

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

**Ms M Penkethman & Mr D Walker**

**v**

**Communication Workers Union**

**Date of Decision**

**13 September 2017**

**DECISION**

Upon application by Ms Penkethman and Mr Walker ("the claimants") under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

1. I refuse the claimant's application for a declaration that during the 2017 elections of its Midland No 7 branch, the Communication Workers Union ("CWU" or "the Union") breached its Midland No 7 branch rule 4.5.4 by Simon Hawkins, CWU Delivery Rep and Mick James CWU Distribution Rep, canvassing for Jason Cornwall, Craig Jones, Bernard McDonald, Derek Turner, Craig Jones and Constancia Corbishly by way of putting up posters asking members to vote for them.
2. I refuse Mr Walker's application for a declaration that the CWU breached rule 4.5.3, paragraph two of the Midland No 7 branch rules by not issuing Mr Duncan Walker a voting paper for the 2016 election of the legal and medical secretary in which he was entitled to vote thereby denying him the right to vote.

**REASONS**

1. Ms Penkethman and Mr Walker brought this application as members of the Union. They did so by separate registrations of complaint which were received at the Certification Office on 25 and 27 February 2017 respectively.
2. Following correspondence with my office, Ms Penkethman and Mr Walker confirmed complaint 1 in the following terms:

### **Complaint 1**

*On or around 10 January 2017 the Midland No.7 Branch of the CWU breached its rule 4.5.4 by Simon Hawkins, CWU Delivery Rep and Mick James CWU Distribution Rep canvassing for Jason Cornwall, Craig Jones, Bernard McDonald, Derek Turner, Craig Jones and Constanca Corbishly during the 2017 Branch elections by way of putting up posters asking members to vote for them.*

Mr Walker made a further complaint in the following terms:

### **Complaint 2**

*That on or around 5 January 2017 the union breached rule 3, paragraph two of the Midland No 7 branch rules by not issuing Mr Duncan Walker a voting paper for the 2016 election of the legal and medical secretary in which he was entitled to vote. This denied him the right to vote.*

3. At the hearing before me, Ms Penkethman and Mr Walker were represented by Mr Walker. Written witness statements and oral evidence was given by Mr Walker, Ms Penkethman, Chris Parkinson and Samantha Craig. Additionally written witness statements were provided by Z WxZasek, Ian Hickton, Gary Bennison, Malcolm Brundrett, Simon Tinsley and Melanie Heath, all members of the Midland No 7 branch of the CWU. The Union was represented by Mr Stuart Brittenden of counsel. Oral evidence for the Union was given by Mr Peter Metcalfe, Senior Policy Adviser, CWU, and Ms Anne Hock, Scrutineer, Popularis. They also provided written witness statements. There was also in evidence the national rules of the Union and a 426 page bundle of documents containing correspondence and other documentation as supplied by the parties for use at the hearing. A separate 343 page document was provided by the claimants which was the paperwork relating to the CWU National Disciplinary Case Penkethman v Cornwall and Brown No 04/15. At the start of the hearing I made it clear that I could not see the direct relevance of these papers to the complaints before me and would require an explanation of relevance if they were referred to; in the event no such reference was made. Both the Union and the claimants provided skeleton arguments.

### **Application to Amend Complaint 2**

4. At the outset of the hearing Mr Walker made an application to amend Complaint 2 by changing the rule referred to. He asked that 'rule 3, paragraph two of the Midland No 7 branch rules' be changed to 'rule 4.5.3 paragraph 2 of the Midland No 7 branch rules' so that Complaint 2 would read as follows:

*That on or around 5 January 2017 the union breached rule 4.5.3, paragraph two of the Midland No 7 branch rules by not issuing Mr Duncan Walker a voting paper for the 2017 election of the legal and medical secretary in which he was entitled to vote. This denied him the right to vote.*

The request was on the basis that the rule originally referred to did not relate to the issue that the complaint clearly addresses, that is that Duncan Walker did not receive a ballot paper.

5. Mr Brittenden for the Union did not object to the amendment. I accepted the amendment.

### **Findings of Fact**

6. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
7. The CWU Midland No 7 branch is a branch of just over 1,000 members. It covers several workplaces in and around the Stoke on Trent Area. The workplaces vary in size of membership from 1 to some 243. There are 23 units/workplaces in the branch. The largest units are Stoke Hanley Delivery Office 243 members, Stafford Delivery Office 136 members, Contact Centre Stoke 114 members and Longton Delivery office 87 members. (PM Witness Statement para 7)
8. Maxine Penkethman joined the CWU in 2003. She has served as a Local Rep, a Health and Safety Rep at Area level, as Women's Officer at branch level and as Branch Secretary of the Midlands No 7 branch for seven years up until February 2017.
9. Mr Walker joined the CWU in 2016. He stood as a candidate in the Midland No 7 branch elections in 2017 for the position of Legal and Medical Secretary.
10. On 26 March 2008 a Letter to Branches ('LTB') was sent out from John East, CWU National Organising Secretary. The LTB was headed 'Branch Ballots' and sets out some mandatory guidance. At paragraph 12 of the LTB he says the following;  
*'Branches should be made aware that there is no longer a mandatory rule that has to be incorporated into the branch model constitution stating that canvassing is not allowed under national rules, in fact there is no longer a national rule that prohibits canvassing in branch/area elections. While this is a matter for branches to agree at their branch meeting they should make clear when agreeing their ballot procedures whether canvassing is allowed or not.'*
11. On 2 May 2014 a further LTB No 288/14 was sent out by W Hayes, then the General Secretary of the CWU, attached to it was *'the new Branch Model Constitution, which will come into force with immediate effect'*. Within the attached document rule 4.5 read:  
*'Branch election procedures.*  
*Branches shall establish rules governing the conduct of elections to ensure equality of treatment for all candidates. These shall be incorporated into the branch constitution/branch rules and shall be published to the membership. All Officership Elections in Branches shall be held as individual membership ballots which may only be undertaken by post, email and workplaces.'*

