

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

MR S CURRIE

v

PUBLIC AND COMMERCIAL SERVICES UNION

Date of Decision:

16 September 2005

DECISIONS

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

- (i) I refuse to make the declaration sought by the Claimant that the Public and Commercial Services Union acted in breach of section 46(1)(a) of the 1992 Act in its 2005 General Secretary Election.
- (ii) I refuse to make the declaration sought by the Claimant that the Public and Commercial Services Union acted in breach of section 47(1) of the 1992 Act in its 2005 General Secretary Election.

REASONS

1. By an application dated 31 March 2005 the Claimant made two complaints against the Public and Commercial Services Union (“PCS”, “the Union”). The application alleged a breach of section 46(1)(a) and a breach of section 47(1) of the 1992 Act relating to the Union’s 2005 election for its General Secretary. The alleged breaches are:-

Complaint 1

“that on or about 24 March 2005 in breach of section 46(1)(a) of the 1992 Act, the Union failed to hold an election for the post of General Secretary of the Union”

Complaint 2

“that on or about 24 March 2005 in breach of the section 47(1) of the 1992 Act, Mr Currie was unreasonably excluded from standing as a candidate in the Union’s election for the post of General Secretary”

2. I investigated the alleged breaches in correspondence. As required by section 55(2)(b) of the 1992 Act, the parties were offered the opportunity to be heard and a formal hearing took place on 22 August 2005. The Union was represented by Mr Ford of Counsel instructed by Ms Phillips of Thompsons Solicitors. Mr Lanning, PCS, Deputy General Secretary, Mr Kelly, PCS, Vice President, and Mr Cochrane, PCS, Head of Policy were in attendance. Mr Cochrane submitted a witness statement and gave evidence. Mr Lanning also gave evidence. A bundle of documents was prepared for the hearing by my office which contained relevant exchanges of correspondence. The rules of the Union and of three other unions (the Transport and General Workers Union, the GMB and Prospect) were also in evidence. Both parties submitted skeleton arguments. The Claimant had indicated that he would not be able to attend the hearing but submitted written submissions to supplement correspondence included in the bundle of documents. These decisions have been reached on the basis of the representations made by the parties, together with such documents as were provided by them.

Findings of Fact

Having considered the representations made to me and the relevant documents I make the following findings of fact:-

3. Mr Serwotka became General Secretary of the Union as a result of an election accepted by the High Court as satisfying the requirements of the 1992 Act and as having an effective date sometime in December 2000. In that election candidates had to be validly nominated by no less than 50 branches. Mr Reamsbottom, incumbent General Secretary, was not standing. Both Mr Serwotka and Mr Lanning a candidate in that election achieved the necessary 50 branch nominations.
4. In 2004 the Union’s National Executive Committee (NEC) decided that the election for General Secretary in 2005 should run in conjunction with the annual elections to the NEC. At its meeting on 7-9 December 2004 the NEC had before it a paper covering draft regulations laid under union rules. The regulations left open the number of branches who had to validly nominate a candidate for their name to appear on the ballot paper. The covering paper drew attention to the question of the level of this threshold in the following terms:

“The threshold is a matter for the NEC. The threshold was set at 50 for the 2000 GS election and at 25 for the DGS and AGS elections. The NEC will wish to consider whether the threshold of 50 branches is consistent with the need to ensure any candidate has sufficient support across the Branches of the union but also whether it is a realistic number for minority candidates. The Act requires that “no member of the trade union shall be unreasonably excluded as a candidate...”

5. The NEC is minuted as having 'noted' the paper. No decision on the nomination threshold is recorded. On the evidence of Mr Lanning I find that the NEC debated the issue and that there was a vote which was for the threshold to be the lower figure of 25. The election regulations, with the 25 nomination threshold, were circulated on 14 January 2005 to all branches of the Union by post and by other means, all designed to reach all Union members. Nomination forms and the timetable for the election were also sent to branches on 14 January.
6. At the closing date for nominations on 24 March 2005, Electoral Reform Services, the independent scrutineers for the election, reported that Mr Serwotka was the only candidate to attain the support of 25 valid nominations from supporting branches and was therefore elected unopposed. The Union announced the result that day, 24 March. On 31 March, Mr Currie e-mailed the Certification Officer registering a complaint.
7. On 3 May 2005 the Union circulated workplace representatives with a full list showing the 187 branches that had nominated Mr Serwotka, the 12 for Mr Wilde, the 2 for Mr Currie, and the 1 for Mr Priestly.

