CERTIFICATE OF INDEPENDENCE

GOVERNMENT COMMUNICATIONS STAFF FEDERATION

DECISION OF CERTIFICATION OFFICER

Introduction and decision

1. An application for a certificate of independence for the Government Communications Staff Federation was received in my office on 19th January 1996. No formal objections were made to it by any party. I have been making enquiries as provided for in section 6(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended). I shall refer to this as the 1992 Act.

2. I, and officials acting under my directions, have met and corresponded with the chairman and representatives of the Federation and with the employers at the Government Communications Headquarters (GCHQ). In addition 1 have sought, and received. clarification on certain points from the Foreign Secretary. Everyone has been most helpful. I am aware that all parties wish the Federation to be independent as well as to be recognised as such by me. However I have concluded that the Government Communications Staff Federation is not an independent trade union within the definition set out in section 5 of the 1992 ACT. This note gives the reasons for my decision.

3. I have not come to this decision lightly. I have carefully considered the application against the normal criteria outlined in paragraphs 14 to 24 of the publication " Guidance for Trade Unions Wishing to Apply for a Certificate of Independence". They include History, Membership Base, Organisation and Structure, Finance, Employer-provided Facilities and

Negotiating Record. These criteria have been operated consistently throughout the life of the Certification Office and were implicitly approved by the Employment Appeal Tribunal in the case or Blue Circle Staff Association v Certification Officer [1977] ICR 224. In addition, in this case I have had to take account of conditions of employment of staff of GCHQ and of certificates made under statute. Both of these impact on the Federation's activities.

4. The Federation was established, when trade unions were excluded from GCHQ, as the "Departmental Staff Association approved by the Director of GCHQ". Time and changes in the conditions of employment have altered that position. The Federation is now a well organised and administered trade union with a track record, within the climate in which it must operate, of determined negotiations. Its finances appear healthy and it has a membership of around 45% of staff employed by GCHQ. However these factors and record are not of themselves sufficient for GCSF to satisfy the statutory definition of an independent trade union.

The Legal Position and Previous Decisions on the Federations Independence

5. Under section 5 of the 1992 Act an independent trade union is one which:

> *" (a) is not under the domination or control of an employer or group of employers or of one or more employers' associations, and*
>
> *(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control."*

If it is established that a union is " liable to interference tending towards control" the union is not independent and the issue of "domination or control" does not have to be addressed.

6. Neither my predecessor, nor the Employment Appeal Tribunal in considering the Federation's previous application ruled on the "domination or control" test. They found that at that time the union was " liable to interference". The events leading up to the establishment of the Federation, the role of the Director until 1995 and the continued use of employees' conditions of service to determine the type of union to which they may belong, could amount to an argument that the Federation was under the "domination or control" of management. That though is not the test on which I rely in reaching my decision. I rely on the fact that I find the union to be " liable to interference tending towards control."

7. The Court of Appeal has ruled in Squibb UK Staff Association v Certification Officer [1979] ICR 235 that " liable to interference" should be interpreted as " vulnerable to interference" rather than as " likely" to experience interference. In that case the then Master of the Rolls expanded on the test as follows:-

> *"One has to envisage the possibility that there may be a difference of opinion in the future between the employers and the staff association. It may be on the amount of pay; it may be on the question of a pension; it may be on the safeguards; and the like. Whatever it may be, there may be a difference of opinion. It may be a mere possibility. But when it arises the questions have to be asked. What is the strength of the employers'? What facilities could they withdraw?"*

8. The Master of the Rolls then went on to consider the relative balance between the facilities that the employer could withdraw and the ability of the union to respond. He agreed with the Certification Officer in that, on the facts of that case, the balance was such that the union was vulnerable to interference and not therefore entitled to a certificate of independence. It is precisely that approach which I have adopted in considering the present application. It is also the approach adopted by my predecessor in his letter of 15 December 1989 and by the Employment Appeal Tribunal in refusing the Federation a certificate when it last applied (Government Communications Staff Federation v Certification Officer [1993] IRLR 260).

9. The EAT in upholding my predecessor's decision mentioned three reasons.

a) It was a condition of service of everyone employed at GCHQ that they were permitted to be members only of a Departmental Staff Association approved for the time being by the Director of GCHQ. In effect that meant of GCSF, which could only exist if the Director approved.

b) It was also a condition of service that disciplinary action would be taken against anyone involved in industrial action.

c) Certificates had been issued by the Secretary of State withdrawing statutory employment rights including access to Industrial Tribunals from staff employed at GCHQ.