12. On 20 April 2016 a letter to various CWU Midland branch No 7 branch members was sent by Samantha Craig, Midland No 7 Branch Official. The letter accepts nominations for various branch positions. At paragraph 3 it sets out '*As you will be aware in the event of any ballot any canvassing and/or electioneering is strictly **not** allowed....*'
13. On 16 December 2016 Maxine Penkethman issued a circular to Midlands No 7 Branch detailing the timescale for the branch Elections. She said ballots were required for positions of Branch Secretary, Treasurer, BAME (Black Asian and Minority Ethnic) Officer, Vice Chair, Political Officer and Legal and Medical Officer. Ballot timetable:  
  
Ballot papers despatched 5 January 2017.  
  
Ballot closes and results due 20 January 2017.  
  
By this stage Popularis Ltd had been appointed as an independent scrutineer to carry out the distribution of ballot material and the counting of the returned ballot papers.
14. On 19 December 2016 address information was extracted from the Union's database for members of the Midlands No 7 branch. This was passed to Popularis to facilitate the despatch of ballot papers to members.
15. On 11 January 2017 Chris Parkinson, Substitute Area Delivery Representative, emailed Kevin Clarke, Branch Chair. He reported having seen a notice on the notice board and on some of the fittings in the Stafford Delivery Office that asked for votes for Jason Cornwall for Branch Secretary, Craig Jones for Branch Treasurer, Constanca Corbishly for BAME Officer, Bernard McDonald for Vice Chair, Derek Turner for Political Officer and Craig Jones for Legal and Medical Officer. The notice had the names Simon Hawkins, CWU Delivery Rep and Mick James, CWU Distribution Rep at the bottom. Chris Parkinson also reported on a conversation he had with a Unit Sub Rep, Simon Tiswell.
16. On 11 January 2017 Duncan Walker emailed Kevin Clarke complaining about the notices at the Stafford Delivery Office. He said he '*will not now be attending the hustings scheduled for this evening the 11<sup>th</sup> January 2017 or taking any further part in this election*'. On the same day Liz Price also emailed Kevin Clarke drawing to his attention '*flyers/leaflets have been given out to members of staff at Stafford delivery office to canvass for the ballot.*'
17. On 11 January Kevin Clarke, Branch Chair resigned.
18. On 12 January an email was sent by Joe McCluskey, Substitute IR Rep Longton Delivery Office, to Dave Ward, CWU General Secretary, Beryl Shepherd, CWU President, Tony Kearns CWU Senior Deputy General Secretary, J Loftus CWU, Peter Metcalfe CWU and 'Branch Secretary'. The email raised the issue of '*2 reps have handed out flyers/posters recommending members to vote for a slate*

*of candidates that they see will be a 'vote for change'. It goes on to say 'this clearly breaks branch rules and I feel needs to be fully investigated and action needs to be taken.'*

19. On 12 January Maxine Penkethman sent a letter to Beryl Shepherd, CWU President, raising the issue of *'canvassing and electioneering which contravenes rule 4.5.4.'* On the same day Ms Penkethman also sent a letter to Tony Kearns raising a formal complaint of a breach of rule 4.5.4.
20. On 12 January Chris Parkinson sent an email to Tony Kearns, Beryl Shepherd, Dave Ward, Jane Loftus, Peter Metcalfe raising a formal complaint of a breach of branch rule 4.5.4.
21. During the same period Samantha Craig sent an undated email to Ms Penkethman forwarding an undated complaint to Anne Hock, Dave Ward, Tony Kearns and J Loftus which raised issues of a breach of CWU rule 4.5 in both Stoke Distribution and Stafford Delivery Office.
22. Also, on 12 January Ms Penkethman notified CWU Head Office that Duncan Walker had not received a ballot paper.
23. On 13 January a ballot paper was despatched to Duncan Walker by Popularis Ltd.
24. During the period 13 January to 16 January there was an exchange of emails between Maxine Penkethman and Meta Thomas, PA to Andrea Snowden, CWU Head of Administration, regarding the Midlands No 7 branch rule book. The copy sent by Ms Penkethman on 12 January with her formal complaint only contained odd numbered pages and did not include rule 4.5.4. On 16 January 2017 Ms Penkethman sent a photograph/jpeg of rule 4.5.4 explaining that she was experiencing IT difficulties and was unable to send a full scanned copy of the rule book.
25. On 17 January the Midland No 7 Branch Committee wrote to Bernard McDonald drawing to his attention that *'at Stoke Distribution one poster and one personal letter addressed to you, relating to the ballot/election of Midland No 7 Branch Officers, have been pinned on the notice board and have been defaced.'* An explanation was requested by Friday 27 January. On the same day the Midland No 7 Branch Committee also wrote to Simon Hawkins, CWU Delivery Rep and Mick James, CWU Distribution Rep stating *'that at Stafford Delivery Office a list of preferred candidates in the ongoing Branch Elections for Branch Officers has been distributed and displayed on several fittings. An explanation is requested.'*
26. On 17 January Andrew Longshaw emailed Tony Kearns, Beryl Shepherd, Dave Ward, J Loftus, P Metcalfe and 'Branch Secretary'. He raised a complaint about the ongoing election regarding *'championing certain candidates via their*

