

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

**IN THE MATTER OF A COMPLAINT
AGAINST THE OFFSHORE INDUSTRY LIAISON COMMITTEE**

Date of Decision:

25 November 1994

DECISION

Under section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) I am empowered to make, or refuse to make, a declaration on the application of any person who claims that their trade union has failed to comply with one or more of the provisions of Chapter IV of Part I to the 1992 Act (“Chapter IV”) which imposes a duty to hold elections for certain positions. One of the requirements imposed in respect of these elections is that the trade union shall, before the election is held, appoint a qualified independent person (“the scrutineer”) to carry out specified functions in relation to the election.

The application and basic facts

1. On 1 August 1994 after some preliminary correspondence I received a formal complaint from nine members of the Offshore Industry Liaison Committee (“the union”) alleging that the union had failed to appoint a scrutineer as is required by law in respect of elections of members to the “Organising Committee” (the union’s principal executive committee) which took place on 27 May 1994.

2. Other allegations were made by the complainants in the course of the correspondence with me but these related to matters which were either outside of my jurisdiction or were overtaken by events. They are not dealt with in this decision.
3. I held a hearing in Edinburgh on 28 October 1994. I reserved my decision and reasons at the end of the hearing.
4. The complainants were represented by Mr Chambers (one of their number) and the union was represented by Mr Kemp of Philip, Gauld and Kemp solicitors.
5. In this complaint I must decide whether the law requires a trade union to appoint a scrutineer under section 49 of the 1992 Act where an election is uncontested and a ballot is not required to determine the result. At first glance this might seem to be a straight forward question but a detailed scrutiny of the legislative provisions of Chapter IV of the 1992 Act shows it to be a complex issue. At the public hearing held on this matter I was assisted greatly by helpful, clear and succinct submissions by Mr Kemp on behalf of the union and Mr Chambers on behalf of the 9 complainants and I am most grateful to them.
6. There is no dispute on the facts in so far as they relate to this issue. It is accepted by both sides that:
 - (a) the organising committee is the principal committee of the union exercising executive functions within the union:

- (b) the election of the members of the organising committee of the union which took place on 27 May 1994 was uncontested (by this I mean that the number of nominations for places on the executive committee was the same or less than the number of vacancies);
- (c) that the rules of the union do not require a ballot in such circumstances; and
- (d) that no scrutineer was appointed for the election.

The requirements of legislation

7. Section 46 of the 1992 Act requires that:

- “(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,*
(my emphasis).
 - (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 ...”*

Section 49(1) requires that:

“the trade union shall, before the election is held, appoint a qualified independent person (“the scrutineer”) to carry out -

- (a) the functions in relation to the elections which are required under this section to be contained in his appointment; and*
- (b) such additional functions in relation to the election as may be specified in his appointment”.*

8. Section 49(3) sets out a number of requirements placed on the scrutineer. These include supervising (or in some cases carrying out) the production of the voting papers and their

distribution and receipt of completed voting papers; inspecting the register of names and addresses of the members of the trade union. He must carry out this last function if a member or candidate alleging inaccuracies in the register asks him to do so and he does not consider the allegation to be ill-founded.

9. Section 49(3)(b) and (c) state that he shall be required:

- “(b) to take such steps as appear to him to be appropriate for the purposes of enabling him to make his report (see section 52);*
- “(c) to make his report to the trade union as soon as reasonably practicable after the last date for the return of voting papers”;*

10. Section 49(5) states:

“The trade union shall, before the scrutineer begins to carry out his functions, either -

- (a) send a notice stating the name of the scrutineer to every member of the union to whom it is reasonably practicable to send such a notice, or*
- (b) take all such other steps for notifying members of the name of the scrutineer as is the practice of the union to take when matters of general interest to all its members need to be brought to their attention”.*

11. Section 52 sets out what the scrutineer's report shall contain. It reads:

“(I) The scrutineer's report on the election shall state -

- (a) the number of voting papers distributed for the purposes of the election,*
- (b) the number of voting papers returned to the scrutineer,*
- (c) the number of valid votes cast in the election for each candidate, and*
- (d) the number of spoiled or otherwise invalid voting papers returned, and*

(e) *the name of the person (or of each of the persons) appointed under section 51A or, if no person was so appointed, that fact.*

(2) *The report shall also state whether the scrutineer is satisfied -*

(a) *that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election,*

(b) *that the arrangements made (whether by him or any other person) with respect to the production, storage, distribution, return or other handling of the voting papers used in the election, and the arrangements for the counting of the votes, included all such security arrangements as were reasonably practicable for the purpose of minimising the risk that any unfairness or malpractice might occur, and*

(c) *that he has been able to carry out his functions without such interference as would make it reasonable for any person to call his independence in relation to the union into question;*

and if he is not satisfied as to any of those matters, the report shall give particulars of his reasons for not being satisfied as to that matter.

