

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

Mr J ECCLESTONE

v

NATIONAL UNION OF JOURNALISTS

Date of Decision:

2 July 2003

DECISION

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

1. I declare that the National Union of Journalists (“the Union”) acted in breach of section 46(1)(a) of the 1992 Act in March 2002 by failing to secure that Mr John Barsby was elected to the post of President of the Union in an election satisfying the requirements of Chapter IV of the 1992 Act.
2. I am satisfied that steps have been taken by the Union to secure that the same or any similar failure will not occur in the future. In such circumstances I am required by section 55(4) of the 1992 Act to specify in the declaration the steps taken by the Union. These steps consisted of amendments to the rules of the Union and to the Standing Orders of the National Executive Council made on 17 and 18 January 2003, as further particularised in the reasons for this decision.
3. I consider that it would be inappropriate to make an enforcement order.

REASONS

1. By an application dated 18 December 2002, the Applicant made a complaint against his union, the National Union of Journalists (“the Union”) alleging a breach of the 1992 Act in respect of its election processes. This is a matter within the jurisdiction of the Certification Officer by virtue of section 55(1) of the 1992 Act. Following correspondence with my Office the complaint was identified in the following terms:-

The election of Mr John Barsby to the post of President of the union at its Annual Delegates Meeting in March 2002 was in breach of section 46(1)(a) of the Trade Union and Labour Relations Act 1992.

2. I investigated this matter in correspondence. As required by section 55(2) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 5 June 2003. The Union was represented by Michael Ford of Counsel. Ms C Kirby, Legal Officer of the Union was in attendance. Mr Ecclestone acted in person. A bundle of documents in respect of the complaint was prepared for the hearing by my Office which consisted of relevant exchanges of correspondence with the parties, together with their enclosures. This decision has been reached on the basis of the representations made by the parties, together with such documents as were provided by them.

Findings of Fact

3. The facts in this matter are short and agreed. On 31 July 2001 my predecessor as Certification Officer, Mr Whybrew, decided an earlier case of *Ecclestone v NUJ* (D/79-81/01). Mr Whybrew made a declaration that the Union had breached section 46(1) of the 1992 Act by having failed to elect its President in accordance with the legislation. He made an enforcement order in the following terms:-

“I order that by 30 April 2003, the post of President of the National Union of Journalists shall be filled in a manner which satisfies the requirements of Chapter IV of Part 1 of the Trade Union and Labour Relations Act 1992 (as amended). In the intervening period, commencing with the date of this order, there shall be no election for the post of President of the union that does not satisfy the requirements of the legislation.”

4. The Union considered five different options to secure compliance with the order of the Certification Officer. One of the options, option five, was to change the rules of the Union so as to bring the Union within section 46(4) of the 1992 Act. Section 46(4) provides that the requirement to be elected at an election satisfying the requirements of Chapter IV does not apply if certain conditions are fulfilled. Specific legal advice was obtained by the Union on this option, which advice emphasised that the Union would need to make it absolutely clear in the Standing Orders and in practice that the President had no additional rights to attend or vote by virtue of her or his capacity as President.
5. The National Executive Council (“the NEC”) of the Union met to consider these options on 11/12 January 2002. The NEC resolved to accept option five and made a number of amendments to its rules, pursuant to the power to do so in rule 22(f). Specifically, rule 8(h) was amended, a new rule was added (now rule 8(j)) and rule 9(j) was repealed. New rule 8(j) substantially reproduces section 46(4) of the 1992 Act. On the basis of these amendments the Union considered that it could proceed with the election of President for the 2002/2003 period in compliance with both Chapter IV of the 1992 Act and the enforcement order of the Certification Officer.
6. The election of members to the NEC of the Union for the period 2002/2003 was concluded in February 2002. One of those elected was Mr John Barsby. The Annual Delegate Meeting (“ADM”) of the Union took place in March 2002 and the delegates to the ADM elected Mr Barsby to be the President of the Union. The new NEC and the new President took up office at the end of the ADM.
7. On 10 May 2002 the Union’s acting legal officer, Mr Barnacle, prepared a report in which he reviewed the role of national officers on NEC committees. The national officers of the Union are the President, General Secretary and Deputy General Secretary. They were each ex-officio members of the three standing sub-committees of the NEC, which are provided for in its Standing Orders, and of the Emergency Committee, which is provided for in rule 8(g). Ordinary members of the NEC were entitled under the Standing Orders to be

