custom and practice. He argued that its terms had not become sufficiently certain or notorious, even if reasonable. Mr Potter referred to the case of **Hicks v. UNITE the Union (No 2) D/32-39/14-15** and **Rawlins v. BMA (D/1-5/07)** as examples of cases in which I had considered the validity of alleged rules in similar circumstances. He agreed with the approach I had adopted in those cases which was to examine each alleged rule on a case by case basis and look at its particular circumstances. On the facts of this case, he pointed to the fact that the Balloting Protocol is not part of the rule book, that it had not been approved by the EC, that its focus is on fairness, that it includes some broad guidelines as well as precise terms, that it is not strictly enforced and that there is no rule enabling the branch to make such ballot rules.

#### **Conclusions – Preliminary Point 2**

44. The rules of trade unions are ordinarily and principally to be found in the rules that have been approved by the members of that union in general meeting. However, those rules may not be the only rules with which union members and the union itself must comply. The rules of a union form a contract of membership between the members inter se and with the union itself. The terms of that contract may be created in a number of other ways, such as by custom and practice, by necessary implication or by express or implied incorporation. The circumstances of each case require individual consideration and, being cases which involve trade unions, the relevant history and context usually repay attention.
45. There are factors which point towards the Balloting Protocol being rules of the Union and which point towards them not being rules of the Union. I have considered these both individually and as a whole. The factors that point against the Balloting Protocol being a rule of the Union include the name itself. It is a protocol, not a rule. It arose from a set of recommendations in a report which was clearly not a set of rules. It has never been approved by the EC nor is there a minute of the Branch Committee approving it as a rule, let alone the approval of the members of the branch in a ballot. There is no rule of the Union which enables the branch to devise such a balloting protocol. There is no evidence as to how exactly the current Balloting Protocol came about. There are references in the documentation to the Balloting Protocol as a code of conduct and/or set of principles. No person has been permanently disqualified from an election for having breached it.
46. On the other hand, there are factors that point towards the Balloting Protocol being a rule of the Union. These include the fact that its content has existed in one form or another since about 1995 with the knowledge and ostensible support of, first, the TGWU branch and, since 2012, the Unite branch. Further, it now appears on the branch website in the section dealing with constitutional matters. It also regulates an important part of the democratic structure of the Union. The balloting process is important in any democratic organisation but it is an issue of particular sensitivity in



BASSA. I was told at the hearing that this branch has not only a history of factionalism and dissent but also a concern that BA may interfere in an internal election to support a favoured candidate. In such circumstances, it can reasonably be anticipated that the branch would wish to regulate and safeguard its electoral procedures more rigorously than might other branches to ensure fairness and a level playing field. The individual provisions of the Balloting Protocol have been refined over the years to become more certain and capable of precise application. Any provision that lacks such certainty may only have effect as guidance. It is a trite proposition that the status of a document or a relationship is not determined by its title but by its content or nature. The title is merely a relevant consideration. The approach taken to the interpretation of the Union rules in **Jacques v. AUEW (1986) ICR 683** is that regard must be had to the meaning of the disputed rule which was intended by its author, its purpose and the readership to which it is addressed. Applying that approach to this different situation, I observe the particular importance of balloting to this branch and the consequence of non compliance with the Balloting Protocol. Bullet point 15 provides, "Failure to comply with the Branch Election rules from the opening of nominations to the closure of the ballot will result in candidates being ineligible to stand for this election". Bullet point 16 provides, "Any decision reached may be subject to appeal or otherwise. Any appeal is to be notified to the National Officer". The Balloting Protocol therefore goes beyond mere guidance or a code of practice to provide not only for a sanction, but for an appeal procedure. I find that this, taken together with the mandatory use of language throughout the Balloting Protocol would give rise to an understanding by a reasonable member that the terms of the Protocol are mandatory, have consequences and, as such, are rules of the Union. That view is reinforced by the description of the Protocol (on some but not all occasions) as being rules. This together with the equivocal answers given by the branch when questioned on this subject suggest a wish to be able to argue both ways; that the Protocol was mere guidance when it suited and that it contains enforceable rules when it suited.