(2A) *The report shall also state -*

(a) *whether the scrutineer -*

(i) *has inspected the register of names and addresses of the members of the trade union, or*

(ii) *has examined the copy of the register as at the relevant date which is supplied to him in accordance with section 49(5A)(a),*

(b) *if he has, whether in the case of each inspection or examination he was acting on a request by a member of the trade union or candidate or at his own instance,*

(c) *whether he declined to act on any such request, and*

(d) *whether any inspection of the register, or any examination of the copy of the register, has revealed any matter which he considers should be drawn to the attention of the trade union in order to assist it in securing that the register is accurate and up-to-date, but shall not state the name of any member or candidate who has requested such an inspection or examination".*

12. 52(2B) requires the report to also cover the performance of any other independent person appointed to count the votes in the election.

Subsection (3) states:

“The trade union shall not publish the result of the election until it has received the scrutineer’s report”

Sections (4) to (6) deal with the distribution of the scrutineer’s report to members.

13. Finally, section 53 states that, *“Nothing in this Chapter shall be taken to require a ballot to be held at an uncontested election”*.

The complainants’ case

14. The complainants assert that an independent scrutineer is required to be appointed by a trade union even in an election which is uncontested. The scrutineer must be appointed before nominations are opened. The complainants submission is straight forward. They say that section 49(1) is clear and unambiguous and requires the trade union “before the election is held. to appoint a qualified independent person (“the scrutineer”) ...” (my emphasis). They say that “election” includes an uncontested election and in support of this they point to three matters. First they say that the normal meaning of election includes an uncontested election. Secondly they say that section 53 makes it expressly clear that where the word “election” is used in Chapter IV it is meant to include an uncontested election (section 53 states “nothing in this Chapter shall be taken to require a ballot to be held at an uncontested election”). Thirdly they say that section 46 uses “election” without

qualification (like section 49) and this must include an “uncontested election” within its meaning. Otherwise a person returned at an uncontested election would not satisfy the primary requirement of Chapter IV contained in section 46 namely 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 ...”(my emphasis). That in a nut shell is the complainants case.

The Union’s case

15. The union contend otherwise. They say that when Chapter IV uses the word “election” it means different things in different places and the meaning of the word where it appears has to be determined from the context in which it is found. They say I must look to the whole scheme of the legislation (which I will deal with later) and to a number of inconsistencies in the statutory provisions if “election” is to be interpreted throughout as including an uncontested election. For example they point to the provisions of section 52(1) (see para 11) which states that the scrutineer’s report “on the election” shall state five specified matters, none of which can apply to an uncontested election. Another example of inconsistency is to be found in subsections 49(3A) and (3B). Subsection 3A deals with requests to the scrutineer to inspect the register of members. Such a request can only be made to him “during the appropriate period” 49(3B)(a) defines “appropriate period” as beginning with:

“... the first day on which a person may become a candidate in the election or, if later, the day on which the scrutineer is appointed”.

The union say this indicates that a scrutineer can be appointed after nominations open in an election and therefore if section 49 is to be read as meaning the scrutineer is to be appointed before nominations open there would be an inconsistency.

16. I now turn to the main submission by the union. It says that the correct way to interpret the provisions of Chapter IV is to look at it schematically. Section 46 starts off with the general duty to hold elections. In that section election is used in its wide context. It includes an uncontested election. Section 47 deals with nominations and makes express provision that no candidate shall be unreasonably excluded. Section 48 deals with the election addresses that candidates should submit. It is only after the nomination of candidates that you will ever know whether or not an election is to be uncontested.
17. Section 49 requires the scrutineer to be appointed. The union say this only applies where an election is contested. This conclusion is reached by reference to the functions the scrutineer is required to carry out by virtue of section 49(3) (which all relate to a ballot). It also points, in particular, to section 52(1). That subsection uses the word “election” in a narrow sense of “contested election” because all that the scrutineer is required to report on are questions about an election which is decided by ballot.
18. In relation to section 53 the union submits that the use of the words “ballot” and “uncontested election” in juxtaposition is to avoid what would be a drafting nonsense. Had the draughtsman said “Nothing in this Chapter shall be taken to require an election to be held at an uncontested election” it would be meaningless. Therefore reliance on section 53 as a means to interpreting “election” elsewhere in the provisions is unsafe.