*noticeboard at Stoke distribution and via letters on fittings at Stafford DO and Distribution' (Doc 163).*

27. Dave Ward, General Secretary wrote to Ms Penkethman on 17 January. He set out the advice that had been given to the Branch Chair Kevin Clarke (who had by now resigned) which was *'he should immediately write to the alleged authors of the poster/notice to tell them that their actions were potentially in breach of the branch constitution on canvassing. Furthermore, that they must refrain from such behaviour and that failure to do so could mean further action being taken against them by the branch.'* He goes on to say that *'all complaints in the first instance should be formally dealt with by the branch.'*
28. Gary Bennison, Stoke MPU Representative, emailed Ms Penkethman on 18 January. He complained about the tampering with the notices on the Stoke Distribution noticeboard and notices in Stafford DO advising members who to vote for.
29. Ms Penkethman emailed Ms Hock at Popularis on 19 January. She informed Ms Hock of the seven complaints she had received regarding canvassing/electioneering to date and stated that she expects to receive more. She said that *'this appears to be a serious breach of CWU rule 4.5.4 and needs investigating thoroughly by the Branch.'*
30. On 19 January a further complaint was sent to Maxine Penkethman about the elections/ballots procedure by John Allen, CWU member.
31. Chris Parkinson, Acting Branch Chair, sent out a note to all Midlands No 7 branch reps on 20 January. The note is headed to *'All reps - Midland No 7 Branch Officer Ballots, Important Notice.'* He asks that an attached notice is displayed on notice boards. The notice set out that the results of the election were due to be announced on 20 January. However, due to a number of formal complaints alleging a breach of CWU branch rule 4.5.4 the announcement had been deferred *'until such time as these complaints have been investigated.'* The notice is signed *'Regards Midland No 7 Branch Committee.'* On the same day letters go out to all of the candidates from Midland No 7 branch informing them of the delay.
32. Also on 20 January 2017 Ms Hock sent a letter to Tony Kearns, Senior Deputy General Secretary, CWU enclosing the results of the branch election for Midland No 7 branch.
33. Ms Penkethman received further complaints on 20 January from Chris Parkinson, Diane Woolrich and Janice Yates about canvassing.

34. On 20 January 2017 Chris Parkinson sent out an email setting up an Emergency Branch Meeting to discuss the complaints of breach of rule 4.5.4 for 14.30 on 23 January 2017.

35. A note from 'Stafford Delivery Office' to Midland No 7 Branch Committee dated 21 January 2017 stated:

*'With regards to your letter dated 17/01/2017 it states that you feel we have been canvassing. I would like to state that I am not a candidate so this cannot be classed as canvassing as for myself I have no agenda. Within my office all we have done is recommended who we believe will be the best candidates to represent and move our branch forward over the forthcoming years.'*

*Regards*

*Stafford Delivery Office'*

36. At the Emergency Branch Meeting on 23 January it was agreed:

*'Independent Scrutineer to be asked to investigate once replies received from reps alleged to have written notices and from rep whose offices had CS staff highlighted in pink highlighter pen.'*

37. On 1 February a Midland No 7 Election Pack and covering letter was sent to Anne Hock to enable her to carry out the investigation.

38. On 13 February the report on Midland No 7 branch elections by Ms Hock was produced. Its overall conclusion was, *'I therefore see no reason why the Branch Committee should not now publish the results.'* At some point after receiving the Popularis report the outgoing Midland No7 Branch Committee met and agreed to publish the election results. Following this the Election results were published. This showed a 30% turnout with 1,093 ballot papers having been sent out and 326 returned. Among the results was that of Branch Secretary where Jason Cornwall received 224 votes and Maxine Penkethman received 97 votes.

39. On 25 February Mr Walker wrote to the Certification Office making two complaints relating to the CWU Midland No 7 branch elections in 2017.

40. On 27 February Maxine Penkethman sent an email to the Certification Office raising her complaint.

### **The Relevant Statutory Provisions**

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

**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.

**The Relevant Rules of the Union**

42. The rules of the Union which are relevant for the purposes of this application are CWU national rules and Midland No 7 branch rules:

**National Rules**

**Rule 2 Objectives**

**2.1 The objectives of the union shall be:**

...

1.3 To secure the greatest possible measure of effective participation by the Union and its members in all decisions affecting their working lives as determined by these Rules

**Rule 6 Branches**

**6.1 General**

...