47. I have not found the determination of the legal status of the Balloting Protocol an easy matter. I was not assisted by the failure of Mr Murray, the Union's Chief of Staff, to attend at the hearing to give evidence in accordance with his witness statement. Mr Murray is a person with considerable knowledge of the rules and constitution of the Union and its constituent parts. However, having regard to the subject matter of the Protocol, the mandatory way in which it is expressed, the inclusion of a significant sanction and appeal process, the ability of the branch to create branch rules which do not conflict with the main rules of Unite, together with the history of the way in which the Balloting Protocol has evolved and its context, I find that the Balloting Protocol is a rule of the Union.
48. Section 108A(8) of the 1992 Act provides that the rules of a union over which I have jurisdiction include reference to the rules of any branch. Accordingly I find that the complaints which allege a breach of the Balloting Protocol of the branch may proceed to a full hearing as breaches of rules of the Union.

## **CASE MANAGEMENT DISCUSSION**

49. Having heard submissions on the two preliminary issues, I invited clarification of each of the complaints made by the claimants with a view to identifying the relevant issues which would require adjudication at a full hearing and to possibly striking out any complaints or parts of complaints under section 256A(1) of the 1992 Act that were misconceived or had no reasonable prospects of success. The claimants had been informed in correspondence before the hearing that I would be considering their complaints in this way. I consider each complaint individually.

### **Complaint One**

50. The first complaint is of a breach of the Balloting Protocol that I have found to be a rule of the Union. It is in effect a complaint of six breaches of that Protocol.

50.1 Complaint 1(a) is a complaint of a breach of bullet point 2 of the Balloting Protocol in that it is alleged that the positions that were vacant were not clearly publicised on the BASSA website. I find that the posting on the BASSA website on 13 April 2015 headed "Elections for representatives 2015" does clearly publicise the vacancies by way of a request for nominations for them. Accordingly, I strike out this complaint on the grounds that it has no reasonable prospects of success.

50.2 Complaint 1(b) is a complaint of a breach of bullet point 3 of the Balloting Protocol in that the relevant rules dealing with branch elections were not publicised to all members. I find that both the branch constitution and Balloting Protocol were posted on the branch website and that these contained the rules dealing with the branch elections. Accordingly I strike out this complaint on the ground that it has no reasonable prospect of success.

50.3 Complaint 1(c) is a complaint of a breach of bullet point 5 of the Balloting Protocol. The issue to be adjudicated is whether the election addresses of candidates were published on the branch website. This complaint may proceed to a full hearing.

50.4 Complaint 1(d) is a complaint of a breach of bullet point 9 of the Balloting Protocol in that one candidate in the branch election allegedly proposed or seconded another candidate in his election address. I find that the election address in question does not propose or second the proposal of any other candidate. In my judgement the meaning of this bullet point is related strictly to the electoral procedure of proposing or seconding a person and is not engaged by a favourable reference to that person or to a position that the person may subsequently be offered. Accordingly I strike out this complaint on the grounds that it is misconceived and/or has no reasonable prospect of success.

50.5 Complaint 1(e) is a complaint of a breach of bullet point 10 of the Balloting Protocol and it may proceed to a full hearing. The issues to be adjudicated are whether there was a bulk emailing as alleged and whether information concerning the work of a candidate in raising issues faced by workers in Colombia amounted to a breach of the provision that "no literature ... is to be permitted".

50.6 Complaint 1(f) is a complaint of a breach of bullet point 11 of the Balloting Protocol and it may proceed to a full hearing. The issue to be adjudicated is whether a relevant bulk emailing took place in breach of the provision that "No bulk emailing ... is permitted". One of the alleged bulk emails was sent on 30 April 2015, the same day that Ms Freeman submitted her nomination to run for Branch Chair. It may be relevant to determine if that alleged bulk email was sent before Ms Freeman became a candidate in the election.

