

**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 NATIONAL UNION OF MINEWORKERS (YORKSHIRE AREA)**

Date of first complaint **25 November 1993**

Date of Decision (1) **Jurisdiction 17 March 1994**
 (2) **Non-election of officers and executive 14 April 1994**

Date Reasons Published **29 April 1994**

DECISION

Under section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) I am empowered to make, or refuse to make, a declaration on the application of a member who claims that their trade union has failed to comply with any of the requirements contained in Part I of Chapter IV of the Act concerning the need for elections to certain positions within the union.

The application

1. On 25 November 1993 I received a formal complaint from a member of the National Union of Mineworkers (Yorkshire Area) (the union), subsequently clarified by correspondence alleging that the union had failed to ensure that members of the union's executive committee and in particular Mr F Cave (Assistant General Secretary) had not been properly elected within the previous five years as is required by statute. The initial complaint referred to the Area Council but by the time of the second hearing related to the executive however designated.

Background

2. The National Union of Mineworkers (Yorkshire Area) is a trade union in its own right but it also forms a constituent part of the National Union of Mineworkers. The Yorkshire Area is presently taking steps to transfer engagements to the national union which if successful will mean that its assets would be transferred and it would cease to have a separate identity. The complainant brought this action because he alleges that one or all of the committee orchestrating the transfer have not been properly elected to their posts.

Jurisdiction

3. The union was not prepared to offer its defence on the substance of the complainant's case unless or until I had heard them on the question of whether the complainant was a member who was entitled to make a complaint under the Act. It was accepted by all parties that the complainant was not a full member of the union but a "Limited Member". The union argued that this meant he could not bring a complaint and that I had no jurisdiction to hear it. I heard argument on this issue at a formal hearing on 17 March

1994. For the reasons given below I decided on that day that I had the necessary jurisdiction and set the date for a second hearing which took place on 14 April.

4. On both occasions the union was represented by Mr Michael Ford of Counsel instructed by Christian Fisher, Solicitors. The complainant attended in person and was accompanied by a member of his union branch.

Decisions

5. (1) The complainant as a Limited Member of the National Union of Mineworkers (Yorkshire Area) is a member within the meaning of the relevant legislation and therefore entitled to bring a complaint to me about the election or otherwise of the executive and officers of his union.
- (2) The principal committee of the National Union of Mineworkers (Yorkshire Area) exercising executive functions (the Area Executive Committee), has not been elected in accordance with Part I Chapter IV of the Act. As a consequence its officers and members of the Area Executive Committee do not hold office by reason of an election satisfying the requirements of Part I, Chapter IV of the Trade Union and Labour Relations (Consolidation) Act 1992.

I set out separately in Parts I and II below the law, the argument and the reasons for my decision on each of these issues. In part III I deal with remedies.

Part I - The complainant's right to be heard

The Law

6. Part I Chapter IV of the 1992 Act requires unions to hold ballots for certain posts. It also provides in section 55(1) for complaint to me by a person with sufficient interest who alleges that his union has failed to comply with one or more provisions of the Chapter.

The definition of such a person is given in section 54(2) as

“(a) a person who is a member of the trade union (provided, where the election has been held, he was also a member at the time when it was held) or

(b) a person who is or was a candidate at the election.”

7. No definition of “member” is given in the legislation.

Types of membership under the rules of the Union

8. The rules of the National Union of Mineworkers (Yorkshire Area) mentions five types of member. These are:

(a) Full Members. Those eligible for this include those employed in the coal-mining industry in GB; those employed in other energy undertakings or other undertakings specified by Conference; employees of the Union; members who become MPs or MEPs; (with permission and subject to paying full subscriptions) all former members temporarily engaged in undertakings which the union does not organise; and unemployed members whose employment was terminated by the employer through redundancy or victimisation;

(b) Honorary Members;

- (c) Limited Members. Those eligible for this category are “any person having been a Full Member of the union for not less than twelve months, upon ceasing to be eligible for Full Membership and whilst not engaged in any full-time employment in respect of which that person would be entitled to apply for membership of another TUC affiliated trade union, and whilst under the age of 60 years”;
- (d) Retired Members. This category includes former Full Members on reaching retirement age or retiring early on health grounds or under a Voluntary Early Retirement Scheme. Limited members on reaching 60 and spouses of deceased former full Retired or Limited Members are also eligible;
- (e) Associate Members - admitted at the discretion of the Area Council.

9. At the end of 1993 there were 8,121 Full Members, 2,556 Limited Members and 59,839 others of whom over half were spouses.

The Union’s case

10. Having at one stage suggested in correspondence that the complainant was not even a Limited Member within its rules, the union conceded from the outset of the hearings that he was a Limited Member. They also accepted that the proper exclusion of someone from voting in an election under section 50(2) did not mean that they were excluded from making a complaint under section 55.

