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

Gerard Coyne & Richard Brooks

v

Unite the Union

Date of Decision **4 May 2018**

REASONS

Introduction

1. In December 2016, the Respondent, Unite the Union ("Unite") called an election for the post of its General Secretary. At the end of the electoral process, on 21 April 2017, Unite announced the result of that election. There were three candidates, Mr McCluskey, who had been Unite's General Secretary since 2010, Mr Coyne, one of the two present Applicants and Mr Allinson. Mr McCluskey received 59,067 votes; Mr Coyne received 53,544 votes and Mr Allinson received 17,143 votes, on an overall turnout of only 12.2%. The result was formally declared on 28 April 2017.

2. On 2 June 2017 Mr Coyne and Mr Brooks, also a member of Unite, presented to the Certification Officer, under section 108A of the Trade Union Labour Relations (Consolidation) Act 1992 a number of complaints about that election and its conduct. Unite responded that there was no basis for the complaints.

3. I have been appointed by the Certification Officer as Assistant Certification Officer to hear and adjudicate upon those complaints.

4. On 26 January 2018, I held a directions hearing at which the Applicants, Mr Coyne and Mr Brooks, were represented by Mr Millar QC and Unite was represented by Mr Segal QC. From that hearing, there emerged a list of the issues to be decided in respect of each of the ten complaints which the Applicants had put forward and a set of directions. Counsel agreed at that hearing that the first complaint was of a different nature from the others. Whereas the following nine complaints relate to the manner in which the election was conducted by Unite, the first complaint amounted to a contention that, under Unite's Rules, there was no power to hold the election at all, at the time at which it was held. I proposed that the first complaint should be dealt

with as a preliminary issue; counsel agreed; and therefore, I directed that the preliminary issue should be heard over one day on 27 March 2018. Subject to the outcome of the preliminary issue, I directed that the remaining complaints should be heard over five days commencing on 25 June 2018.

5. In the list of issues, the issue arising under the first complaint were defined as follows:-

> (a) Had the office of General Secretary been 'vacant' within the meaning of Unite Rule 15.1 when Unite called the election?
>
> (b) If not, did the Union have the power under Rule 15 of their Rules to call an election for the office of General Secretary in December 2016?

The Hearing

6. On 27 March 2018 at the hearing of the preliminary issue, I heard oral evidence from Mr Coyne on behalf of himself and Mr Brooks and from Ms Cartmail on behalf of Unite; and I heard oral argument from Mr Millar and Mr Segal, each of whom had provided skeleton arguments before the hearing began.

7. I now give my decision on the preliminary issue.

The History

8. Unite is the largest trade union in the United Kingdom. Mr Coyne is a longstanding member of Unite and is or was at the material time employed by Unite as Regional Secretary of one of Unite's regions. Mr McCluskey is also a longstanding member of Unite. He was first elected to the post of General Secretary of Unite in 2010. Mr Brooks is also a longstanding member of Unite. The position of General Secretary is governed by Rule 15 of Unite's Rules ("the Rules"). Rule 15.3 provides that:-

> 'The General Secretary shall be responsible for the administration of the affairs of the Union, including convening the meetings and implementing the decisions of the Executive Council, and such other duties as may be determined by the Executive Council.'

And Rule 15.5 provides that:-

> 'The General Secretary shall be under the control of and act in accordance with the directions of Executive Council.'

9. Rule 15.2 provides as follows:-

> 'The General Secretary shall not hold office without re-election for more than five years from the last day on which the votes were passed in his/her previous election.'

Thus, at the time when Mr McCluskey first became General Secretary in 2010, pursuant to Unite rules, his term in that office was subject to a maximum period of

five years, subject to re-election. That provision in the Rules was consistent with the provisions of statute. In 2012, Unite decided, well within Mr McCluskey's first five-year term, to hold a new election for the position of General Secretary; and at the end of that election, in April 2013, Mr McCluskey was re-elected to that position.

10. At the time of the 2013 election, Rule 15.1 provided as follows:-

> 'All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union.'

11. Under the provisions of Rule 13, there must be a Rules Conference every fourth year for the revision of the rules and constitution of Unite. In July 2015 Unite held a Rules Conference as required by Rule 13.1. At that conference, a branch of Unite proposed that Rule 15.1 be amended by adding the following sentences to the existing sentence set out above:-

> 'The fixed term of office for each General Secretary election will be set at five years. If the General Secretary position becomes vacant due to retirement, resignation or death within a fixed term of office a General Secretary election will be called.'