members of no more than one of the standing sub-committees. Membership of the Emergency Committee was restricted by the rules to four ordinary members of the NEC, elected by the ADM, together with the national officers. Mr Barnacle identified a potential problem arising out of the fact that the presence of the President on these committees was not by virtue of his election to the NEC but by virtue of his position as President. Mr Barnacle commented, *“It is arguable that to allow the President to vote in his or her capacity as a member of the executive on an NEC committee conflicts with this section of the Act”* (ie section 46(4)). He proposed three alternative amendments to the Standing Orders.

8. The NEC considered Mr Barnacle’s report at its meeting on 24/25 May 2002. One of the proposed amendments was put to the vote but it was not carried. Accordingly the President retained his ex-officio right to attend and vote at each of the NEC sub-committees and the Emergency Committee.
9. Mr Ecclestone made this complaint to my Office on 18 December 2002. The complaint was put to the Union for its comment in accordance with the usual procedure of the Certification Office.
10. The NEC of the Union met on 17/18 January 2003 and there was a discussion of the Applicant’s complaint. After considering a report by the legal officer, Ms Kirby, the following two resolutions were carried:-
 1. *“This NEC agrees to amend Standing Order 34b to allow for any member of the NEC to attend and speak at all NEC sub-committees, but that each member shall choose to be a member, and to vote, at only one NEC sub-committee.”*
 2. *“This NEC agrees under Rule 22(f) to amend Rule 8(g) to give effect to the principle that the Emergency Committee shall consist of four members elected from the next year’s NEC by ADM and three members elected by and from the NEC at its first meeting at the conclusion of ADM.”*

The purpose of these amendments was to remove from the President his ex-officio right to attend and vote at the sub-committees of the Executive and the Emergency Committee.

The Relevant Statutory Provisions

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

Section 46

- (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) -
 - (b) -
 - (c) president, and
 - (d) -
- (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.
- (5) A “voting member of the executive” means a person entitled in his own right to attend meetings of the executive and to vote on matters on which votes are taken by the executive....”

Section 119

- (1) In this Act, in relation to a trade union -

‘executive’ means the principal committee of the union exercising executive functions, by whatever name it is called.

Section 55

- (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)
 - (b) give the applicant and the trade union an opportunity to be heard,and may make or refuse the declaration asked for.
- (3) If he makes a declaration he shall specify in the provisions with which the trade union has failed to comply.
- (4) Where he makes a declaration and is satisfied that steps have been taken by the union with a view to remedying the declared failure, or securing that a failure of the same or any similar kind does not occur in future, or that the union has agreed to take such steps, he shall specify those steps in the declaration.

12. By section 55(5A) of the 1992 Act, I am required to make an enforcement order where I make a declaration unless I consider that to do so would be inappropriate.

The Union Rules

13. The Union rules most relevant to the Applicant's complaint are:-

Rule 8: National Executive Council

(a) - (f)

(g) There shall be an Emergency Committee of the NEC which shall consist of the three national officers plus four other members elected from the incoming NEC by ADM. The General Secretary and Deputy General Secretary shall be members of the Emergency Committee. The Emergency Committee shall have power to deal with any matter with which the NEC has power to deal unless two or more members of the Emergency Committee request that a matter shall be dealt with by the full NEC. When meeting to consider and decide upon an industrial dispute, the Emergency Committee shall invite to attend for that item such members of industrial councils and the NEC who are representative of members directly affected by the dispute. Such industrial council and NEC members shall have power to speak but not to vote on that item at the Emergency Committee meeting. The NEC and Emergency Committee shall have power to delegate their duty to hear complaints and appeals under rule 24 to a complaints committee consisting of NEC members only. The NEC shall elect from its own members such committees as it deems necessary to conduct the business of the union and shall have power to co-opt non-voting members on to those committees.

