

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

**IN THE MATTER OF COMPLAINTS AGAINST
THE MUSICIANS UNION**

**APPLICANTS: MR J PETTERS
MR G SAUNDERS**

**Date of Hearing:
Date of Decisions:
2001**

**21 September 2001
12 October**

DECISIONS AND ORDER

The General Secretary/Scard Complaint

1. Declaration: The Musicians Union breached section 46(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), by failing to secure that Mr Scard’s continuation in the position of General Secretary for a period in excess of five years was by virtue of being re-elected at an election satisfying the requirements of Chapter IV of the 1992 Act.
2. I make no enforcement order pursuant to section 55 (5A) of the 1992 Act.

The Chairperson/Patrick Complaint

3. Declaration: The Musicians Union breached section 46(1)(a) of the 1992 Act, by failing to secure that the Chairperson, Mr Patrick, held the position of Chairperson by virtue of having been elected to it at an election satisfying the requirements of Chapter IV of the 1992 Act.

4. Pursuant to section 55(5A) of the 1992, I make the following enforcement order:

“The Musicians Union shall secure forthwith that:

- (i) Mr Patrick ceases to hold the position of Chairperson of the union pursuant to union Rule VII, and
- (ii) No member of the union occupies the said position of Chairperson otherwise than in accordance with section 46(4) of the 1992 Act or following an election held to satisfy the requirements of Chapter IV of the 1992 Act”.

REASONS

1. By their applications dated respectively 9 March and 6 April 2001, Mr Petters and Mr Saunders each made a number of complaints against their union, the Musicians Union (“MU”). Certain of these complaints were not accepted as being within my jurisdiction and one was dismissed on withdrawal (D/87/01). The remaining two complaints were heard together by consent. Mr Petters alleged that:

- (i) in breach of S46(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), Mr Scard had continued to hold the position of General Secretary for a period in excess of five years without being re-elected at an election satisfying the requirements of Chapter IV of the 1992 Act, and
- (ii) in breach of S46(1)(a) of the 1992 Act, Mr Patrick held the position of Chairperson of the union without ever having been elected at such an election.

I shall refer to these complaints as being “the General Secretary/Scard complaint” and “the Chairperson/Patrick complaint”. Mr Saunders made a similar application with regard to the General Secretary/Scard complaint.

2. I investigated these matters in correspondence and, on 21 September 2001 held a formal hearing. The union was represented by Mr E Cooper (Russell, Jones and Walker Solicitors) with Mr A Knight (Deputy General Secretary, MU) in attendance. Mr Petters was represented by Mr A J Hows (A J Hows & Assoc, Solicitors). Mr Saunders acted in person. A bundle of documents was prepared for the hearing by my Office which consisted of relevant exchanges of correspondence with the parties, together with their enclosures. An additional bundle was made available to the parties in advance of the hearing at the request of the union.

Findings of Fact

3. Having considered the representations that were made to me and the relevant documents I make the following findings of fact:-
 - 3.1 Mr Scard was first elected as General Secretary of the Musicians Union in 1989. He was re-elected in October 1994. In October 1999 Mr Scard stood again for re-election as General Secretary. He was unopposed and declared duly elected.
 - 3.2 The lawfulness of the October 1999 election was challenged in applications to the Certification Officer made by three members, Mr Read, Mr Irvine and Mr Johnson (Decisions D/2-3/00 and D/13-14/00). My predecessor upheld their complaints that the union had unreasonably excluded a member from standing as a candidate, had failed to send a notice to members advising them of the name of the scrutineer and had failed properly to appoint a scrutineer. An enforcement order was made which required the union to hold a fresh election for the post of General Secretary and to publish the results of that election before the 1 January 2001. The hearing of those complaints took place on the 23 March and 31 May 2000. The decisions on the first two matters were given, and an enforcement order was made, on the 27 March 2000. The decision on the third matter was given on the 1 June 2000.
 - 3.3 It was not contested by the union that Mr Scard had continued to act as General

Secretary after 27 March 2000 until a date in November 2000.

- 3.4 A further election for the post of General Secretary was held in the autumn of 2000, which resulted in Mr Kay being declared elected on the 13 November 2000 by a margin of just eight votes. The applicants allege that, notwithstanding this declaration, Mr Scard continued to hold himself out as General Secretary and that he signed at least one significant letter describing himself as the General Secretary on the 14 November. For the purposes of the present decision, however, nothing turns upon this particular allegation.
- 3.5 The union no longer holds Mr Scard out as being its General Secretary. Mr Kay is the duly elected General Secretary. However it would appear that Mr Kay was subsequently suspended from holding office and has since been placed on what has been described as “garden leave”. Any dispute between Mr Kay and the union has no relevance to this decision.
- 3.6 By rule VII(1) of the rules of the union the Executive Committee is to elect a Chairperson from amongst its members. Mr Patrick was elected in accordance with this procedure in 2001 and is the current Chairperson. In accordance with the rules of the union, the Chairperson not only chairs meetings of the Executive Committee but also has a second or casting vote at such meetings and chairs meetings of the Appeal Committee.