The transcript of the relevant part of the Rules Conference records that the Executive Council recommended that the amendment be supported. The amendment was carried, apparently unopposed; and therefore Rule 15.1 was thenceforth enlarged by the addition of the two new sentences. Because the words of Rule 15.1 as amended are central to the issue which I have to decide, it is probably right to set them out again in full. They are:-

> 'All elections for the General Secretary shall be on the basis of a ballot of the whole membership of the Union other than ordinary retired members who shall not be eligible to vote. The fixed term of office for each General Secretary election will be set at five years. If the General Secretary position becomes vacant due to retirement, resignation or death within a fixed term of office a General Secretary election will be called.'

12. I do not know when or by what means that the words in the first sentence of that rule *'other than ordinary retired members ...'* were added; but it is immaterial for present purposes.

13. The transcript of the Rules Conference records that the mover of the amendment to Rule 15.1 said that the purpose was to give the Union stability by setting out that the General Secretary's period of office was one of five years. She said *'That means that Len or any further General Secretary will be elected to hold office for five years.'* The transcript shows that no reference was made to the third sentence of the amended Rule 15.1, the second sentence of the amendment. It is clear that the intention of the mover of the amendment was to bring about a situation in which the statutory maximum term for a General Secretary would also become a fixed term, subject to the second sentence of the amendment. In his witness statement, Mr Coyne says that there was no suggestion at the 2015 Rules Conference that the five-year period would be shortened, although it was well known at that time that there had to be elections for the Executive Council in 2016/17. That assertion was not challenged.

14. In December 2016, well within the five-year period for the last election of the General Secretary, in April 2013, the Executive Council decided to bring the next election for the position of General Secretary forward; the electoral process was to start about a year earlier than would have been required by the maximum term, in December 2016, and to conclude at the end of April 2017. The reason for doing so was said to be that the Executive Council elections were to be carried out on that timetable and that, if the General Secretary election were to be carried out at the same time, there would be a saving in costs to Unite of about £1 million. The proposal put to the Executive Council by its Chief of Staff and adopted by the Executive Council said: *'Combining the two ballots would therefore save Unite around £1 million in costs associated with the elections. The alternative would be to start a fresh ballot, with a near-identical electorate, just a few months after the previous ballot had concluded.'*

15. The proposal to the Executive Council then said:-

> *'It is therefore proposed that an election for General Secretary is held on the same schedule already agreed as that for the Executive Council elections.*
>
> *To conform with the requirements of 15.1, the General Secretary therefore gives notice of his resignation from office (after the requisite notice period), such resignation to take effect from 28 April 2017, the date of which the result of the General Secretary election is declared.'*

That proposal, too, was adopted by the Executive Council. On the same day in a message sent to regional secretaries and to other senior Unite officials, the Chief of Staff wrote:-

> *'This is to advise that the Executive Council agreed to hold a General Secretary election early next year, on the same schedule already approved for the election to the Executive Council. I attach the paper agreed by the Council which sets out the details. You will see that the reason for running the two ballots concurrently is the very considerable saving to the union which would result.*
>
> *In order to comply with the provisions of Rule 15.1, the General Secretary has tendered his resignation from office (having regard to the due notice period), to take effect from April 28 2017, the date the result of the ballot is declared. The General Secretary indicated to the Council that he will be a candidate in the forthcoming election. On the General Secretary's proposal, the Council appointed Gail Cartmail to serve as Acting General Secretary for this period in order to ensure that there is no lack of continuity in service or support to our membership, and that the full integrity of our procedures is not only protected, but seen to be protected.'*

16. In her witness statement on behalf of Unite, Ms Cartmail, who is at present one of the five Assistant General Secretaries of Unite, states that the only requirement in respect of the timing of a General Secretary election is that the maximum term of

office is one of five years, under rule and by statute but that Unite could hold an election at any time within the five-year period. I will return to this understanding of the rules later in this decision.

17. There is no dispute that, as had happened before the 2013 election, Mr McCluskey remained in office during the electoral process of 2016/17 and discharged his duties as General Secretary, insofar as he was able to do so consistently with his electioneering activities. In her witness statement Ms Cartmail says that it is standard practice within the trade union movement for elected officers to remain in office during an election and that that is the only sensible course of action in such circumstances. I have no doubt that that was so with Unite and, probably, generally before the rule change which is central to this issue and that that practice was followed by Unite in the 2016/17 General Secretary election.