2. The objectives of each Branch shall be to:

a) comply with the Branch Model Constitution and authorised variations;

f) implement the policies and directives of the NEC and its Industrial Executives

**6.3 Branch Constitution**

1. All Branches shall operate according to the Model Branch Constitution that shall set minimum standards for every Branch. The NEC shall be responsible for publishing the Model Branch Constitution and ensuring its adherence. The Model Branch Constitution shall be mandatory.

2. The Branch Constitution may be varied subject to agreement by the Branch and approval of the NEC.

**Rule 8 National Organisation**

**8.2 President and Vice President**

8.2.3 The President is the principle lay-official of the Union and shall be responsible for ensuring the Union acts in accordance with its Rules.



## **Branch Rules**

### **4.2 Management**

*The affairs of the Branch shall be governed by General Meetings of, which therefore shall be an AGM and minimum of one other. In the intervals between General Meetings the affairs of the Branch shall be directed by Branch Officers and Branch Committee.*

**Rule 4.5 Branch Election Procedures (As stated in Branch Model Rules & Standing Orders Midland No 7 Branch, provided by Ms Penkethman and Mr Walker with their applications to the Certification Office)**

....

#### **4.5.3 Voting Papers**

*The Branch Committee shall appoint a Ballot Returning Officer, who will arrange two independent scrutineers to assist with the count of voting papers.*

*Voting Papers shall be issued to each member as may be appropriate for each election to be held by post in a sealed envelope together with precise instruction as to ballot arrangements which shall have been decided by the Branch Committee and notified to the membership in advance at the time of calling for nominations. The Election Procedures as published must be adhered to at all times.*

.....

#### **4.5.4 Canvassing/Election Address**

*Under National Rules canvassing will not be allowed, however, candidates may submit an election address where this is permitted, which will be included with the Ballot papers despatched to members.*

**Rule 4.5 Branch Election Procedures (As stated in latest version of Branch Model Rules & Standing Orders Midland No 7 Branch, held by CWU Head Office.**

#### **4.5 Branch Election Procedures**

*Branches shall establish rules governing the conduct of elections to ensure equality of treatment for all candidates. These shall be incorporated into the branch Constitution/Branch Rules and shall be published to the membership.*

#### **Voting Procedures**

*Current voting procedures will continue to apply in each Branch. Where Branches wish to change procedures the proposals must be submitted in writing to the National Organising Secretary for clearance. Prior to a Branch merger voting procedures must be included in the new proposed model rules due to be submitted to the National Organising Secretary.*

#### **Positions becoming vacant between AGMs**

*Any vacancies, which may arise amongst the Officers between elections, shall be filled under the procedures detailed above.*

## CONSIDERATIONS AND CONCLUSIONS

### Complaint One

44. Ms Penkethman and Mr Walker's joint complaint is as follows:

#### **Complaint 1**

On or around 10 January 2017 the Midland No.7 Branch of the CWU breached its rule 4.5.4 by Simon Hawkins, CWU Delivery Rep and Mick James CWU Distribution Rep canvassing for Jason Cornwall, Craig Jones, Bernard McDonald, Derek Turner, Craig Jones and Constancia Corbishly during the 2017 Branch elections by way of putting up posters asking members to vote for them.

45. The relevant branch rules are :

#### **Rule 4.5 Branch Election Procedures**

##### *4.5.4 Canvassing/Election Address*

*Under National Rules canvassing will not be allowed, however, candidates may submit an election address where this is permitted, which will be included with the Ballot papers despatched to members.*

### Summary of Submissions

46. Mr Walker for the claimants submitted that there had been a clear breach of branch rule 4.5.4. He said that there was no dispute that posters had been put up in the Stafford Delivery Office that canvassed for Jason Cornwall, Craig Jones, Bernard McDonald, Derek Turner, Craig Jones and Constancia Corbishly during the 2017 branch elections. These posters had the names Simon Hawkins, CWU Delivery Rep and Mick James, CWU Distribution Rep, at the bottom of them. Mr Walker submitted that the actions of Mr Hawkins and Mr James were made all the worse because they had 'signed' the posters in their official CWU capacities.

47. Mr Walker submitted that the rule on no canvassing was very well known within the branch. He referred to notices going out in both the 2011 and 2016 branch elections to prospective candidates that made this clear. He also referred to both the oral and written witness testimony that had been provided by himself, Ms Penkethman, Mr Parkinson and Ms Craig that had been unequivocal in affirming that branch rule 4.5.4 prohibited canvassing. In addition he referred to the written witness statements provided by branch members Z WxZasek, Ian Hickton, Gary Bennison, Malcolm Brundrett, Simon Tinsley and Melanie Heath that supported this position.

48. Mr Walker stated that the rule book he had provided to the Certification Office was the same one he had been provided with when he joined the Union.

