

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

Ms D Corrigan

v

GMB (No 1)

Date of Decision:

20 March 2007

DECISION

Upon application by Ms D Corrigan under section 55(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

- (i) I declare that prior to 8 May 2006 the GMB acted in breach of section 46(1)(a) of the 1992 Act by failing to secure that, following the resignation of the former General Secretary in April 2005, the position of General Secretary of the GMB was filled by a person elected to it at an election satisfying the requirements of the 1992 Act.
- (ii) I do not consider it would be appropriate to issue an enforcement order.

REASONS

1. Ms Corrigan (“the Claimant”) is a member of the respondent trade union, the GMB (“the Union”). By an application dated 15 May 2006, Ms Corrigan made a complaint to me against her Union arising out of the resignation of the Union’s former General Secretary on 7 April 2005 and the resultant vacancy of the office of General Secretary. Following correspondence with my office, Ms Corrigan identified her complaint in the following terms:-

‘In breach of section 46(1)(a) of the 1992 Act, following the resignation of the former General Secretary on 7 April 2005, the GMB failed to secure that the position of General Secretary of the union was elected at an election satisfying the requirements of Chapter IV of the 1992 Act.’

2. I investigated the alleged breach in correspondence and a hearing took place on 20 February 2007. Ms Corrigan was represented by Mr D Rafferty, a volunteer worker for the Belfast Unemployed Centre. Mr Elliott, an officer of the Union from July 1988 to May 2005 attended and was called by Mr Rafferty to give evidence. The Union was represented by Mr Jason Galbraith-Marten, instructed by Mr J O’ Hara of Thompsons, solicitors. Mr Alan Garley,

South Western Regional Secretary provided a witness statement and gave evidence. Mr Alan Wylie, GMB Finance Director, was also in attendance. A bundle of documents was prepared for the hearing by my office. The rules of the Union were also in evidence. Both Mr Galbraith-Marten and Mr Rafferty submitted a skeleton argument.

Findings of Fact

3. Having considered the oral and documentary evidence, the witness statements and the representations of the parties, I find the facts to be as follows.
4. The chief executive officer in the GMB is known as the General Secretary and Treasurer. Following the usual practice in the Union I shall refer to the General Secretary.
5. In April/May 2003 Mr Curran was elected General Secretary.
6. On 29 October 2003 Mr Kenny was elected to the Union's Central Executive Council (CEC).
7. On 15 March 2005 Mr Curran was suspended from office.
8. On 23 March 2005 Mr Kenny was appointed under rule 14.2 to act as General Secretary - a position which under rule debarred him from standing in an election to fill the vacant post of General Secretary or that of Deputy General Secretary and did not carry a vote on the CEC. Mr Kenny agreed not to exercise his right to vote as an elected member of the CEC. Mr Kenny did not vote in any capacity on the CEC while acting as General Secretary under rule 14.2.
9. On 7 April 2005 Mr Curran's resignation was announced and a joint press statement was issued to that effect.
10. The 5 May 2005 was the effective date of Mr Curran leaving office.
11. On 5 June 2005 the Union's Congress noted that investigations into a number of allegations of electoral malpractice in the Union had been instigated and Congress agreed not to hold an election to fill the post of General Secretary immediately. The CEC agreed to return to Congress with proposals for changes to election procedures that would enable nominations to be sought within one week of a Congress in 2006 agreeing the changes. In its report inviting Congress to endorse the delay in the election and, in effect the appointment of Mr Kenny, the CEC explained that "in the event of the Certification Officer upholding a complaint on this issue the CEC would ask that an enforcement order should not be issued pending [the investigation and follow up on electoral malpractice] ... or alternatively that any enforcement order should allow time for such steps".

12. In July 2005 the Union agreed that Mr Kenny should be paid a salary equivalent to that which had been paid to Mr Curran. This salary was paid from 1 August 2005.
13. On 11 January 2006 the Assistant Certification Officer declared, in *Doyle v GMB (D/1/06)*, that the Union had breached its rules in not seeking nominations for the vacant post of General Secretary “forthwith” once it was clear that Mr Curran was leaving. No enforcement order was issued. Congress had agreed that the requirement under rule to call for nominations forthwith should not be met in seeking to replace Mr Curran.
14. In February 2006 the investigation into alleged electoral malpractice reported to the CEC with a number of recommendations for changes in the Union’s rules and procedures. The report, with all its attachments, was around 1000 pages.
15. On 11 March 2006 the Union’s recalled Congress 2005 amended the Union’s rules incorporating many of the recommendations in the investigators’ report and lifting the bar on anyone appointed under rule 14.2 standing in a future election. Congress triggered an election for the position of General Secretary.
16. On 8 May 2006 the Electoral Reform Services head of operations, who was the Independent Scrutineer for the election of the GMB General Secretary, reported that Mr Kenny had been elected unopposed.
17. On 15 May 2006 the Claimant wrote to the Certification Officer alleging that Mr Kenny held the post of General Secretary of the GMB without having been elected to it in an election satisfying the 1992 Act. Three days later, having heard of his recent election, she wrote again to the effect that Mr Kenny had held the position of GMB General Secretary for a considerable time without having been elected to it.
18. No complaint was received from any Union member about Mr Kenny not being elected according to Chapter IV of the 1992 Act until after he had been elected in May 2006.