18. The electoral process proceeded on the basis that Mr McCluskey had tendered his resignation with effect from 28 April 2017, on which date the result of the General Secretary election would be announced and the electoral process completed. Mr McCluskey, as had no doubt been contemplated, stood for re-election. Indeed in a press note issued upon the same day as the decision of the Executive Council to adopt the Chief of Staff's proposal, 6 December 2016, Mr McCluskey's intention to stand in the upcoming election was expressly stated. I have set out, in paragraph 1 above, how many votes each of the three candidates received.

19. During the electoral process a number of complaints were made to the Returning Officer relating to the conduct of the electoral process, some of which may have emanated from Mr Coyne or Mr Brooks or his supporters and some of which were critical of Mr Coyne. None of those complaints raised the issue which I now have to decide. Complaints were also made to the Union's Electoral Commissioner; they too did not raise the present issue.

The Issue

20. It is now time to identify that issue; and that can be done quite simply. It is submitted on behalf of Mr Coyne and Mr Brooks that, pursuant to Rule 15.1 as amended, a General Secretary election could not take place so as to bring the now fixed five-year term of Mr McCluskey's office to a close unless his position had become:-

> *'Vacant due to retirement, resignation or death.'*

It is submitted by Mr Millar QC that the words used are clear and that the election of the General Secretary's position in 2017 was called and indeed completed when that position was not vacant; Mr McCluskey did not resign he gave notice of his intention to resign but that notice did not expire until the date when the election finished. Up to that date, the General Secretary's position was held by Mr McCluskey, who carried out his duties as normal, save for time spent on electioneering.

21. Unite appears to be correct in their contention that this point was not taken until after the election was complete. However, Mr Millar and Mr Segal agree that my task is one of construction of the Rules. The fact that the argument which the complainants

now seek to advance was not raised during the electoral process is not, in my judgement, an indication that it is either a good or a bad argument. I have no difficulty in understanding why what could perhaps be accurately described as a 'lawyer's point' was not spotted or pursued in the throes of a hotly contested election.

22. In short, Unite's response is that the Rules properly understood do not require that at the time of the election the General Secretary's post needs to be actually vacant; it is enough if the General Secretary has announced his resignation, to take effect at the end of the electoral process. It is argued that, as a matter of language, common sense and the appreciation by ordinary members of the meaning of the rule, an announcement by an officeholder that he is retiring creates a vacancy and that from the time Mr McCluskey gave notice that he was resigning with effect from the end of the electoral process, his office was vacant for the purposes of the rule.

The Proper Approach to Construction

23. There was, naturally, much elaboration of the two contrasting positions in argument before me, to which I will come in due course; but first it is necessary to consider the guidance provided by authority on the construction of trade union rules.

24. The starting-point of any examination of authority in this area is to be found in the speech of Lord Wilberforce, giving the joint opinion of the House of Lords in *Heatons Transport (St Helens) Limited v Transport General Workers Union* [1972] ICR 308. As is common ground between the present parties, each person who becomes a member of a trade union enters into an agreement with the union the basic terms of which are to be found in the union's rules. At page 393G to 394C of his speech, Lord Wilberforce said:-

> *'The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the TUC Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:*

> *"Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union.""*

25. In *Taylor v NUM (Derbyshire Area)* [1985] IRLR 99, Vinelott J, when considering a question of construction of the rules of the respondent union, described that passage as containing the 'correct approach to construction of the rules as a union'; see paragraph 33 of his judgment in the Chancery Division. He referred to the principle there set out as having been applied by Lord Diplock in *Porter v NUJ* [1980] IRLR 404 and by Lord Dilhorne in *British Actors' Equity Association v Goring* [1978] ICR 791. Lord Diplock, in *Porter*, said:-

> *'I turn then to the interpretation of the relevant rules, bearing in mind that their purpose is to inform the members of the NUJ of what rights they acquire and obligations they assume vis-à-vis the union and their fellow members, by becoming and remaining members of it. The readership to which the rules are addressed consists of ordinary working journalists, not judges or lawyers versed in the semantic technicalities of statutory draftsmanship.'*

26. In *Jacques v AUEW* [1986] ICR 683, Warner J had to resolve an issue as to the meaning of the rules of the defendant union. The union had abrogated the provision to members of certain benefits. The rules provided that such abrogation could only take place if 40% of the members affected by the benefit voted in favour of the abrogation. However, there was no rule that the rule which required that level of support could not itself be amended at a rules revision meeting without that level of support. Thus, issues as to the construction of the rules had as to correct implications to be drawn from them arose.