The Law

4. The provisions of the 1992 Act which are relevant for the purpose of these applications 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) *that no person continues to hold such a position for more than five years without being re-*

elected at such an election.”

Section 46(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;*

and the requirements referred to above are those set out in sections 47 to 52 below.”

Section 119 *“ ‘president’ means the official of the union who holds the office of president or, where there is no such office, who holds an office which is equivalent, or (except in section 14(4) or chapter IV) the nearest equivalent to that of president.”*

Section 54(1) *“The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).”*

Section 54(3) *“No such application may be made after the end of the period of one year beginning with the day on which the union announced the result of the election.”*

5. Rule VII(1) of the rules of the union provides *“At the first meeting of the EC in each year the EC shall elect a Chairperson and Vice-Chairperson for the year from amongst their number.”*
6. Under section 55 of the 1992 Act, any person having sufficient interest who claims that a trade union has failed to comply with any of the requirements of Chapter IV of Part I of the 1992 Act concerning the need for, and conduct of, elections to certain positions may apply to me for a declaration to that effect.
7. Section 55 of the Act empowers me to make such enquiries as I think fit and, after giving the applicant and the union an opportunity to be heard, to make or refuse to make the declarations asked for. I am required, whether I make or refuse the declaration sought, to give reasons for my decision in writing. Such decisions may be accompanied by written observations on any matter arising from, or connected with, the proceedings.

8. In making a declaration under section 55 of the Act I am required to specify the provisions with which the trade union has failed to comply. Where I make a declaration I am required, unless I consider to do so would be inappropriate, to impose an enforcement order on the union.
9. Under section 55(5A) my enforcement order should impose one or more of the following requirements on the union:-
 - 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 Submissions

The General Secretary/Scard Complaint

10. The union submitted as a preliminary point that I was precluded from hearing this complaint as it effectively reproduced the causes of action that had been raised in the complaints brought by Mr Read, Mr Irvine and Mr Johnson. In the union's submission, this gave rise to the defence of res judicata or cause of action estoppel. Mr Cooper argued that the earlier cases and the present case arose from the same circumstances, namely the election for the position of General Secretary in 1999, and that this in itself was sufficient for the doctrine of res judicata to apply. He submitted that this was a matter of general importance to trade unions as it gave rise to the prospect of other members bringing further complaints on a matter that had already been determined by the Certification Officer. He stated that it was not only contrary to public policy for the same circumstances to be relitigated by different members but that this could lead to an enormous drain on the resources of both my Office and the trade union concerned. He argued that the same complaints could have been advanced at the hearings in March and May 2000 but were not so advanced. He further submitted, by way of support for his earlier arguments, that section 54(3) of the 1992 Act provides for a limitation period of one year "beginning with the day on which the union announced the result of the election" and that accordingly the present applications, having been made in March and April 2001,

were out of time.

11. Mr Cooper stated, however, that if I found against him on these preliminary points, the union would have to concede that there had been a breach of section 46(1)(b) of the 1992 Act by the union in relation to the complaint.
12. On behalf of Mr Petters, Mr Hows submitted that his client's complaint related to the period after the Certification Officer had made his decision in the Read, Irvine and Johnson case on the 27 March 2000. He stated that before this decision it may have been understandable for the union to have maintained that Mr Scard was the duly elected General Secretary but not thereafter. He asserted that it was simply not possible for anyone to have raised this complaint prior to the 27 March as no one could then have known that the union would continue to allow Mr Scard to hold the position of General Secretary after that date. Mr Hows further submitted that the principle of *res judicata* did not apply as the issues to which the present complaint gives rise are not identical to the issues in the earlier cases and that the parties are not the same. Finally, he submitted that the union had had different options open to it to ensure that the administration of the union could continue to function. There was no need for Mr Scard to continue to have been held out as the General Secretary.
13. Mr Saunders adopted the arguments advanced by Mr Hows.

The Chairperson/Patrick Complaint

14. The union conceded that the position of the Chairperson fell within the definition of 'president' in S119 of the 1992 Act and that Mr Patrick had not been elected to the post of Chairperson at an election complying with Chapter IV of the 1992 Act. In these circumstances the union was obliged to concede and did concede that it had failed to secure that Mr Patrick held the post of Chairperson by virtue of a qualifying election in breach of S46(1)(a) of the 1992 Act.