49. Although Mr Walker was not able to provide evidence as to when the Midlands No 7 branch rules had last been approved by the National Executive Committee (NEC) he submitted that there was evidence to support the proposition that rule 4.5.4, as set out in the rules supplied by him to the Certification Office, was a valid rule. He pointed to the fact that in the initial contact with CWU Head Office staff they had not questioned whether rule 4.5.4 was a valid rule. In particular, he referred to a section of a letter dated 17 January 2017 to Maxine Penkethman from Dave Ward, CWU General Secretary, in relation to her complaint about the posters displayed in the Stafford Delivery Office. In the section of the letter referred to Mr Ward set out the advice that had previously been given to Kevin Clarke, prior to his resignation as Branch Chair:

*'he should immediately write to the alleged authors of the poster/notice to tell them that their actions were potentially in breach of the branch constitution on canvassing. Furthermore, that they must refrain from such behaviour and that failure to do so could mean further action being taken against them by the branch.'* Mr Ward's letter went on to inform Ms Penkethman that *'all complaints in the first instance should be formally dealt with by the branch.'*

50. Mr Walker submitted that the reference to *'potentially in breach of the branch constitution on canvassing'* was evidence that the Union accepted that rule 4.5.4 was a valid branch rule. To support this submission he said it was clear when dealing with Peter Metcalfe that he had accepted that rule 4.5.4 was a branch rule.
51. Mr Walker also submitted that the inquiry carried out by Ms Hock of Popularis had not called into question the validity of rule 4.5.4.
52. Mr Walker questioned why the Head Office of the Union had asked Ms Penkethman for a copy of the current rule book of the branch when she raised the canvassing complaints with them. He submitted that if they already held a copy dating from around 2011, as the Union now claimed, they would not have needed to ask Ms Penkethman for a copy.
53. Regarding what was meant by the word 'canvassing' in the rule, during the course of the hearing Mr Walker accepted that it would be permissible for members of the branch to discuss the candidates in an election and say who they recommended. He felt that for the position to be otherwise would not be democratic nor in line with free speech. However, he felt that rule 4.5.4 applied to all members not just candidates in an election.
54. Mr Walker submitted that it may have been the case that the outgoing Branch Executive Committee had accepted the recommendations of the Popularis report and published the election results; however, he submitted this had been done under duress. He pointed to Maxine Penkethman's witness testimony which referred to a campaign within the branch including references on social media

and abusive phone calls to get the election results published. In addition he submitted that the decision to release the results was reached in conjunction with and on the advice of Mr Metcalfe and Anne Hock of Popularis.

55. For the Union Mr Brittenden submitted that the Union's primary case was that rule 4.5.4 of the Midland No 7 branch, as submitted by Ms Penkethman and Mr Walker, was not a valid rule. Mr Brittenden went on to submit that rule 4.5.4 is Ultra Vires on the grounds that:

National rule 6.3 provides that:

*6.3.1 All Branches shall operate according to the Model Branch Constitution ...  
The Model Branch Constitution shall be mandatory.*

*6.3.2 The Branch Constitution may be varied subject to agreement by the Branch  
and approval of the NEC.*

56. He said that similar provision appears at rule 6.1.2 of the national rules in respect of the need to comply with the Branch Model Constitution as well as implementing the '*policies and directives*' of the NEC.
57. He submitted that it was for the complainants to show that rule 4.5.4 of the Midlands No 7 branch Rules had been submitted to and approved by the NEC as required by rule 6.3. He submitted that the claimants had not been able to provide the required evidence. In the circumstances he submitted that I should rely on the evidence of Peter Metcalfe. Mr Metcalfe's evidence was:
- (i) LTB 231/2008 had explained that there was no national rule which prohibited canvassing. The fact that rule 4.5.4 contains outdated text suggests that if it was ever approved this was a very outdated version.
  - (ii) Had the Midlands No 7 Branch Constitution submitted by Ms Penkethman and Mr Walker with their applications to the Certification Officer been presented for approval by the NEC it would not have been approved because:
    - It relies on the existence of national rules that do not exist which are said to prohibit canvassing.
    - There are several elements of the rule that would have caused the NEC or others exercising delegated powers to question it. These include the ambiguous nature of the rule in that it is unclear who the prohibition applies to, candidates only or all members? The rule does not define what constitutes canvassing.

- The rules, as presented by Ms Penkethman and Mr Walker did not contain amendments to reflect later changes to the model rules made in 2014 and 2016. Any application for approval of a branch constitution which did not incorporate the changes made to the Branch Model Constitution would also be flagged up in the process.
58. Mr Metcalfe provided evidence that extensive searches had been carried out by the Union through paper and electronic files. The Union had been unable to find correspondence showing that the branch had sought approval of a constitution containing rule 4.5.4, or correspondence raising any of the difficulties referred to above.
59. Mr Brittenden also submitted that I should accept the evidence of Mr Metcalfe in relation the retention of branch rules by the Union's Head Office. Mr Metcalfe had said that it is customary for the most recent/approved rules to be kept on file. He said that in his experience branch files were kept in reasonably good order at Head Office. He confirmed that in 2011 a copy of the Midland No 7 Branch Constitution was placed onto the Union's electronic files at Head Office. This would have been the copy that the branch had sent for approval previously which is why this version was retained. This did not contain rule 4.5.4.
60. Mr Brittenden submitted that on the balance of probabilities the version of Midlands No 7 branch rules held by the Union's Head Office dating from 2011 was the one which received NEC approval.
61. However, should he be wrong about which rule book had been approved by the NEC, Mr Brittenden submitted that the purported restriction on canvassing in rule 4.5.4 is defective. He said that the prohibition is based upon the stated existence of national rules and the complainants had not identified any such relevant national rule. The lack of such a national rule was a key element and without it the suggested prohibition could not be binding. This is on the basis that it is an express term that branch rules have to be construed in conformity with the national rules. He submitted that where national and local rules conflict in principle national rules prevail. He referred me to paragraph 6.13 of the Certification Officer's decision in ***Hughes and Higgins and the Communication Workers' Union D/6-16/01***, where the Certification Officer said:
- 'This is a case where branch and national rules appear to conflict. In such cases, and particularly in the circumstances of this case, I am clear that national rules prevail.'*
62. Summing up the Union's position in this aspect of their defence Mr Brittenden said that since no national rule prohibits canvassing, rule 4.5.4 must be construed in a manner consistent with national rule, which means there is no