The Relevant Statutory Provisions

19. The provisions of the 1992 Act which are most relevant for the purpose of this application are as follows:-

S46 Duty to hold elections for certain positions

- (1) *A trade union shall secure –*
 - (a) *that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and*
 - (b) *...*
- (2) *The positions to which this chapter applies (subject as mentioned below) are-*
 - (a) *member of the executive,*
 - (b) *any position by virtue of which a person is a member of the executive,*

- (c) *president, and*
 - (d) *general secretary;*
- (4) *This Chapter does not apply to the position of president or general secretary if the holder of that position –*
- (a) *is not, in respect of that position, either a voting member of the executive or an employee of the union,*
 - (b) *holds that position for a period which under the rules of the union cannot end more than 13 months after he took it up, and*
 - (c) *has not held either position at any time in the period of twelve months ending with the day before he took up that position.*

S.55 Application to Certification Officer

- (1) *A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.*
- (2) *On an application being made to him, the Certification Officer shall –*
- (a) *make such enquiries as he thinks fit, and*
 - (b) *give the applicant and the trade union an opportunity to be heard, and may make or refuse the declaration asked for.*

S. 61 Other supplementary provision

- (2) *Nothing in this Chapter affects the validity of anything done by a person holding a position to which this Chapter applies.*

S.119 Expressions relating to trade unions

In this Act, in relation to a trade union –

“executive” means the principal committee of the union exercising executive function, by whatever name it is called;

“general secretary” means the official of the union who holds the office of general secretary or, where there is no such office, holds an office which is equivalent, or (except in section 14(4)) the nearest equivalent, to that of general secretary;’

The Relevant Union Rules

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

FULL TIME OFFICIALS AND OFFICE HOLDERS

Rule 14 General Secretary and Treasurer

As at 2003

14.2 The Central Executive Council shall, if circumstances so warrant, in case of either a vacancy or a suspension, appoint an elected official to act as General Secretary and Treasurer pro tem, until a new General Secretary and Treasurer is elected, or a suspended General Secretary and Treasurer is restored to office. An elected official who holds such temporary office shall not be entitled thereby to a vote on the Central Executive Council, and shall not be eligible for nomination and election as General Secretary and Treasurer or as a Deputy General Secretary.

As at 2006

14.2 *The Central Executive Council shall, if circumstances so warrant, in case of either a vacancy or a suspension, appoint an elected official to act as a General Secretary and Treasurer pro tem, until a new General Secretary and Treasurer is elected, or a suspended General Secretary and Treasurer is restored to office. An elected official who holds temporary office shall not be entitled thereby to a vote on the Central Executive Council.*

RULE 15 – Election of General Secretary and Treasurer and of Deputy General Secretary

As at 2003

15.2 *Nominations shall be sought from the Branches of the Union by the Central Executive Council six months before the term of office expires, or forthwith in the event of a vacancy. Nominations shall be sent by Branches to a Returning Officer appointed by the Central Executive Council.*

As at 2006

15.2 *Nominations shall be sought from the Branches of the Union by the Central Executive Council six months before the term of office expires, or in the event of a vacancy, as soon as practicable taking account of any relevant matters. Nominations shall be sent to a Returning Officer appointed by the Central Executive Council.*

Summary of the Submissions

The Claimant

21. The Claimant argued that Mr Kenny acted as General Secretary of the GMB from 23 March 2005 to 7 May 2006 without at any time being elected in a way that satisfied the 1992 Act.
22. During that time Mr Kenny, among other things, successfully opposed an increase in the wage of GMB national officers which had been agreed by Mr Curran; he launched a job evaluation and crackdown on foreign junkets for national officers; he negotiated over the proposed merger with Amicus and TGWU; was involved in redundancies and promotions; lobbied MPs; attended the TUC conference as GMB General Secretary, and was paid akin to his predecessor.
23. A press statement issued by the Union after Mr Kenny's election in May 2006 contained passages as follows:-

"in his 13 months in charge ... the Union's finances have returned to surplus ... Membership is up by 4000 this is the first growth since the 1970s" "Last year (Paul Kenny) launched no-holds barred campaigns against the venture capitalists that took over the ownership of the AA."
24. In the Claimant's view this was clear evidence that in fact, and according to GMB itself, Mr Kenny was in full control as the GMB General Secretary. He became the day to day chief executive officer of the GMB on 23 March 2005 without being elected according to section 46 of the 1992 Act.