Conclusions

The General Secretary/Scard Complaint

15. The term *res judicata* is used to describe the defence to an entire cause of action, the ground of it being that the whole of the legal rights and obligations of the parties in relation to the cause of action have already been determined as between the parties by an earlier final judgement. Its essence is that the earlier proceedings were between the same parties and involved the same subject matter.
16. These proceedings are clearly not between the same parties as were involved in the complaints brought by Read, Irvine and Johnson. Mr Cooper was unable to direct me to any authority of the basis of which he could argue that the principle of *res judicata* extended beyond the same parties. On this ground alone Mr Cooper's central submission cannot succeed.
17. Having so decided, it is not necessary for me to determine whether the subject matter of this complaint is the same as in the case of Read, Irvine and Johnson. However, if it were necessary, I find that the complaints in this case did not relate to the same subject matter. In the case involving Read, Irvine and Johnson the successful complaints were about the mechanics of the ballot conducted in the autumn of 1999 and were brought under section 47(1), section 49(1) and section 49(5) of the 1992 Act. The present complaint looks to the union's failure to secure that Mr Scard did not occupy the position of General Secretary after the 27 March 2000 and is brought under section 46 of the 1992 Act. Accordingly, this is a complaint which looks to a failure by the union of a different description and at a different point of time. As such it is not a complaint which could have been brought at the same time as that brought by Read, Irvine and Johnson.
18. I also reject the argument that the application was out of time as it had not been made within one year of the announcement of the result of the election. In my judgement the

limitation period of one year applies to applications in which complaint is made of a failure to comply with the statutory requirements regarding the mechanics of an election. It does not apply to the more general duty or requirement on a union imposed by section 46 of the 1992 Act to secure that a person holding the relevant position does so by virtue of having been elected in a lawful election within the last five years, in circumstances where the complaint does not turn on any of the specific requirements of section 47 to section 52 of the 1992 Act. If this were not the case, there would be no remedy available to a member if a General Secretary exceeded his or her initial period of five years in office without there having been any further election. It cannot be said that in these circumstances the relevant limitation period began to run from the date of that General Secretary's initial election.

19. I have considered whether in the circumstances of this case it would be appropriate for me to make an enforcement order under section 55(A) of the 1992 Act. I have been informed that Mr Scard is no longer held out as being General Secretary, that a fresh election has been held and that a new General Secretary has been elected, albeit that there remain some internal difficulties. In these circumstances the applicants do not seek an enforcement order and I do not make one.

The Chairperson/Patrick Complaint

20. The union conceded that Mr Patrick, as Chairperson of the Executive Committee occupied a position which falls within those described in section 46(2) of the 1992 Act and that he held that position otherwise than being elected at an election satisfying the requirements of Chapter IV of the 1992 Act. This concession was properly made following the decision of the Employment Appeal Tribunal in *BECTU v Gates* (EAT/1462/00), given on 7 July 2001, in which the EAT upheld the decision of my predecessor given on the 2 November 2000 that the indirect election of a relevant post-holder by members of the Executive Committee does not satisfy those statutory requirements. Accordingly I find that the union is in breach of section 46(1) of the 1992 Act by failing to secure that Mr Patrick held the position of Chairperson by virtue of such an election.

21. I consider that in the circumstances of this case it is appropriate that I make an enforcement order having regard in particular to the continuation in office of Mr Scard after the decision of the Certification Officer in the case of Read, Irvine and Johnson. I have been informed by the union that there are various ways in which it might bring itself within the relevant statutory provisions, not all of which would require a ballot to be held. For example, advantage might be taken of section 46(4) of the 1992 Act. The union would wish to consider its position and reach a conclusion within its own democratic processes. I respect that view and therefore decline to order that an election be held for the position of Chairperson. Having regard to the duties of the Chairperson and the interim measures that can be taken by the union, I do not consider that the proper administration of the union would be significantly adversely affected by ordering that Mr Patrick forthwith ceases to be the Chairperson and that neither he nor any other member of the union should occupy that position without either being lawfully elected or by virtue of section 46(4) of the 1992 Act. I accordingly make such an order.

D COCKBURN
Certification Officer

Observations

I am authorised by section 55(5) of the 1992 Act to make observations on any matter arising from or connected with the proceedings.

Mr Cooper argued that it could not have been the intention of Parliament that any union member can make a complaint to me on a matter which has already been the subject on a previous complaint and which has been finally determined. He submitted that there must be some mechanism for disposing of applications which are in effect repetitive and pointless.

I observe that not all applications which at first appear to fall into this category will in fact do so, as the present case demonstrates. Care must therefore be taken in not reaching an over hasty conclusion that future applications on similar subject matters are pointless. Guidance as to how identical issues might be dealt with is contained in section 55(10)(b) of the 1992 Act which deals with the situation in which there has been previous litigation over the same failure by a trade union. This section requires that “*on an application by a different person under this section in relation to that failure, the Certification Officer shall have due regard to any declaration, order, observations or reasons made or given by the court regarding that failure and brought to the Certification Officer’s notice.*” By parity of reasoning I shall also of course have due regard to any previous decision of the Certification Officer having regard to the alleged failure. Any application which is a pointless duplication of an earlier complaint will be dealt with expeditiously and the repetition of applications based on causes of action already determined may raise an issue as to whether they constitute an abuse of process.

Since the hearing of this matter I have been informed that Mr Patrick resigned from the position of Chairperson of the union with effect from 27 September 2001.