(h) At the time of election to office, the President, Vice-President and Treasurer shall have been elected under this Rule as members of the incoming NEC taking office following the Annual Delegate Meeting.

(j) The President of the NUJ shall not, in respect of that position, be a voting member of the NEC or an employee of the NUJ.

(i) the term of office for the President shall extend from the close of one ADM to the close of the next, but shall not in any case extend more than 13 months.

(ii) the President shall not have held the position of President or General Secretary at any time in the period of twelve months ending with the day he or she takes up the position of President.

(iii) the President shall attend meetings of the NEC and exercise voting rights solely as a member of the NEC [under rule 8] this rule, elected as a representative of an industrial or geographic sector pursuant to [8] (a) and (b).

(k)-(aa).....

STANDING ORDERS OF THE NATIONAL EXECUTIVE COUNCIL (PRIOR TO JANUARY 2003 AMENDMENTS)

30. The Chair shall have only one vote at Council meetings which may be cast either as a deliberative or a casting vote.

34. a) There will be three sub-committees of the NEC, the Policy Committee, the Development Committee and the Finance Committee. All matters of union business shall be referred to the relevant sub-committee for consideration before the full NEC, except those issues deemed to be matters of urgency. The three sub-committees shall

have authority and responsibility to make decisions on all matters related to their particular areas of responsibility. They shall be able to make and implement decisions in line with existing policy. Where two members of the sub-committee wish the matter to go to the NEC or where the matter is in doubt or needs clarification, this shall be referred to the full NEC for consideration.

b) The National Officers shall be members of the NEC committees. Otherwise no member of the NEC shall be a member of more than one committee.

The Submissions

14. The Applicant submitted that the role of the President of the Union at the time of this complaint was no different to the role of the President at the time of his previous similar complaint. He acknowledged that the Union had attempted to seek to take advantage of section 46(4) of the 1992 Act but he maintained that the changes were nothing more than cosmetic and had no substantive effect on the traditional role and influence of the President. The Applicant referred to *Gates v BECTU*, which concerned a similar issue with regard to the President of BECTU. In that case the then Certification Officer decided in November 2000 (D/23-24/00) that an indirect election for the position of President breached section 46 of the 1992 Act. That decision was upheld by the Employment Appeal Tribunal (EAT) in April 2001 (EAT/1462/00). In the course of his decision the Certification Officer referred to section 46(4) as applying to situations in which the President performs “*a limited ceremonial role*” (para 2.46). The EAT referred to, “*...a presidency of the rather honorary or titular kind that is described in section 46(4)...*” (para 10). With commendable diligence, the Applicant also drew my attention to the comments of parliamentary counsel in evidence to a House of Lords committee on 12 February 1992 in which he described the obligation to hold elections for certain positions as being, “*...subject to certain exceptions which are intended to exclude purely honorary posts*”. The Applicant submitted that the role of President in the NUJ was not ceremonial, honorary or titular. He argued that it was a key political office and granted the holder of the office greater powers than the other members of the NEC. In the Applicant’s submission, the effect of section 46(4) was to prohibit a President from being a voting member of the executive. He argued that it was not tenable for the Union to maintain that, when Mr Barsby voted on the NEC, he did so as an

ordinary member of the NEC and not as President. He further argued that the President's ex-officio voting position on the Emergency Committee took him outside the protection of section 46(4) and required him to be elected by the membership at large. He submitted that by rule 8(g) the Emergency Committee had all the powers of the NEC and, when appropriate, stands in place of the NEC. The Applicant stated at the hearing that he was not pursuing any similar point with regard to the President's attendance at the sub-committees of the NEC. Finally, the Applicant submitted that the President enjoyed voting rights beyond the ordinary members of the NEC by virtue of Standing Order 30, which gave him either a deliberative or casting vote at the NEC.