prohibition of canvassing.

63. Mr Brittenden then made further submissions for me to consider should I not accept the Union's main argument. He recognised that the claimants may wish to say that rule 4.5.4 was established by way of custom and practice. However, he submitted that this could not be the case here because custom and practice could not supplant the express stipulation under the national rule that Branch Constitutions require NEC approval.
64. Mr Brittenden also made submissions on the construction of rule 4.5.4. He pointed out that the rule does not define what constitutes 'canvassing'. He submitted that the Union accepted that 'canvassing' is capable of bearing a wide or a narrow meaning depending upon the context. He further submitted that in the context of branch elections it can only have objectively been intended that canvassing would have a narrow meaning. This was because democracy underpinned the Union's system of self-governance and its structures. He suggested that it cannot have been intended for members of the Union to effectively be silenced from expressing any comment or opinion about who they wished to vote for (or not vote for as the case may be) in branch elections, or from expressing their reasons for so doing. He submitted that Mr Walker had accepted this when giving evidence as he accepted that following a hustings members would not be prohibited, by the terms of rule 4.5.4, from discussing the candidates or their preferences. That being the case Mr Brittenden submitted that it must be right that if members were not prohibited from expressing a preference for a candidate or candidates verbally then it was not logical to suggest a written expression of preference was prohibited.
65. It was submitted that a narrow meaning had to be adopted when considering the true meaning and intention behind rule 4.5.4. To adopt a wide meaning would conflict with the Objectives of the Union under National Rule 2.1.2 and 2.1.3 of securing the greatest possible measure of effective participation in the Union.
66. Mr Brittenden also put forward the argument that properly construed rule 4.5.4 is a direction to candidates in an election and not anyone else. The prohibition is stated in a single sentence which also contains a direction that '*... candidates may submit an election address where this is permitted, which will be included with the Ballot papers dispatched to members.*' He submitted that his construction was consistent with the ordinary meaning of canvassing as involving a person engaged in campaign activity acting under the instructions of, or otherwise at the behest of a particular candidate. He said that Mr Walker in correspondence with the Certification Office had conceded that he had '*no evidence*' that '*candidates were complicit in the production or dissemination of the poster...*' He submitted that as there is no evidence that the posters were

disseminated by any candidate (whether directly or indirectly) so there could be no breach of rule 4.5.4.

67. Mr Brittenden also made submissions on the impact of branch autonomy in relation to this complaint. He drew my attention to rule 4.2 of the Midlands No 7 Branch Constitution which states:

*'The affairs of the Branch shall be governed by General Meetings of, which there shall be an AGM and minimum of one other. In the intervals between General Meetings the affairs of the Branch shall be directed by the Branch Officers and Branch Committee.'*

68. Mr Brittenden pointed out that, following the complaints about canvassing from a large number of members of the Union, the Branch Committee had delayed the publication of the branch election results and had commissioned Anne Hock of Popularis to investigate the allegations. Ms Hock's report recommended the publication of the results and the Branch Committee unequivocally accepted this recommendation before resolving to declare the election results as being valid, and publishing the results. It was submitted that these steps were all legitimate under rule 4.2.

69. Mr Brittenden submitted that by bringing a complaint to the Certification Officer the complainants impermissibly sought to circumvent the decision of the Branch Committee to release the results. He submitted that the point is of legal significance because of **Hamley v GMB** [1986] IRLR 293 (per Harman J) and the cases referred to therein. In Hamley, Harman J stated:

*'10. ....In my view that is indeed the correct analysis of the law. It follows that the allegations in paragraph (5), unless they amount to an allegation that the machinery of the union was not properly followed through, cannot be heard in the court by way of appeal from that decision. The machinery is set out in the rules ...*

*20. ....where a man has expressly agreed by contract to accept a tribunal containing certain persons, he cannot thereafter come bleating to the courts complaining of breach of natural justice when the contract is carried out exactly according to its terms as he had always known, if he had read the rule book, he was bound to accept.'*

70. Mr Brittenden submitted that the last paragraph applies by analogy to the decision reached by the Branch Committee. He submitted that the key point holds true: where the rules expressly confer a power upon a body to make a determination, if such a determination is made in accordance with the rules, then that is binding and beyond challenge.