27. The judge, at page 692A to B said:-

> *'There are, of course, in those dicta differences of emphasis and of formulation, but not, I think, differences of principle. It is to be observed that Lord Pearson and Lord Salmon agreed both with what was said by Lord Wilberforce in the Heatons Transport case and with what was said by Viscount Dilhorne in British Actors' Equity Association v Goring [1978] ICR 791. The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean,*

bearing in mind their authority, their purpose, and the readership to which they are addressed.'

Having applied those principles, the learned judge held that if the rules were read literally there was there was no express provision that a 40% level of support was required; but, if the principles set out in the authorities were followed and a reasonable interpretation was adopted, the rules should be construed on the basis that there was no power in the union to abrogate the benefits without the level of support which the rules intended.

28. In my view, in the passage set out above from page 693 of his judgment in *Jacques*, Warner J accurately and helpfully digested the previous authorities and set out the principle which I must apply in reaching my decision in this case.

29. I have also been referred to the speech, very well-known in the area of the construction of contractual documents, of Lord Hoffman in *ICS Limited v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912/3, in which Lord Hoffman set out the following principles:-

'(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonable available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to

conclude that the parties much, for whatever reason, have used the wrong words or syntax: see Manual Investments Co Ltd v Eagle Star Life Assurance Co Ltd 1997] AC 749.'

That general guidance is consistent with the principles in cases involving trade union rules which have been set out above.

30. In argument both Mr Millar and Mr Segal agreed, by way of summary of the authorities, that the principle can be expressed as 'what would the reasonable trade union member understand the words to mean'.

The Evidence

31. The witness statements of Mr Coyne and Ms Cartmail set out the history which I have summarised earlier. Each was tendered for cross-examination. Mr Coyne explained how he had been surprised by the Union's decision, during the first period in which there had been a minimum as well as a maximum five-year term for the General Secretary's holding of office (subject of course to the exceptions provided for in Rule 15.1), to bring forward the General Secretary election; he believed that Mr McCluskey had agreed to serve Unite for a full five years. He also believed that, when Mr McCluskey's five-year term ended, there would be a handover period; he thought that was provided by law; but there is nothing in the Rules or in any statutory provision which establishes such a period. He agreed that generally during a General Secretary election the General Secretary does not stand down during the period of the election; but he felt that that should not apply in the light of Rule 15.1 as amended.

32. He did not agree with Mr Segal's proposition that everyone understood Rule 15.1 as amended to mean in practice that the General Secretary could give notice of resignation with effect from the end of the electoral process and then resume office if re-elected.

33. Ms Cartmail in her witness statement made the point that in the trade union world rules are supplemented by practice or 'custom and practice' as that familiar source of pragmatic union governance is often described. However, she did not draw attention to any practice or custom and practice in the present case beyond the acknowledged practice that, prior to the 2015 amendment, a General Secretary or officeholder whose office was up for election would continue to carry out the duties of his or her office until the election was completed. Ms Cartmail also said orally, and in her statement, that to comply with Rule 15.1 as amended Unite could hold an election for the General Secretary post at any time within the five-year period. That is incorrect; unless the General Secretary has died, resigned or retired, such an election could not, under rule, take place; and Ms Cartmail when taken expressly to the words of Rule 15.1 as amended by Mr Millar, agreed that what she had described was, by 2016, subject to the last sentence of Rule 15.1 as amended and that one of the three events set out in that sentence had to exist before there could be an election.

34. During the course of the evidence and arguments I asked whether Mr McCluskey held a contract of employment which had express terms as to retirement and/or resignation. The parties did not know and agreed to make enquiries; I was then provided on 4 April from Unite and on 13 April from the applicants' solicitors with copies of a document entitled 'Statement of terms and conditions (Executive Council appointed officers) officers appointed before 1 June 2011'. I am grateful to the parties for supplying it. It seems that Mr McCluskey had never had a statement of terms and conditions of employment of his own.

35. The document provides that an officer must give at least one month's notice of his intention to leave the Union's employment. There is no retirement age; and there is no express provision as to retirement or resignation. It sheds no light on the current problem.