The Relevant Statutory Provisions

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

S.46 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) *that no person continues to hold such a position for more than five years without being re-elected at such an election.*

S.47 Candidates

- (1) *No member of the trade union shall be unreasonably excluded from standing as a candidate.*
- (2) *-*
- (3) *A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all the members are excluded by the rules of the union*

But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded.

S.53 Uncontested elections

Nothing in this Chapter shall be taken to require a ballot to be held at an uncontested election

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.*
- (5A) *Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or more of the following requirements –*
- (a) *to secure the holding of an election in accordance with the order;*
 - (b) *to take such other steps to remedy the declared failure as may be specified in the order;*
 - (c) *to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.*

The Union Rules

9. Principal Rules

Senior Full-Time Officers

PR11 “The Senior Full Time Officers shall consist of a General Secretary...The General Secretary and other Senior Full-Time Officers posts shall be filled by an election, conducted on the same basis as that laid down for membership ballots under these Principal Rules...”

Membership Ballots

PR20 “Subject to these Principal Rules, the NEC may issue regulations for the conduct of any membership ballot. Such regulations shall be published to Branches and shall be binding on all members...”

Submissions

10. The Claimant accepted that the Union’s decision to hold the General Secretary election at the same time as the NEC elections was the correct and logical step to take to reduce administrative costs. However, in putting in place the regulations for the General Secretary election, the Union effectively ensured that no election would take place as no candidate opposing the incumbent would be able to secure 25 branch nominations. The absence of an election breached section 46(1)(a) of the 1992 Act.
11. Similarly the same 25 nomination threshold acted as an unreasonable exclusion of him standing as a candidate in the election for the post of General Secretary. This was in breach of Section 47(1) of the Act.
12. The requirement for candidates to secure nominations from 25 branches does not work to ensure that a candidate has a minimum level of support in the Union. Branches vary in size from 50 to 3,000. So it would be possible for someone with only 5 nominations from branches with a combined membership of 5,000 to be excluded from the ballot paper but another with 25 nominations from branches with a combined membership of 1,000 would be included.

13. In the claimant's view the irrationality of this provision is made worse by the fact that branch general meetings are held with little more than 10 to 20% of the actual membership in attendance. The number of branch nominations in no way reflects the degree of support a candidate has. In an election for Vice-President (where no threshold operated) he received 1 nomination and nearly 13,000 votes whereas the candidates who defeated him had an average of 128 nominations but only got approximately 16,000 votes. Nominations by branches are not a measure of support in the wider Union.
14. The difficulty of getting 25 branch nominations was exacerbated by the fact that experience in past elections showed that the Union would not provide potential candidates with the names and addresses of branches. The Claimant did not accept the Union's argument that the 25 threshold was needed to avoid the costs incurred in an election brought about by a person with no level of support from members and no chance of success. Firstly, he did not accept that someone with a few nominations from large branches had no chance of success and secondly, the cost of holding a General Secretary election had been hugely reduced by holding it at the same time as the NEC election.
15. The PCS NEC put in place a set of regulations to limit the number of candidates to the extent that no election took place and the incumbent General Secretary would be installed for a further 5 years. The Union's aim was to secure control of the Union in the hands of a political faction led by Mr Serwotka on whom many members of the NEC were reliant for support. The effect of the regulations was to unreasonably exclude other potential candidates including himself. It was not about candidates having a level of support in the PCS; it was not about cost to the Union. It was about denying PCS members the right, enshrined in the 1992 Act, to elect the General Secretary on an individual postal basis.
16. The claimant requested that the Certification Officer should direct the PCS to hold an election for the position of General Secretary with no artificial threshold of nominations.
17. For the Union Mr Ford pointed out that the Union's regulations for the 2005 General Secretary election were discussed and agreed at the NEC meeting in December 2004. The threshold of nominations was reduced from 50 to 25 branches, consistent with the level of support required for the Assistant General Secretary and Deputy General Secretary elections. The purpose was to ensure that a candidate had a minimum level of support in the Union. The PCS has some 300,000 members organised into 911 branches so the threshold represents just 2.7% of the branches.
18. There was a regulation preventing the issuing of branch addresses without written permission of the Union. This was introduced after past allegations that the Union's database was being used to give some candidates an unfair advantage over others.
19. In the General Secretary elections held in 2000 the regulations required that a candidate received 50 branch nominations. The incumbent General Secretary