### **Complaint Two**

51. The second complaint concerns an alleged breach of paragraph 6.5.4 of Appendix 1 of the rules of Unite, in that the 2015 branch election was allegedly carried out unfairly or followed an "unfair procedure". The claimants specify four ways in which the election was carried out unfairly. Sub-paragraph (b) of this complaint is that the branch constitution under which the election was conducted was not valid. I have already determined that the branch constitution was valid and so this ground of complaint cannot be sustained in any event and is struck out.
52. In considering this complaint a preliminary issue arises as to whether paragraph 6.5.4 of Appendix 1 of the Unite rules is indeed a rule of the Union. Appendix 1 reproduces the relevant rules and then provides guidance from the EC on the meaning and application of those rules. Guidance does not become a rule simply by being contained in the rule book. However, it is arguable that paragraph 6.5.4 is a rule of the Union by virtue of rule 18.3 which provides that the election of work place representatives shall be by such means as authorised by relevant guidance issued by the EC. Paragraph 18.3.1 of Appendix 3 provides such guidance in the words, "See also EC guidance on rule 6 re lay office".
53. Should paragraph 6.5.4 of Appendix 1 be a rule of the Union, a second preliminary issue arises as to what enforceable obligation it imposes on the Union. The first sentence clearly imposes an obligation to inform members of a pending election and requires there to be an invitation for nomination. The second sentence, however, imposes no prescriptive procedure. It enables branches to have different election procedures but requires in "any such case will be a fair procedure". The requirement of having a fair procedure is so vague that there is an issue as to whether it imposes an enforceable obligation as opposed to being mere encouragement or words of aspiration. I was informed that paragraph 6.5.4 has since been removed from the Appendix.
54. In any event, paragraph 6.5.4 of Appendix 1 looks to the procedure that has been adopted by a branch in elections for lay office. In BASSA, the procedure is provided for in the branch constitution and Balloting Protocol. Paragraph 6.5.4, if applicable, enables the branch's procedure to be challenged on the basis that its unfairness is in breach of the rules of the Union. The grounds of unfairness advanced by the claimants at sub-paragraphs (a) and (c) relate to the way in which the Branch Committee applied the procedure, not the alleged unfairness of the procedure. Accordingly, these are not complaints that are comprehended by the rule allegedly breached and I strike them out as having no reasonable prospect of success.

55. Sub-paragraph (d) of complaint two is expressed obliquely. Mr Fernandez explained at the hearing that the claimants had two concerns. First, whether the Branch Committee informed the membership that the elections for the position of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff were to be conducted by a ballot of all relevant members or by an electoral college. I find that this argument has no reasonable prospect of success as the invitation for nomination, properly read, makes it clear that the election shall be by the relevant crew, namely by the relevant membership, not by an electoral college. The claimants' second concern is whether the experience requirement or qualifications to become a candidate for the relevant positions made it virtually impossible for any member to stand for those positions. This complaint is reasonably arguable but should be plainly expressed so that the Union may know the case it has to meet. The complaint that I allow to go forward as complaint two is as follows:

"During the 2015 BASSA branch elections, the Union breached paragraph 6.5.4 of Appendix 1 of its rules when the branch followed an unfair procedure by applying the experience of qualification requirements of rule 1.5 of the branch rules to the elections for the position of Agreements Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff"

56. An issue that arises in the consideration of this complaint is whether the guidance issued pursuant to rule 18.3 has any relevance to the election of branch officers. Rule 18.1 is expressed to be a rule dealing with the election of workplace representatives, not branch officers.