19. The union also referred me to the pre-consolidated statutory provisions on which Chapter IV is based. These provisions are found in sections 12 to 15 of the Employment Act 1988 (“the 1988 Act”) and Part I of the Trade Union Act 1984 (“the 1984 Act”). The 1984 Act provisions set out the requirements relating to electing members of the executive committee. The 1988 Act introduced the requirement to appoint a scrutineer.
20. Section 15 of the 1988 Act drew a distinction between “ballots” and “elections”. However the union contend that this distinction is not significant because “ballot” was used where scrutiny was being introduced for political fund ballots (election being unsuitable) and “election” where reference was made to elections to the executive committee. These distinctions still remain in the consolidation.
21. The union’s case was that “election” must mean different things in different parts of Chapter IV. In certain circumstances it can include an uncontested election but where the context requires, it really means an election determined by ballot. The submission was that in section 49 the use of the word “election” necessarily means one to be determined by contested ballot. The common sense approach to the provisions was that it was not intended by Parliament that a scrutineer should be appointed in uncontested elections because there was nothing for him or her to do.
22. I was also referred to a Department of Employment booklet entitled “Trade Union Executive Elections”. This explanatory booklet seeks to describe in layman’s language the requirements of the statutory provisions relating to elections. The booklet does not directly deal with the question as to whether or not a scrutineer needs to be appointed in

an uncontested election but the union's contention is that by this omission it indicates that a scrutineer need only be appointed on a ballot and not an election which is uncontested.

Decision

23. This has not been an easy case to decide and I confess that I have found the statutory provisions to be inconsistent in at least one instance.
24. "Election" is not defined by the 1992 Act. Its meaning must be determined by its ordinary meaning and by its use in the statutory provisions. I do not think that its meaning is obscure or ambiguous and in these circumstances the booklet "Trade Union Executive Elections" is essentially irrelevant. My starting point therefore is the plain meaning of the word I am asked to interpret. The Shorter Oxford Dictionary defines "election" as "the action of choosing for an office, dignity or position; usually by vote" (my emphasis).
25. "Election" is of course a word used in statute elsewhere. Some guidance might then be taken from such an instance. Rule 17 of the Parliamentary Elections Rules reads as follows:-

"(1) If the statement of persons nominated shows more than one person nominated, a poll shall be taken in accordance with Part III of these rules.

(2) If the statement of persons nominated shows only one person standing nominated that person shall be declared to be elected in accordance with Part IV of these rules."

"Election" here clearly includes an uncontested election. I can rely upon the same interpretation of the meaning of the word "election" in sections 46 and 53 of the 1992 Act

because these implicitly include an election which is uncontested. The more difficult question for me is whether there is sufficient reason to interpret “election” in section 49 (relating to the appointment of a scrutineer) as having a more restricted meaning.

26. I might have been persuaded that “election” did have a narrower meaning if it had been shown expressly that this was Parliament’s intention and that on the face of the statutory provisions there was nothing for the scrutineer to do in an uncontested election, so that any report from him would be totally vacuous. The provision would then be potentially ambiguous. This has however not been shown. Even in section 52(1) it seems to me possible and proper for the scrutineer’s report to comply with the requirements in an uncontested election by stating that no ballot took place and that therefore none of the requirements of subsection 52(1 A to E) are relevant. But section 52(2) also includes a requirement on the scrutineer which directly affects an election even where there is **no ballot**. Section 52 requires of the scrutineer’s report shall also state whether the scrutineer is satisfied:
 - (a) “that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election...” (my emphasis).
27. One clear example of such a requirement is that no candidate had been unreasonably excluded from standing in the election. This requirement is found in section 47 of the 1992 Act and applies in an uncontested election as well as a contested one because the reason why an election may be uncontested is because a candidate has been excluded.

28. It is also of note that unless the word “election” includes uncontested election, there is no statutory requirement that members of the union should be informed about the election taking place. This is because the only notification the statute requires a member to be sent is that found in section 49(5) requiring the union to send notice of the name of the scrutineer to every member of the union or take such other steps of notifying as is the normal practice of the union to do so, before he begins to carry out his functions.
29. The statute however still may seem inconsistent. For example, the requirement found in section 49(2)(c) which requires the scrutineer to make his report to the trade union as soon as is reasonably practicable after the last date for the return of the voting papers. When is the report to be made in an uncontested election? These minor inconsistencies do not distract me from the view that I must apply the normal meaning of the word “election” in section 49.
30. I am reinforced in that view by consideration of the pre-consolidated statutory provisions to which the union drew my attention. In the 1988 Act Parliament chose to insert the independent scrutiny provisions into the 1984 Act provisions relating to executive committee ballots. In doing so it drew a distinction between “ballots” (for political funds) and “elections” for appointing executive committee members. If Parliament had wished to limit scrutiny to elections resolved by ballots in section 49 it could have expressly done so. It did however chose not to do so. Indeed a provision identical to section 53 in the 1992 Act was already in place in Part I of the 1984 Act. Parliament could have said that nothing requires the appointment of a scrutineer in an uncontested election in the same way it does not require ballot in such an election, but again it did not do so.