### **Conclusions Complaint One**

71. At the heart of this complaint is rule 4.5.4 of the Midlands No 7 Branch Constitution as submitted by Mr Walker and Ms Penkethman to the Certification Office with their applications. Put simply the question is whether this is a valid rule, as the claimants would have it or not a valid rule as submitted by the Union.

72. I am in no doubt that Mr Walker, Ms Penkethman, Samantha Craig and Chris Parkinson, who provided oral and written witness testimony, and the further six Midlands No 7 branch members who gave written witness statements all genuinely believed that a rule existed that prohibited canvassing in their branch elections. Indeed there is evidence in the bundle, produced for the hearing, that members within that branch who would not be seen as allies of Ms Penkethman also accepted that there was a rule that prohibited canvassing.
73. However, the Union has put forward arguments that suggest those who take the view that rule 4.5.4 is a valid rule are wrong. In essence, the Union argue that the national rules require branch rules to be consistent with them. They specifically refer to national rule 6.2 (a)

*The objectives of each Branch shall be to:*

- a) comply with the Branch Model Constitution and authorised variations;*

and national rule 6.3

*1. All Branches shall operate according to the Model Branch Constitution that shall set minimum standards for every Branch. The NEC shall be responsible for publishing the Model Branch Constitution and ensuring its adherence. The Model Branch Constitution shall be mandatory.*

*2. The Branch Constitution may be varied subject to agreement by the Branch and approval of the NEC.*

74. These rules expressly require compliance with the Branch Model Constitution and authorised variations. A branches ability to make variations to the Model Branch Constitution is therefore fettered by the need to obtain the approval of the NEC.
75. The Union's evidence to support their argument that rule 4.5.4 was not a rule that had received the approval of the NEC and as such was not a permitted variation to the Model Branch Constitution was three fold. Firstly, by way of the evidence of Mr Metcalfe they explained the process for branches obtaining NEC authorisation for their rules and variations to the Model Branch Constitution. Mr Metcalfe explained that it was the Union's practice to retain at Head Office the most recently authorised version of a Branch's Constitution. In the case of the Midlands No 7 branch he gave evidence that the most up to date version on file, dated from 2011, did not contain rule 4.5.4 which was contained in the copies of the Branch Constitution submitted by the claimants. Secondly, Mr Metcalfe gave evidence that had a version of the Branch Constitution been submitted for approval to the NEC after 2008, when the prohibition on canvassing at a national level was removed, the Union would have at the very least queried the wording of rule 4.5.4 and it would have been unlikely that the rule in the form submitted by the claimants would have been approved. Thirdly, he pointed out that the rule book submitted by the claimants did not contain the amendments known to have been made to the Branch Model Constitution since 2008.



76. Ms Penkethman and Mr Walker were not able to give evidence as to when they say the Midlands No 7 Branch Constitution had last received the approval of the NEC. Mr Walker gave evidence that the rule book he had submitted was the one that he had been given on joining the branch in 2016. Ms Penkethman and the witnesses also said that the rule book submitted was the one they had always worked to.
77. The evidence before me was limited. I did not have any direct evidence from the claimants that the version of rule book they claim to be valid had been approved by the NEC. Ms Penkethman gave evidence that it was her practice to update the rules of the branch to take account of amendments made to the Model Constitution and then send the amended version out to reps. However, she was not able to say when she last did this and said that she may not have done it during the period 2013 to 2017, this being the period in which she was making representations to the Union about being bullied in the branch. In contrast, Mr Metcalfe was able to provide evidence for the Union which points to the Midlands Branch No 7 constitution having last been approved by the NEC around 2011 and without rule 4.5.4. At the Hearing Mr Brittenden, commenting on the fact that that I would have to make a finding on the issue on the balance of probabilities, accepted that the issue was not crystal clear, but he submitted that if my calculation was that the balance was more than 50% in favour of the Union I should find for them. I do find that the balance is with the Union, but not by a significant amount.
78. For the above reasons I dismiss complaint one.
79. Should I be wrong in the above I consider briefly below the other grounds submitted by the Union.
80. I accept the Union's submission that the purported restriction on canvassing in Rule 4.5.4 is defective. The prohibition is based upon the stated existence of a national rule; there is no such national rule. I further accept that since no national rule prohibits canvassing, rule 4.5.4 must be construed in a manner consistent with national rule, this means that there is no prohibition against canvassing. I would therefore have dismissed the complaint on this basis.
81. I accept the Union's submission that it could not be said that rule 4.5.4 was established by way of custom and practice as custom and practice cannot supplant the express stipulation under the national rule that Branch Constitutions require prior NEC approval. I would have dismissed the complaint on this basis.
82. I accept the Union's submission that properly construed, rule 4.5.4 is a direction to candidates in an election and not anyone else. The prohibition is stated in a single sentence which contains a direction that '*... candidates may submit an election address where this is permitted, which will be included with the Ballot papers dispatched to members.*' I accept that the Union's construction is

consistent with the ordinary meaning of canvassing as involving a person engaged in campaign activity acting under the instructions of, or otherwise at the behest of a particular candidate. There was no evidence in this case that candidates were complicit in the production or dissemination of the posters at the Stafford Delivery Office. I would have dismissed the complaint on this basis.