### **Complaint Three**

57. The third complaint concerns an alleged breach of rule 18.1. The reference to Appendix 3 in the complaint is otiose. I observe that the substance of the complaint is the same as complaint 2(d), which is to proceed. This complaint alleges a breach of a different rule on the same facts. However, on its face, rule 18.1 is not engaged by the complaint that the claimants seek to bring. The branch is conducting a relevant election in the relevant timescale. Accordingly I strike out this complaint on the grounds that it has no reasonable prospect of success.

### **Complaint Four**

58. The fourth complaint concerns an alleged breach of rule 6.2 and paragraphs 6.2.1 and 6.3.1 of Appendix 1 to the rules. It alleges that the persons who were elected to the positions of Agreement Secretaries, Industrial Director, Deputy Industrial Director and Chief of Staff were not "accountable representatives of workers" within the meaning of rule 6.2. In discussion with Mr Fernandez, however, it became clear that this complaint was premised upon those elected not being 'accountable representatives of workers' at the time they assumed office after the 2015 elections. This is a misunderstanding of rule 6.2. The opening words of that rule are "In order to be eligible as a candidate for election ...". The crucial time is therefore the time a person seeks to be and becomes a candidate. The persons who were elected were previous branch office holders and rule 6.3 provides that the definition of who is an 'accountable representative of workers' must include "branch office holders who are in employment ...". This provision applies to the contested provisions. Accordingly this complaint is misconceived. It is based on a misunderstanding and I strike it out as having no reasonable prospect of success.

### **Complaint Five**

59. The fifth complaint concerns an alleged breach of rule 18.3 of the rules of the Union in respect of an alleged breach of the relevant guidelines as complained about in complaints 2 to 4. However, rule 18.3 is an enabling provision. It provides that the method of election of work place representatives shall be by such means as authorised by relevant EC guidance. As an enabling provision, it does not, in my judgment, impose an obligation on the Union which is capable of being breached. Should there be any breach connected with rule 18.3 it would be of any guidance made pursuant to it, which guidance is found to have taken effect as a rule of the Union. Accordingly, this complaint of a breach of rule 18.3 is misconceived and I strike it out.

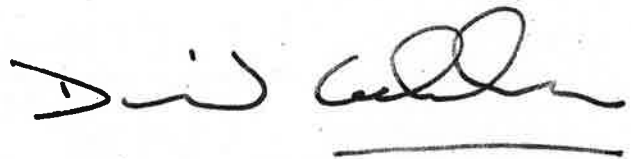
60. In any event, as I have already struck out the first three sub-paragraphs of complaint 2 as well as complaints 3 and 4, the only part of complaint 5 which could have proceeded relates to the guidance that appears in paragraph 6.5.4 of Appendix 1. However, I have allowed that part of complaint 2 to go forward that alleges a breach of the guidance in paragraph 6.5.4 of Appendix 1. The thrust of this complaint is therefore comprehended within that part of complaint 2 that will proceed to a hearing and which will be litigated.

### **Complaint Six**

61. The sixth complaint concerns an alleged breach of Fundamental Principle 5 of the branch constitution. This principle requires the branch to make the branch membership database available to a member upon request to a member of the Branch Committee. My jurisdiction as regards breaches of the rules of a trade union is limited. It extends only so far as section 108A(2) as the 1992 Act permits. I find that Fundamental Principle 5 of the branch rules does not relate to any of the matters set out in section 108A(2) nor does it clearly or directly related to them. Accordingly an alleged breach of Fundamental Principle 5 is outside my jurisdiction and I strike out this complaint as being misconceived and/or having no reasonable prospect of success.

### **Complaint Seven**

62. The seventh complaint concerns a breach of section 30 of the 1992 Act. I allow this complaint to go forward to a full hearing. The issue to be determined in this complaint is whether the records sought by the claimants are accounting records within the meaning of section 30 or whether they are membership records not within the meaning of accounting records in section 30. Should the records sought be accounting records, a further issue to consider is whether an order should be made for access to them having regard to Article 8 of the European Convention on Human Rights and the Human Rights Act 1998.



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