10. These factors of themselves gave the employer a powerful weapon to use in the circumstances of disagreement described by the Master of the Rolls and also seriously weakened the Federation's ability to respond in such circumstances.

11. My predecessor also noted that the Federation "functioned with management support - financial and otherwise - of a kind which inevitably gave rise to some questions about its independence". He did not reach a final view on these questions. He regarded the requirement for the Federation to be approved by the Director as. by itself fatal to the claim for independence.

Changes Since the EAT Decision and their Significance

12. There have been many changes in the position since 1992. In particular, in December 1995 the Foreign Secretary announced the removal of the requirement for an in-house trade union within GCHQ to have the approval of the Director. Then in July 1996 he announced the lifting of the general ban which prevented staff in the security and intelligence services, including those at GCHQ, having access to Industrial Tribunals. Decisions on whether access will be allowed are now taken on an individual basis.

13. The first of these changes removes the Director's explicit veto on the Federation. This veto was regarded by my predecessor and by the EAT as fatal to the Federation's case for independence. If the Director withdrew his approval no one at GCHQ could remain a member of the Federation. The ending of the veto means that the Director can now withdraw only recognition. He no longer has the explicit power to withdraw approval. If recognition was withdrawn GCHQ staff could remain in membership of an unrecognised

union. The Federation's membership base would be affected no differently from that of any other union faced with derecognition.

14. However the new condition of service replacing the veto imposes explicit constraints on the Federation. The condition reads:

> *"Members of staff at GCHQ may only belong to or engage in the activities of a trade union or staff association whose officers and elected or appointed representatives are employees of GCHQ and answerable only to their fellow employees of GCHQ".*

This condition means that if the Federation elected as an officer someone who was not a GCHQ employee, GCHQ staff would not be allowed to remain members. Similarly if the Federation merged (transferred engagements or amalgamated) or even affiliated with another organisation or took into voting membership anyone who was not a GCHQ employee they would become answerable to other than fellow employees. In these circumstances again GCHQ staff would not be allowed to remain members of the Federation. Thus while the removal of the veto may seem to put the Federation in the same position as any other union where the employer will only recognise one union, that is not the case. If the Federation broke these conditions it would not just cease to be recognised it would lose its entire membership base among GCHQ employees.

15. The Federation have contended first that this does not stop them from recruiting non-GCHQ employees, secondly that they could affiliate with other organisations and thirdly that many single employer unions have certificates of independence. On the first point the employer's evidence to me was that non-GCHQ employees, even those transferred from GCHQ to employment on privatised work. could not be voting members of the

Federation. That view is consistent with my interpretation of the conditions of service. On the second the EAT noted that "Affiliation as we understand that phrase is an agreement by one organisation to be bound by the constitution of that other organisation." On that basis affiliation would clearly make the Federation answerable to other than GCHQ employees and hence not an organisation to which such employees could belong. In any event the Federation's ability to enter into a relationship with any other union or unions is significantly curtailed. On the third point it is true that single employer organisations can and do obtain certificates of independence. It is also true though that such organisations can and do affiliate or merge with others eg, British Cement Staff Association merged with EETPU in 1992.

16. These conditions certainly limit the Federation's control over key aspects of its organisation and structure. While this may be more relevant to the question of control. which I am not considering, it is also relevant to the question of influence tending toward control. The Federation is not in a position to widen its power base to enable it to better withstand attack by a hostile employer

17. The relevance of the change in access to Industrial Tribunals is also more limited than it may seen at first sight. The day before he made the announcement about opening up access to Industrial Tribunals the Foreign Secretary signed a certificate under section 275 of the 1992 Act which has the effect of disapplying the provisions of that Act to, among others, employees in GCHQ. Employees in GCHQ may now have access to tribunals on general employment rights issues which are not covered by the 1992 Act. But they have

no such access in respect of the trade union and related rights which are covered by that Act.

18. Other things have not changed. Management continues to provide the financial and other support to which my predecessor drew attention. Industrial action is still prohibited by the employers. In addition inducement to take such action is now also banned.

19. It is against that background that I have to consider the relative strengths of Ac Federation and the employer at GCHQ in the event of a difference of opinion of the kind envisaged by the Master of the Rolls in Squibb.