25. The Assistant Certification Officer had found (D/1/06) that under its rules the Union should have immediately set in hand the process of electing a successor. In the Claimant's view section 46(1) of the 1992 Act also required such an action. If taken, the action in her view would have meant that a properly elected General Secretary could have been in post some four months after Mr Curran's resignation.
26. In the Claimant's view the necessary action was not taken and Mr Kenny was appointed to act as General Secretary 'pro tem' because it was thought that the proposed merger with Amicus and TGWU would eliminate the need for any future election of a GMB General Secretary. Those were the circumstances in which Mr Kenny took a post which, under the rules of the Union, at the time debarred him from standing for election as General Secretary.
27. The Claimant did not accept that the investigation of alleged election malpractices was the real or a sufficient reason for not proceeding with an election as soon as it became clear that Mr Curran was leaving.
28. Mr Rafferty, for the Claimant, put it that the 1992 Act required unions to ensure that every person holding the position of General Secretary had been duly elected to that position in an election complying with the requirements of the 1992 Act.
29. He noted that a few limited exemptions from the election requirement exist, chiefly for new unions and in relation to proximity to retirement of previously elected General Secretaries. He argued that these exemptions did not apply in this case, nor are there any other exemptions which could apply.
30. Mr Rafferty accepted that section 61(2) of the 1992 Act meant that actions taken by an unelected General Secretary were not invalidated solely because he or she had not been properly elected. He explained that the Claimant had been concerned that section 61(2) might have been called on in defence of actions taken by an unelected General Secretary accused of other misdemeanours in office. He accepted that that was not argued by the Union.
31. The Claimant sought:
 - (i) a declaration that Mr Kenny had been acting as General Secretary of the Union for more than thirteen months without having been elected to that post, and
 - (ii) an enforcement order to the effect that in calculating when Mr Kenny should stand for re-election the clock should start from 23 March 2005 when he was appointed to act as General Secretary.

The Union

32. Mr Galbraith-Marten submitted that the principle issue for determination by the Assistant Certification Officer is whether Mr Kenny held the position of General Secretary for the purpose of section 46 of the 1992 Act. The Union contended that he did not hold that position; rather that he performed some

(but not all) of the functions of General Secretary in an acting role in the interim period. He called Mr Garley to give evidence.

33. Mr Garley drew a distinction between the position of Acting General Secretary and of General Secretary. Unlike the General Secretary, the Acting General Secretary holds office as a full voting member of the CEC. One is an elected post, the other filled by appointment of the CEC and, until 11 March 2006 a person holding such temporary office as Acting General Secretary was not eligible to stand for election as General Secretary. Mr Garley also said that Mr Kenny during his period as Acting General Secretary did not seek to use his vote in any capacity as a member of the CEC.
34. Mr Garley explained that he always regarded it as a trade union view that someone who acts up in a post should be paid the full rate for the work they do, without being guaranteed permanent appointment to the post should it fall vacant. That is why the Salaries Committee of the CEC resolved to pay Mr Kenny at a rate equivalent to that of General Secretary.
35. He accepted that Mr Kenny performed many of the functions listed by the Claimant but questioned the accuracy or significance of how some of them had been reported by the Claimant.
36. Mr Garley highlighted what he saw as the enormous defects in the Union's electoral system which were identified by the internal investigation and corrected by decisions of Congress before the election of Mr Kenny in May 2006. The changes in 2006 included forbidding the acceptance of monetary or other contributions to candidates campaigns, requiring candidates to submit a financial return to the National Director of Finance, forbidding canvassing by officers, officials and employees unless they took leave to do so, requiring candidates to disassociate themselves from any apparent breach of the election code as soon as he/she became aware of it, and regulating canvassing and listings.
37. Mr Galbraith-Marten submitted that prior to Mr Kenny's election in May 2006 he did not hold the position of General Secretary. He carried out some, but not all, of the functions of the General Secretary and that is not sufficient to bring him within the scope of section 46. The Union contended that there is a substantive difference between 'holding a post' and 'acting' in the role.
38. In the Union's view were the complaint to succeed and it be held that a person asked to carry out the functions of a relevant office for the purpose of section 46 is held to be a person holding that office, the Union could never lawfully appoint a person to an acting role, no matter how extreme the circumstances (following death, sickness, leave, maternity leave for example). The Union would be faced with a stark choice to ask someone to carry out the functions of the post knowing that it was acting unlawfully, or carry on without those functions being performed until a qualifying election had been held.
39. The Union recognised that it could not deliberately manipulate its structures so as to avoid the obligations set out in the 1992 Act. But it saw section 119 as

being designed to avoid a union saying it did not have a General Secretary and not electing the person who most closely approached that role.