15. For the Union, Mr Ford contended that at the date of Mr Barsby's election Chapter IV of the 1992 Act did not apply to the position of President within the NUJ as the conditions contained in section 46(4) were fulfilled. Counsel submitted that such voting rights as were enjoyed by Mr Barsby were enjoyed by virtue of his election as an ordinary member of the NEC and not by his subsequent election at the ADM as President. In Mr Ford's submission such terms as ceremonial, honorary and titular were a gloss on the statute and the correct approach was to give effect to the natural language of section 46(4). With regard to the Emergency Committee, Mr Ford submitted that rule 8(g) had now been changed so as to remove the President's ex-officio position on it. He also pointed out that the Emergency Committee does not have identical powers to the NEC as it has no power to deal with any matter which two or more of the members of the Emergency Committee request to be dealt with by the full NEC. He also noted that "*executive*" is defined in section 119, for the purposes of section 46, as meaning, "*the principal committee of the union exercising executive functions, by whatever name it is called*". He stressed the use of the definite article in connection with the principal committee, which he submitted was a clear indication that there could be only one executive, in this case the NEC. My attention was drawn to *Paul v NALGO* (1987) IRLR 43 in which the then Certification Officer refused to accept that any of the eight National Service Conditions Committees of NALGO could properly be considered the principal executive committee of that union. Mr Ford further

submitted that the Emergency Committee is distinct from the NEC in membership and name and the fact that it may make some important decisions does not detract from its separation from and subordinate position to the NEC. With regard to the voting rights of the President in Standing Order 30, Mr Ford submitted that the Standing Orders are subject to the rules of the Union and Standing Order 30 is ineffective insofar that it is inconsistent with the rules. In this case rule 8(j) provided that the President shall not, in respect of that position be a voting member of the NEC. Mr Ford submitted that this effectively deprives the President of any right to vote beyond the right he enjoys as an ordinary member of the NEC. In addition, it was argued that this purported right gave no practical advantage to the President as, in the event of the other votes being tied, his vote would be decisive in any event, either as a deliberative or casting vote. Mr Ford finally argued that the Chair of the NEC was not necessarily the President. He noted that Standing Order 30 refers to the Chair of the NEC which, by Standing Order 11 could be either the President or Vice-President.

Conclusions

16. I accept Mr Ford's submission that in examining the relevant provisions I should give the statutory language its natural meaning and not give undue weight to any gloss that may have been put upon it. I observe that *Gates v BECTU* was not a case in which the interpretation of section 46(4) was an issue or apparently even argued. I accordingly reject the Applicant's argument that because the role of the President was not purely, "*ceremonial, honorary or titular*" it could not fall within the section 46(4) exception. The facts of this case need to be applied more specifically to the language of the statute.

17. Section 46(4) of the 1992 Act provides that:-

"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) ...
- (c) ..."

In the Applicant's submission this provision prevents a President who is not properly elected by the membership from ever being a voting member of the executive. However, such an interpretation gives no meaning to the words, "...*in respect of that position*". In my judgement, the natural meaning of the statutory language permits a President to attend and vote at a meeting of the executive but not "*in respect of*" his or her position as President. Accordingly, if the President has also been elected as an ordinary member of the executive he or she may vote in that capacity, but not in the capacity as President. I note that the rule changes made by the Union in January 2002 virtually reproduce section 46(4) of the 1992 Act and prohibit the President from being a voting member of the NEC "*in respect of that position*". Accordingly, in my judgement, the Applicant's primary submission fails. In assessing whether section 46(4) applies on the facts of this case it is not sufficient merely to examine the functions of the President before and after the rule changes. It is necessary to examine the words of the statute and to test if the section 46(4) conditions were met at the relevant time. Insofar as Mr Barsby voted on the NEC from March 2002, I find that he did so in respect of his position as an elected member, not as President, and that the Union was not disentitled for this reason from relying upon section 46(4)(a) to exempt the position of President from the voting requirements of Chapter IV of the 1992 Act.