The relevance of history

20. The first question I have considered is one which must always be at the back of the Federation's mind. In the event of a severe dispute between the Federation and management which threatened operations at GCHQ would not the employer take similar action against the Federation as it took against other unions in 1984'? The EAT in 1992 took the view that it would. The Director of GCHQ in 1991 took a similar line when he said "it would be possible for HMG. for whatever reason, to change the conditions of service of GCHQ staff in such a way as to prohibit them from joining or continuing to belong to the GCSF".

21 There is no doubt that GCSF is vulnerable in this way and given past history this is not a fanciful risk. It has been be argued that all public service unions are in a similar position and yet they have certificates of independence. I note though that no other public service

union is forced by conditions of service of its members to confine its membership to one organisation; no other public service union is so totally vulnerable to attack on grounds of national security. However I have not regarded this potential threat as a determining factor in my decision. To do so would imply that no union confined to GCHQ could ever obtain a certificate of independence and I do not believe that to be the case.

22. My major concerns stem from the fact that GCSF representatives and elected officers have to be employees of GCHQ, from the extent of employer provided facilities and from restrictions on me ability of the Federation to pursue claims or withstand attack.

Federation Officers have to be Employees of Management

23. In the Blue Circle case (see above) the EAT. noting that one of the staff association's officers was an employee of the company, commented:

> *"a secretary who is not an employee is by virtue of his personal independence less liable to be subject to pressures of company policy and negotiation."*

They added "though of course the personality of the secretary may matter more than his employment situation". I believe this latter observation to be inconsistent with the Squibb view (which post-dated it) on the meaning of "liable". Personality is more relevant to "likelihood"; the employment situation relates to "vulnerability".

24 The employment situation of officers of the Federation is such that in the event of a disagreement with management they could be moved and not necessarily replaced. The Federation said mat could not happen because it was not GCHQ policy to move people

against their will and that it would be unlawful to seek to move employees arbitrarily with a view to putting pressure on the Federation. Management did not confirm the policy on movement but said that a recent revision to the conditions of service reflected a long standing policy that GCSF's elected officers were on special leave with pay and therefore not available for moving.

25. I do not believe that all this means that if the chips were down a hostile management would be legally barred from moving the Federation's officers to other work. The withdrawal of special leave with pay. could be defended on the grounds that it is a privilege and not a right.

26. In any case given that the officers are employees of management they are dependent on that management for their pay and promotion while in office and for their subsequent career posting and development after they cease to hold office.

27. It is considerations such as these that lead me to the view that the condition imposed by management that all officers of Federation have to be employees of GCHQ is one factor making them vulnerable to interference.

Employer-Provided Facilities

28. The extent of employer-provided facilities is something that always has to be considered in independence cases. Guidance issued by the Certification Officer in 1992 said:

> *"These may take the form of premises, time off and office or other services provided by the employer. In the case of single company unions the normal practice is to cost these items in order to get a rough idea of*

the extent of the union's reliance on them in financial terms. But it is not just a question of finance. It is also necessary to look at the administrative convenience of having facilities provided by the employer, even if they are paid for, and how easy or difficult the union would find it to cope on its own if they were withdrawn. The greater the unions's reliance on such facilities the more vulnerable it must be to employer interference.

The provision of facilities is, of course, common practice among a number of employers, but in the context of independence its significance may vary according to circumstances. A distinction can properly be drawn between a broadly-based union which could continue to function even if an employer withdrew facilities from one or more of its branches and a single company union which might well find it difficult or even impossible to carry on at all if such action were taken by the firm which employs its entire membership."

Again I note that in the Blue Circle case the EAT said:

"The physical situation of the office on company premises doubtless affords practical advantages which are real, but an office elsewhere is likely to fortify a sense of independence."

It is these principles that I have applied in considering the federation's vulnerability on account of employer-provided facilities. I also have to bear in mind that GCSF is effectively a single company union.

29. The Federation receives support totalling ú76,000 for the salaries of its officers and staff. It also has its offices on management property.

30. The Federation has argued that if it was denied access to GCHQ premises it would relocate its portable offices outside GCHQ. Fully serviced accommodation could be rented for £5,200 a year. Clerical staff requirement could be provided for less than £20,000 and officers could work in their own time. The Federation has assets of around

£100,000 and an annual income of the same order. Subscriptions have been increased (64% since 1991) and could be increased again. On this basis the Federation argues it could function well if all employer-provided facilities were withdrawn.