83. I do not accept the Union's submission on branch autonomy. This submission, based on the judgement in *Hamley v GMB* [1986] IRLR 293, suggested that where the Rules expressly confer a power upon a body to make a determination, if such a determination is made in accordance with the rules, then that is binding and beyond challenge. I observed and put to Mr Brittenden at the hearing that this case pre dated the 1999 Employment Relations Act which inserted section 108A into the 1992 Act. This Act gives an express right to members of trade unions to make an application to me that a Union has breached one of certain prescribed types of rules. The only restriction on this being that I have a discretion not to accept such an application unless I am satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union (section 108B(1) of the 1992 Act.). Whilst I accept that it may be undesirable for a union member to seek to unpick a determination, of in this case a breach of rule, particularly where they have been involved in that determination, the statute would appear to allow this. I would not have dismissed the complaint on this basis.

## **Complaint Two**

84. The second complaint is as follows:

### **Complaint 2**

That on or around 5 January 2017 the union breached rule 4.5.3, paragraph two of the Midland No 7 branch rules by not issuing Mr Duncan Walker a voting paper for the 2017 election of the legal and medical secretary in which he was entitled to vote. This denied him the right to vote.

85. The relevant branch rules are:

### **Rule 4.5 Branch Election Procedures**

#### **4.5.3 Voting Papers**

The Branch Committee shall appoint a Ballot Returning Officer, who will arrange two independent scrutineers to assist with the count of voting papers.

Voting Papers shall be issued to each member as may be appropriate for each election to be held by post in a sealed envelope together with precise instruction as to ballot arrangements which shall have been decided by the Branch Committee and notified to the membership in advance at the time of calling for nominations. The Election Procedures as published must be adhered to at all times.

## **Summary of Submissions**

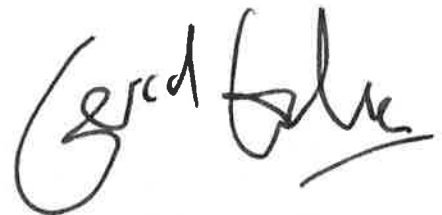
86. Mr Walker submitted that he had not received a ballot paper. This led him to notify the Branch Secretary, Maxine Penkethman. However, he never did receive a ballot paper. The evidence he provided in relation to his efforts to obtain a ballot paper was somewhat contradictory. Initially, in response to a question from Mr Brittenden he said that after he had informed Ms Penkethman he had not received a ballot paper he left it to her to raise the matter with the Union and had not contacted the Union further himself about the issue. Later in response to my questions he said that he had contacted Head Office by telephone 'a couple of days before the end of the ballot' in a further attempt to obtain a ballot paper. However, Mr Walker was not able to give any more details of this contact such as to whom he had spoken or exactly when.
87. For the Union Mr Brittenden submitted that as soon as the Union became aware that Mr Walker had not received a ballot paper they confirmed with the branch his correct postal address and asked Popularis to send out a ballot paper. They pointed to the undisputed evidence of Anne Hock, of Popularis, that she had then sent out a ballot paper by first class post on 13 January 2017.

## **Conclusions Complaint Two.**

88. I do not doubt that Mr Walker did not receive a ballot paper which is unfortunate. However, I accept the Union's evidence that once they became aware that no ballot paper had been received they made arrangements with the scrutineer for a further ballot paper to be despatched to Duncan Walker to the address the branch held for him. At the hearing Mr Walker confirmed that the address used was correct.
89. The Union's submission is that the rule requires them to 'issue' ballot papers and that this was done in Mr Walker's case on 13 January. They argued that the despatch of the ballot paper to the correct address fulfils their obligation under this rule; I agree with this. However, in somewhat contradictory evidence Mr Walker suggested that he made further contact with the Union 'a couple of days' before the close of the ballot. The evidence of this contact would have been helped by some further detail such as the date and the person he had spoken to. I also note that Mr Walker makes no reference to contact with CWU Head Office in his correspondence with the Certification Office. In the circumstances I cannot attach much weight to this evidence. On the balance of probabilities I accept that the Union fulfilled its rulebook obligation in despatching a ballot paper to Mr Walker at the correct address in time for him to participate in the ballot.
90. For the above reasons I dismiss complaint two.

## Observation

91. As I have said in the decision at paragraph 72 I have no doubt that Mr Walker, Ms Penkethman and their witnesses genuinely believed that rule 4.5.4 was a valid rule of the Midlands No 7 branch of the Union. Furthermore there was evidence in the papers that significant number of other members in that branch held a similar view. My role has been to determine the complainant's complaints and, having considered the parties' submissions and evidence, I find in the unions favour. However, I have sympathy with the applicants' position. It appears that the first point at which they became aware that the Union took the view that rule 4.5.4 was not a valid rule was when they were sent a copy of the Union's reply to Ms Penkethman's complaint to my office on 18 April 2017. Up until then the Union's Head Office had given the impression in response to the complaints that it accepted the rule was valid. I consider it may have been desirable for the Union to have attempted to explain the position more sympathetically to Mr Walker and Ms Penkethman given the clearly troubled background in the branch, their genuinely held views, and the far from clear circumstances. The union may also wish to review their procedures to ensure that the process of authorisation of branch rule books is both clearer and documented.



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