The Arguments

36. Mr Millar, in his oral submissions, put his argument, helpfully, in straightforward and simple terms. Under Rule 15.1 as amended, he submitted, there could only be a General Secretary election within the five-year term if one of the three events set out in the third sentence of Rule 15.1 had occurred. Without that, there could be no election; if one of those events had occurred, there must be an election. In this case the only one of the three events which could be relied upon was resignation; but resignation of itself was not sufficient; it was essential that the General Secretary's position had become vacant due to resignation; and, giving the word 'vacant' its ordinary meaning, the General Secretary had not vacated his post on 6 December 2016 or at any time prior to the end of the electoral process; the position was not vacant.

37. Indeed, on the contrary, Mr McCluskey continued to exercise much, if not all, of the functions of his office in his role as General Secretary. He had not left his post or stepped down from it. The mere giving of a notice of resignation is not itself a resignation and does not render the post vacant or create a vacancy.

38. Mr Millar accepted that, if the words of the vital sentence in Rule 15.1 had the effect that the General Secretary must have given up his post and ceased to function as General Secretary before an election could begin, there would have to be an interim period while the election process continued in which there would be no General Secretary; but, he submitted, that was not relevant to the issue of construction; the problem could be addressed by making suitable arrangements; and it would only be necessary to make such arrangements if, for one of the three reasons spelt out in Rule 15.1, the minimum five-year term of office had to be foreshortened.

39. I have not sought to set out all of Mr Millar's submissions but to digest, I hope accurately, the major thrust of his points; and I come now to Mr Segal's submissions, which I have approached in the same way. He too began by directing me to the test which both sides agreed that I should apply. He submitted that, if one had asked an ordinary member of the Union after the Executive Council had announced Mr

McCluskey's tendering his resignation with effect from the end of April 2017 and the resulting forthcoming election for his post whether there was a vacancy, that member would have replied firmly in the affirmative. Once the resignation had been tendered, there was no choice other than to hold an election for his position; the Union has to have a General Secretary; and, therefore, an election became inevitable. No one would have thought that that election could not start until the date on which the resignation expired; that was clearly not the belief of the Union and would not have been the belief of a reasonable member of the Union.

40. Accordingly, on the basis of the test which I should apply, which was not that applied to a question of statutory construction, the General Secretary's post was vacant from December 2016.

Conclusion

41. I have come to the conclusion that Mr Segal's submissions are to be preferred. Mr Millar's argument depends upon a literal interpretation of the words *'if the General Secretary position becomes vacant';* at its centre is the submission that, while the General Secretary remains in office pending the expiry of his resignation at the end of the electoral process, his position is not vacant. If those words were to be found in a statute and the issue which I have to decide were to be one of statutory construction, that argument would have substantial force; but my task is not to approach the issue as one of statutory construction but to ask myself how would the ordinary or reasonable member of the Union understand the relevant words. I must, following Heatons Transport and the subsequent authorities, resist the temptation to construe the words of the rule book as if they were drafted by parliamentary draftsmen and, instead, construe them as they would be understood by such members of the Union.

42. Adopting that approach, as I must, it appears to me to be clear that any such member, if asked once he had read the information provided by the Executive Council in December 2016 or had otherwise learnt that Mr McCluskey had resigned with effect from the end of April 2017 and there was to be a General Secretary election which would end at that date, would, if asked whether the General Secretary post was now vacant, answer in the affirmative; and if asked whether there was now a vacancy for the General Secretary post, would give the same answer. It is surely commonplace for an organisation, whether a business, a charity or a trade union, when someone has given notice of retirement or resignation at a future date to say that there is a 'vacancy' and to take steps to fill that vacancy.

43. In my judgement, the reasonable union member, operating in the real trade union world, would not understand Rule 15.1 as amended to mean that the General Secretary's resignation would have to have become fully effective before the Union could embark on an election for his position, with the effect that there would be an interregnum of some substantial time in which the Union would have to be without a General Secretary. I appreciate that, were there to be such an interregnum, the Union would have to and would adapt to cope with it – as it would if a General

Secretary were suddenly to die in office; but I do not believe that the reasonable member of the Union would understand the words of Rule 15.1 to have that effect when it was not necessary.

44. Accordingly, I resolve the preliminary point in favour of Unite.

His Honour Jeffrey Burke QC

Assistant Certification Officer