31 The extent of employer-provided facilities in this case is considerably greater than in other cases (Blue Circle and Squibb) where a certificate was refused. I do though. recognise that the present financial position of the Federation is quite robust. I do not doubt that in practical terms the Federation could establish a presence "outside the wire". However, on its own figures, to run the Federation at the present level of service in the long run would require an increase in subscription income of over 80%. Costs could undoubtedly be cut but services would suffer. At present the two officers work full-time on Federation activities with the support of experienced administrative staff. The difficulties mat would be involved in running the Federation in addition to puttinginan effective performance in a full time job are obvious. Nor am I convinced that the Federation have considered the practical and security aspect of moving it's offices and records off GCHQ premises.

32. In short I find that the extent of employer-provided facilities contributes to the Federation's vulnerability to interference. In passing I might add that in other cases of which I am aware this effect is mitigated by the union reimbursing the employer for the full cost of such facilities.

Access to Industrial Tribunal

33 If action of the kind described above (paras 24-26) was taken against Federation officers or members they would be in a less favourable position than members or officers of independent unions in seeking legal redress through Industrial Tribunals.

34 The position on access to Tribunals has altered significantly since the EAT decision in 1992. My understanding of the effect of the changes announced by the Foreign Secretary in July 1995, and of clarifications he has given me, is that GCHQ employees claiming unfair dismissal in cases where the reason is trade union membership or activities would. providing certain safeguards were met, have access to an Industrial Tribunal. Procedural safeguards would be invoked, as necessary, to protect sensitive information.

35 That however is not the whole picture. The certificate issued on 22 July 1996 means that the provisions of the 1992 Act do not apply to GCHQ staff and hence to GCSF members and officers. The effect of this is that no GCHQ employee or GCSF officer could claim under the "automatically unfair dismissal" provisions of the 1992 Act, which if established, would entitle them to significantly increased compensation or interim relief. To that extent the employers at GCHQ face lesser penalties than other employers should they dismiss Federation officers or members for trade union activities, and the employees and officers are more vulnerable.

36. More importantly GCHQ employees and GCSF officers could not pursue a claim that their employer had taken action short of dismissal against them because of their trade union membership or activities. The lack of this protection makes officers more vulnerable

to the potential pay. promotion and posting penalties which go with them having to be employees of GCHQ management.

37. The Foreign Secretary has assured me (and I paraphrase) that he never envisaged that disciplinary action short of dismissal would be taken against any individual for taking part in trade union activities consistent with their conditions of service. I fully accept that assurance. Again though, that is relevant to the concept of "likelihood" not to vulnerability should conditions change and hostility break out between the Federation and management at GCHQ. In those circumstances the Federation members and officers. unlike those in other unions, would have no redress through an Industrial Tribunal for action short of dismissal taken against them because of trade union activities. They might in certain circumstances regard such action as constituting dismissal and mount a claim for constructive dismissal. Members and officers of independent unions in identical circumstances, however, can get redress for action short of dismissal through an Industrial Tribunal and retain their jobs.

Prohibition of Industrial Action

38. Even if not faced with action against its officers or the withdrawal of employer-provided facilities what steps could the Federation take to pursue its case in the event of a severe disagreement with management? It is an express condition of service that staff at GCHQ do not take industrial action or induce other members of staff to withdraw their services.

39. Because officers of the Federation have to be members of staff they are banned by this condition from inducing industrial action. The impact of such a condition is not a matter

which the Certification Officer has previously had to address. However the EAT included the ban on industrial action among its reasons for turning down the Federation's last attempt to obtain a certificate of independence. I have also noted that Parliament has directly imposed a similar restriction on industrial action on unions representing prison staff. In doing so it thought it necessary to preclude me from taking account of that restriction in determining the independence of unions representing such staff. No such preclusion operates in respect of unions representing GCHQ staff.

40. I am aware that some independent trade unions forswear industrial action; others enter agreements having the same effect. But they do so as free agents and, as a last resort. they could change their stance (as the Royal College of Nursing has done) or give notice of withdrawal from any such agreement. GCHQ staff and consequently GCSF do not have that freedom.