40. Finally the Union submitted that if the decision went against them on this complaint no enforcement order should be issued as Mr Kenny had been elected as General Secretary in May 2006 at an election which has not been challenged in relation to the statutory requirements.

Conclusion

41. The parties are broadly agreed on the facts of this case except on one crucial point. In the Claimant's view Mr Kenny has held the office of General Secretary for the Union from 23 March 2005. The Union's view is that while Mr Kenny performed some of the duties of the General Secretary from 23 March 2005 he did not hold the office of General Secretary until 8 May 2006. Both agree that he was not elected to that post before May 2006.
42. The key question for me to determine is whether before May 2006 Mr Kenny was holding the office of General Secretary for the purposes of section 46 of the 1992 Act. This is both a question of law and of fact.
43. Section 119 of the 1992 Act says that for the purposes of the Act "general secretary means the official of the union who holds the office of general secretary or, where there, is no such office, holds an office which is ...the nearest equivalent..." This definition can be contrasted with that of the executive which the Act says means "the principal committee of the union exercising executive function by whatever name it is called". The general secretary is defined in terms of office or post whilst the definition of executive concentrates on function.
44. Moreover, as Mr Rafferty accepted, if the Act required every one who performed the functions of a General Secretary to have been elected there would be a breach of section 46 of the 1992 Act each time there was a casual vacancy and anyone was appointed to perform the functions of the General Secretary pending the holding of an election. This is unlikely to have been the intention of Parliament.
45. These arguments suggest that section 46(1) should be interpreted as providing some flexibility for a union in circumstances where the office of General Secretary exists but is vacant.
46. On the other hand, as Mr Galbraith-Marten appeared to accept, a flexible interpretation could leave it open for a union with a casual vacancy for the office of General Secretary to deliberately leave it vacant for an indefinite period, whilst an unelected officer carries out the functions of the General Secretary under some other job title such as "acting general secretary". This is also unlikely to have been the intention of Parliament.
47. The Act, as Mr Rafferty pointed out, makes special provision for the election of officers in newly formed unions and where an elected leader approaches

retirement age, but makes no special exemption in the case of a casual vacancy for the office of General Secretary. Essentially it has been left to the courts, or the Certification Officer to decide each case on its particular facts.

48. I am of the view that, in the case of a casual vacancy, a union may lawfully appoint an acting general secretary to perform the functions of the General Secretary but, should a member make a complaint to the Certification Officer, the Certification Officer will, just as the courts would, look behind the label to the reality and decide whether in fact that person is holding the position of General Secretary for the purpose of section 46(1).
49. In this case, on the issue of fact, I accept that Mr Kenny, unlike previous General Secretaries did not vote at meetings of the CEC. However the Union produced no example of any other General Secretary function he did not perform, and only disputed details of the functions listed by the Claimant. I find that all the General Secretary functions other than voting were vested in Mr Kenny and in Mr Garley's words he was paid the rate for the job.
50. The additional and unusual feature in this case is the length of time that Mr Kenny carried out those functions. He began to carry them out on 23 March 2005 when Mr Curran was suspended. He continued to carry them out after 5 May 2005 when Mr Curran resigned and there was a vacancy for the office of general secretary. He was not elected as general secretary until 8 May 2006.
51. On the facts of this case I find as a matter of fact that, although the office of General Secretary of GMB was nominally vacant from 6 May 2005, Mr Kenny was in reality occupying that office for a significant period before 8 May 2006 without having been elected to it. The reason they chose to delay any election is immaterial. There was a statutory obligation on the Union to hold an election far sooner than they did.
52. The period of time it takes a union to fill a casual vacancy for the office of general secretary will vary from case to case. Each case will depend on its facts. However, the longer it takes a union to hold an election for the vacant office of general secretary, the more likely it is that any person appointed to perform the functions of that office on an "acting" basis will be found, in reality, to be holding that office. On the facts of this case I have no doubt that Mr Kenny was in fact holding the office of general secretary in the period immediately prior to his election, whatever label the Union may have put upon his position.
53. It is for these reasons that I make the declaration:

"that prior to 8 May 2006 the GMB acted in breach of section 46(1)(a) of the 1992 Act by failing to secure that, following the resignation of the former General Secretary in April 2005, the position of General Secretary of the GMB was filled by a person elected to it at an election satisfying the requirements of the 1992 Act."

54. When I make a declaration I am required to issue an enforcement order unless I consider it would be inappropriate to do so. In this case I do consider it to be inappropriate. Since 8 May 2006 Mr Kenny has held the office of General Secretary of the Union by virtue of an election which no one has challenged as being in breach of the requirements of Chapter IV of the 1992 Act. That election allows him to remain in office without a further election until 7 May 2011.

E.G. Whybrew CBE
Assistant Certification Officer