was not standing but Mr Lanning and Mr Serwotka, who at that time was not a full time officer, both achieved the threshold of 50 nominations. In the 2004 elections for Deputy and Assistant General Secretary, posts which had not been up for election before, the threshold was 25 branches and two candidates for each post achieved sufficient nominations. One was a lay activist.

20. Other large unions such as UNISON and Amicus adopt similar thresholds. Others, unlike PCS, have other requirements, such as minimum periods of membership, office holding or levels of competence that candidates must meet.
21. Mr Ford drew my attention to *Paul v Nalgo* [1987] IRLR 43 when the then Certification Officer considered a requirement that a member of that union was required to secure a branch nomination in order to stand as a candidate for the post of district representative. The Certification Officer then said “*I find nothing inherently wrong ... with the idea that a member should be required to obtain a certain level of support from his colleagues as a precondition of standing for election*”.
22. He also drew my attention to the words of Mrs Justice Smith in *Ecclestone v NUJ* [1999] IRLR 166, who said that section 47 was designed to ensure that a person was not excluded by the imposition of unreasonable or unfair criteria, or by the unfair application of fair criteria. The judge also spoke of good industrial practice as requiring criteria which were fair, capable of being objectively applied and preferably laid down in advance. Mr Ford contended that the 25 branch threshold as applied by the PCS in this instance satisfied those tests.
23. Mr Ford confirmed that he was not seeking the protection of section 47(3). The Union’s case was straightforward, Mr Serwotka had been re-elected in March 2005 in an election satisfying the 1992 Act. The 25 branch threshold which the Claimant had not met was made under rule and was not unreasonable.

Conclusions

24. The post of General Secretary is one of the posts to which the election provisions of the 1992 Act apply. The Claimant is a person of sufficient interest being a member of the Union.

Complaint 1

“That on or about 24 March 2005 in breach of section 46(1)(a) of the 1992 Act, the Union failed to hold an election for the post of General Secretary of the Union”

25. In my judgment an election for the position of General Secretary did take place in 2005, culminating in the announcement on 24 March that Mr Serwotka had been returned unopposed. Independent scrutineers were appointed, nominations were sought, rules and timetables were issued and the only reason a ballot did not take place was because only one candidate received sufficient branch nominations. Section 53 of the Act is clear that

nothing in the Act requires a ballot to be held in an uncontested election. For these reasons I dismiss this complaint

Complaint 2

“That on or about 24 March 2005 in breach of the section 47(1) of the 1992 Act, Mr Currie was unreasonably excluded from standing as a candidate in the Union’s election for the post of General Secretary”