41. Industrial action can be very destructive but if proper procedures are followed the law provides certain protections. It is moreover the ultimate weapon of a trade union backed by a dissatisfied workforce but faced with a totally hostile employer. In my judgement that is why the EAT considered it a relevant factor in refusing GCSF a certificate in 1992. It is certainly the way I have viewed it as impinging on the Federation's independence.

42. The Federation, and others, have argued that it is in no different position from other unions with full trade union rights. It argues that anyone taking industrial action is liable to dismissal but that has not been held to affect their union's independence.

43. The difference between GCSF and other unions in this regard is not so much a question of the legal but the practical consequences that might flow from taking, or inducing, industrial action. Virtually every person who takes industrial action renders him or herself liable to dismissal. But such dismissals are rare and the majority of union members are prepared to take the risk. Federation members and officers are however in a different position, even from other public service staff and unions. The history of GCHQ, the explicit conditions of service relating to it and the clear statement (repeated to me by the Foreign Secretary) that industrial action at GCHQ remains unacceptable on national security grounds, place Federation officers and members in a different position. They face not a risk but a certainty of discipline if they take or induce industrial action.

44. The employers ban on industrial action by Federation members is a real and effective one which would severely limit the Federation's ability to respond to a totally hostile or intransigent employer.

Conclusion

45. In this note I have identified six main features which I regard as rendering the Federation vulnerable to interference by the employer at GCHQ.

1. The Federation's officers must be employees of GCHQ. As such they are subject to posting, pay, promotion and disciplinary decisions by the management with whom they negotiate.

2. The Federation's freedom to affiliate with other organisations is significantly restricted, it cannot merge with another union nor can it recruit voting members from elsewhere to broaden its membership base.

3. If the Federation failed to satisfy the conditions of service imposed on GCHQ employees by management no one at GCHQ (including its officers) would be able to remain members.

4. The withdrawal of employer-provided facilities (equivalent to approximately 80% of the Federations income from other sources) could produce severe disruption in the Federation's activities.

5. Federation members and officers would have only limited access to Industrial Tribunals should they wish to claim that action had been taken against them on grounds of trade union membership or activities. If dismissed they could not benefit from the 'automatically unfair' provisions applicable to others in such circumstances and, again unlike others, they would have no redress in respect of action short of dismissal.

6. The Federation is faced with an effective ban on taking or inducing industrial action.

46. I recognise that some of the features may stem from considerations of national security but I have no power to make exceptions on those grounds.

47. Not every one of these features is necessarily conclusive on its own. Nor does my decision rum on my views on each of them being totally unassailable. They are though mutually reinforcing. In present circumstances, where all the key parties are anxious for the Federation to be independent, some of the actions to which the Federation is vulnerable may seem remote. But I return to the words of the Master of the Rolls in Squibb. In talking of a difference of opinion between the employer and the staff association he said:

> *"It does not matter whether it is likely or not - it may be completely unlikely - but one has to envisage the possibility of a difference of opinion."*

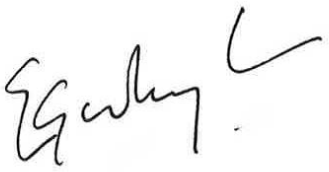
Later in the same case Lord Justice Shaw said:

> *"If the facts present a possibility which cannot be dismissed as trivial or fanciful or illusory, then it can properly be asserted that the union is at risk of, and therefore liable to, such interference. The risk need be no more than one which is recognisable and capable in the ordinary course of human affairs of becoming an actuality."*

48. Features one and four satisfy Lord Justice Shaw's criteria and would almost invariably be sufficient for me to withhold a certificate from any single employer association. Considering all the features together I find that the employer has a powerful array of weapons that could be used in the circumstances outlined by the Master of the Rolls to render the union ineffective. The union is also fettered in the response it could make in such circumstances and in conducting its negotiations. The employer does not have to use any of the weapons nor to have any present intention of doing so. But while they exist the union is vulnerable to interference and therefore not entitled to a certificate of independence.

49. Under section 9(2) of the 1992 Act a trade union aggrieved by my refusal to issue it with a certificate may appeal to the Employment Appeal Tribunal.

50. I am conscious this is a much longer decision than is usual in independence cases when dealt with by the Certification Officer. But the importance of the case deserves it and I hope it gives some clear guidance on the range of issues that I think need addressing before a certificate could be issued.



E G Whybrew
6 November 1996