31. Can any help be found in the meaning of Scrutineer? I do not think so. “Scrutineer” is defined by the Shorter Oxford English Dictionary as “one whose duty it is to scrutinise or examine, especially one who examines votes at an election, etc”. The 1992 Act describes in detail the role of a “scrutineer” in an election under Chapter IV. Section 51A of the 1992 Act now also expressly provides that the counting of votes cast in the election can be undertaken by a person other than the scrutineer. He also has additional duties. The role of scrutineer as statutorily defined is therefore wider than that of the dictionary definition.
32. For all these reasons I am not convinced therefore that “election” in section 49 should be construed more narrowly than elsewhere in Part IV. I am therefore satisfied that there is a duty to appoint even in an uncontested election.
33. This leads me to deal with one more matter. Although it is not directly relevant to the determination I have made, the complainants’ contended that section 49 required the appointment of a scrutineer before opening of nominations in an election. In my opinion section 49 does not require this. The requirement imposed is that the appointment takes place before the election is held. The election is the process by which a person is appointed to the position and it seems to me therefore that it is possible under the statutory provisions for a scrutineer to be appointed after nominations open but before they close. Once nominations close a candidate can be elected unopposed. This approach is supported by the provisions of sections 49(3A) and (3B). The approach also explains the definition of “appropriate period” found in 3B(a) which appears to deal with the case where a scrutineer is appointed after a candidate becomes a candidate in the election but

before the election takes place. However, where a scrutineer is appointed after the opening of nominations it still must be in enough time for the notification of his appointment to be given to members (section 49(5)). This is to enable the scrutineer to be able to report that there are no reasonable grounds for believing that there has been any contravention of a requirement imposed by, or under, an enactment in relation to the election.

34. I therefore make the following declaration:-

I declare that the union breached the requirements of Chapter IV of Part I of the 1992 Act by failing to comply with the requirement to appoint a qualified independent person to act as scrutineer in the election of its Organising Committee (its executive committee) as required by section 49(1) of the 1992 Act. The members of the Organising Committee of the union do not therefore hold office by virtue of an election satisfying the requirements of Chapter IV of Part I of the 1992 Act as required by section 46 of the 1992 Act.

35. At the hearing the union undertook to rerun the election if I found that the statutory provisions had not been satisfied to a material degree. It asked me to indicate whether such a breach in the circumstances of this election was “material”. I do not know whether the outcome would have been different if a scrutineer had been appointed. It may be that other candidates may have stood. I have however received no complaints that anyone was unreasonably excluded (although the time limit for such complaints has not yet expired). I am satisfied that the union did not appoint a scrutineer in good faith and in the mistaken belief, shared I am sure by many (including other unions), that it was acting lawfully. It is not possible for me to rule whether the omission was material. It might well be. All I

can say is that nothing in the case before me indicated any other breaches of the requirements for elections. It must in these circumstances be for the union to decide how to proceed.

Observations

36. Section 55(5) of the Act allows the Certification Officer to make written observations on any matter arising from, or connected with, proceedings in relation to elections. I do so in this case as my decision, which I am convinced is the only one compatible with the statutory provisions, may seem to some to lack common sense. Certainly it would seem to require the scrutineer in the case of an uncontested election to produce a largely vacuous report. In deciding this case I have had little difficulty in interpreting the law. The statutory provisions seem clear.
37. The general policy aim is also clear. It is to secure that trade unions are run by people who have been put into office as a result of periodic free and fair elections. To this end there are detailed provisions relating to election addresses, the keeping of a register, independent supervision of any ballot, the counting of votes, reporting results to members and appeal to me or the courts in relation to breaches of these provisions. There is also a general obligation not to unreasonably exclude a candidate and, as we have seen in this case, to tell members before any election the name of the scrutineer.
38. There is though no direct obligation to tell members that an election is to be held or to inform members of the nomination procedures. The requirement to nominate a scrutineer, to tell members about that, and for the scrutineer to report that there were no reasonable

grounds for believing that there was any contravention of statutory requirements (including unreasonable exclusion) strike me as poor proxies for the direct obligations I have mentioned. This is particularly true given that the scrutineer's report on contraventions is of limited significance if a member complains to the Certification Officer or to the courts.

39. It is not for me to make policy but I note that detailed provisions about telling members of an impending election or calling for nominations need not be specified in statute. A requirement on the union to have and apply rules relating to nominations and notification of elections would be sufficient to reinforce existing policy by ensuring propriety in uncontested elections and make more sense of the scrutineer's role in such elections. I say this without in any way wishing to imply impropriety in the election which is the subject of this decision.

A handwritten signature in black ink, appearing to read "E G Whybrew".

E G WHYBREW
Certification Officer