26. The decision to require 25 branches to nominate a candidate before his or her name could go forward on to a ballot paper was a regulation properly made under the Union rules. The Union do not, however, (correctly in my view), seek to rely on section 47(3) permitting the exclusion of a candidate on the grounds that he belongs to a class of which all the members are excluded by the rules of the Union. The question I have to decide in this case is whether Mr Currie was unreasonably excluded from standing for the Office of General Secretary of the Union.
27. The General Secretary is in effect the Chief Executive Officer of the Union. It is a responsible and powerful position and one to which many members may aspire. It is also one for which Parliament has decreed elections shall be held involving, in the event of a contest, postal ballots of all members. Such elections are therefore both important and costly. In these circumstances the practice has developed among many unions, of attempting to ensure that only candidates with a genuine chance of success are permitted to stand. Various administrative procedures are used to try to achieve this end. The aim is not of itself unreasonable. The question is whether a particular way of seeking that end is reasonable.
28. I do not accept Mr Currie’s argument that in this case the issue of costs is irrelevant. The fact that the General Secretary election was held in conjunction with that to the NEC reduced the costs associated with any ballot for the General Secretary post. It did not though remove them. The need to reproduce election addresses and photographs and to print, distribute and make provision for the return of separate ballot papers all entails costs. This can of course never be a determining factor in whether or not to hold an election required by statute but it is a legitimate consideration in seeking to deter candidates with no chance of success from standing
29. Mr Currie’s strongest argument against the 25 nomination threshold is that, because branches vary so much in size and branch meetings are poorly attended, the number of nominations achieved is no measure of the amount of support a potential candidate has in the union. However, as long ago as 1987 in *Paul v NALGO* the then Certification Officer remarked that there was nothing inherently wrong with the idea that a member should be required to obtain a certain level of support from his colleagues as a precondition for standing for election. He went on to say, in that case (where the requirement was only for one branch nomination) that he was not persuaded that the disparity in branch sizes within the Union had the effect of making the nomination procedure arbitrary and unreasonable. I share that view. Certainly branch nominations are an imperfect measure of support throughout the

membership. But they do indicate that a candidate has attracted support from a range of component parts of the Union.

30. That said, there remains the possibility that a threshold system works to the advantage of those who have the support of one or more of the political factions which operate in most unions. Indeed the majority of those candidates cited by the Union as having achieved the threshold of nominations in previous elections in this Union would have been on the slate of one of the Union's factions. I do not though accept that that is sufficient to make a threshold or a particular level of threshold unreasonable.
31. Only one branch nomination is required to be a candidate for the NEC; for the General Secretary 25 nominations are required. These are though quite different elections. NEC members are elected for only 12 months and rules are in place to prevent the domination of the Executive by members from a department with a large number of members. The aim being to get a range of organisations represented on the NEC. With the General Secretary however the aim is to find one person with support across the Union as a whole. That seems a perfectly reasonable justification for having different thresholds for the NEC and the General Secretary.
32. The final issues for me to consider are - is the 25 nominations threshold a reasonable requirement and, was it reasonably applied in this case. There are 911 branches in the Union. 25 is equivalent to just fewer than 2¾ per cent of those branches. In the previous General Secretary election the requirement was for 50 nominations. Two candidates, including the present General Secretary, who was then a lay activist, achieved that level. The 25 nominations threshold was also met by four candidates in the election for a Deputy and an Assistant General Secretary in 2004. In these circumstances I find that of itself the 25 nominations threshold was not unreasonable.
33. However, as Mrs Justice Smith said in *Ecclestone v NUJ*, fair criteria must also be fairly applied. One concern in this area is that I was told by the Union that no candidate, or potential candidate, in union elections can have access to the branch addresses. This situation came about because the information would have to be drawn from membership records. Past experience was that incumbent officials were said to have misused it in securing their own election.
34. I believe the 25 nomination threshold criteria would be more defensible if branch addresses were available to potential candidates. However, I understand the reasons why they were not. I note that Mr Currie did not ask for this information and that as a previous Vice-President of the Union he would have been well aware of the networks and mechanisms for communicating with members and branches. Whether a less experienced or well known candidate would have been considerably disadvantaged by not having access to branch addresses is not a point I have to consider in this case.
35. In considering the fairness of the way the threshold was applied I have noted that this was not a situation where a new more restrictive condition was

applied suddenly and with individuals being given insufficient time to secure nominations. Anyone anticipating standing in the General Secretary election, which had to take place in 2005, could reasonably have expected to require nominations from upwards of 50 branches. By December 2004 they would have known the General Secretary election was to be run with the NEC elections and by 14 January they would have known that the number of branches from whom they needed nominations was not 50 but 25 and that they had two months to gather them.

36. I accept Mr Ford's submission that in this case the threshold was well known, clear, objectively assessed, reasonable and fairly applied. It is for these reasons that I find that Mr Currie was not unreasonably excluded from standing as a candidate in this election.

E G Whybrew

Assistant Certification Officer