18. I also reject the Applicant's submission with regard to the President's voting rights pursuant to Standing Order 30. The existence of Standing Order 30 is not in itself a breach of any of the conditions to be found in section 46(4). The rules of the Union prevail over the Standing Orders and it is plain from rule 8(j) that, as President, Mr Barsby could not be a voting member of the NEC. In my judgement it is implicit that rule 8(j) comprehends not only the fact of voting but also any privileges of voting, such as the right of the President, exercising his ex-officio powers as Chair, to cast his vote as an ordinary member at a later time to that of the other ordinary members. Accordingly, I find that the rules of the Union prevent the President from exercising any such privilege and, in as much as the Standing Orders purport to give him any such privilege, they are ineffective. Standing Order 30 does not have the effect of making the President, in respect of that position, a voting member of the

executive and thus requiring him to be subject to an election satisfying the requirements of Chapter IV of the 1992 Act.

19. The President's ex-officio position on the Emergency Committee gives rise to a number of issues. It is plain that the principal committee of the Union exercising executive functions is the NEC and also that section 119 refers to, "*the*" principal committee which, subject to the Interpretation Act 1979, would indicate that there is just one such committee in any union. The task in certain borderline cases, such as the case against Equity in 1999 (D/1-2/99), will be to identify which committee of the union is its principal committee exercising executive functions. However, many Executive Committees have sub-committees and such sub-committees will normally be considered to be part of the principal committee exercising executive functions. In these circumstances the members of the sub-committees will need to hold office in accordance with Chapter IV of the 1992 Act. This will not prevent other members being invited to provide factual information or to give technical or professional advice, so long as they do not attend as voting members. In my judgement, it is a matter of fact and degree in each case as to whether it can properly be found that the principal committee of a union exercising executive functions is exclusively its Executive Committee (however named), together with its sub-committees, or whether it also comprehends any other committee of the union. On the facts of this case, I note that the Emergency Committee is not established under the Standing Orders of the NEC but by the rules of the Union. Further, I note that the rules do not establish the Emergency Committee as an independent committee but as a committee of the NEC. Its powers are co-terminus with those of the NEC, although a matter may be removed from its competence if two or more of its members request that the matter be dealt with by the full NEC. I further note that rule 8(g) enables the NEC to "*elect from its own members such committees as it deems necessary to conduct the business of the Union and shall have power to co-opt non-voting members onto these committees.*". Against this background, I find that the Emergency Committee of the Union is a part of the NEC and as such membership of it is subject to the same statutory regime as the NEC.

20. The rules of the Union provided (until amended in January 2003) that the President shall be an ex-officio member of the Emergency Committee. The President therefore became, by virtue of his position as President, a voting member of this part of the executive, which he would not have been by virtue only of his membership of the NEC. Accordingly, I find that at the time of this complaint Mr Barsby was, by virtue of his membership of the Emergency Committee, a voting member of the executive in respect of his position as President. He was therefore, in my judgement, unable to take advantage of the exception in section 46(4) of the 1992 Act. He failed to satisfy section 46(4)(a). It follows that Mr Barsby occupied the position of President of the Union other than by virtue of an election satisfying the requirements of Chapter IV of the 1992 Act.
21. I accordingly declare that the Union acted in breach of section 46(1)(a) of the 1992 Act in March 2002 by failing to secure that Mr Barsby was elected to the post of President of the Union in an election satisfying the requirements of Chapter IV of the 1992 Act. I do not consider that it would be appropriate to make an enforcement order in the circumstances of this case. Mr Barsby left office as President of the Union in March 2003. Furthermore, the Union has taken steps to secure that the same or any similar failure will not occur in the future by the amendments it made to the rules of the Union and the Standing Orders of the NEC on 17 and 18 January 2003, as set out in paragraph 10 of this decision.

David Cockburn
Certification Officer