11. The essence of their argument was that membership for the purposes of the legislation should be seen as a matter of status, involving a cluster of considerations determined by the rules; and that one should also have regard to the purpose of the organisation in that someone who is peripheral to those purposes is unlikely to be a member. On those tests they argued that Limited Members like the complainant were not members within the meaning of the Act.
12. In a search for guidance on the meaning of the term member they drew attention to three cases previously decided by the Certification Officer (SOGAT D/3/90 5 October 1990, SOGAT D/2/91 31 July 1991, NACODS CO/1964/9 20 December 1990) and one High Court case (GKN Bolts and Nuts Ltd or Doukensley [1982] 2 All ER 856).
13. In both of the SOGAT cases the Certification Officer found that although a retired member was not a full member of the union he was a member for the purposes of bringing a complaint about his union's failure to elect its officers.
14. In the NACODS case the Certification Officer found that although the union rule book described retired members as members he did not think that the provision requiring members to be given a vote on a merger issue extended to every member of whatever category. He concluded that while exceptional cases may be rare the facts of the NACODS situation meant that their retired members were not to be regarded as members for the purpose of that merger ballot.

15. The GKN case was about the property rights of members on dissolution of a sports club. In that case the High Court held that even though honorary members paid a small annual fee they along with ‘Associates’ ‘Temporary Members’ and spouses and minor children of members were not entitled to a share of the assets on the dissolution of the club; only full members had that right.

16. The union argued that the case put by SOGAT to the effect that only those working in the trade could be members was so weak (and was in any case undermined by SOGAT’s decision to give retired members a vote in its merger ballot) that the Certification Officer had not had to address the real issue of what constituted membership. Only in the NACODS case had he done that and there he had concluded in his own words on the issue of membership -

“the matter must be determined on the circumstances of the relevant class of members in the light of the organisation and practices of the union as a whole. There may be cases in which the interests of a group of members are so remote from the normal representational functions of a trade union, from its finances and policy making, and from its activities in general that one must conclude that parliament could not have intended that the votes of that class of members should be capable of determining the ballot results. Such cases will no doubt be rare, but I have concluded that this is one such”.

17. Against this legal background and the assertion that the purpose of the union was also relevant, the union said that amongst the tests that should be used to define membership for the purposes of this complaint were:

- (i) the extent to which a person is entitled to participate in the day to day affairs of the union under its rules, such as whether the person is allowed to vote in elections under the union’s rules;

- (ii) the extent to which members participate in other aspects of the union's governance such as can they stand for office?
 - (iii) the extent to which members benefit from the representational functions of the union.

- 18. In that context it was significant that the complainant
 - (i) could not vote or hold office in the union;
 - (ii) would (probably) not benefit from the representational aspects of the union's service;
 - (iii) and was entitled to only very limited participation in the union's affairs.

- 19. The union asserted that within its rules it was clear that unless otherwise specified the term member referred to full members. It was further asserted that in the context of representative organisations such as trade unions, limited weight should be placed upon the fact that a person makes contributions or may receive benefits. The fact that a person is named as, or treated as, a member under the rules is an important indication of membership, although not decisive. The NACODS and GKN cases (see paragraphs 14 and 15 above) were cited to support this contention.

- 20. Given that trade unions are about representation and collective bargaining, Counsel argued that Limited Members had insufficient interest to be treated as members entitled to complain. Moreover if they were held to be members within section 56 they must also be members for all other purposes in the Act including political fund and merger ballot and in relation to discipline. Only in the case of elections might they come within a category

that could be excluded. This outcome was undesirable for policy reasons and not what Parliament had intended as it would entail a wholesale re-writing of rule books which Ministers had told the House of Commons was not the intention of the legislation.

21. For these reasons the union considered that Limited Members were not members within the meaning of section 54 of the 1992 Act and that the Certification Officer had no jurisdiction to hear the complaint brought under section 55 of the 1992 Act.

The complainant's case

22. The complainant explained that he had brought the case with some reluctance but given the proposed absorption of the Yorkshire Area and its funds into the National Union he was concerned that the affairs of the union should be in the hands of properly elected and accountable officials. As a Limited Member with a long history in the union he felt he owed it to existing full members to ensure that they had the say in decision and rule making that members had traditionally enjoyed; the union should not be governed by decisions taken by un-elected officials.

23. In terms of the position of Limited Members in the union he pointed out that as a Limited Member he:

- (i) had paid dues over very many years and should have a say in the future of the union and its assets;
- (ii) regularly attended and spoke at branch meetings;
- (iii) was eligible for union benefits such as sickness and funeral benefits;

- (iv) paid £1.67 a week to the Yorkshire Area which was more than the 97p a week paid to the Area by full members (£2.37 of a full member's subscription went to the National Union);
- (v) would not have to pay any arrears of subscription if he wished to become a full member on taking up full-time employment in the industry again;
- (vi) had the right to become a Retired Member on reaching age 60;
- (vii) represented his branch on the local constituency Labour Party.

24. The category of Limited Member had been created to accommodate mineworkers leaving the industry under voluntary redundancy schemes, and as his activities showed, they were an important category within the union who while only able to benefit in a limited way (on for example compensation issues) from the union's representational role they had sufficient rights and duties within the union to be considered as members and to have a role in seeing that the union was governed in a democratic way.

Reasons for reaching my decision

25. Before considering the substance of this case I have to decide what is meant by "member" in the 1992 Act. This is the first time my office has had to consider the question since the coming into force of that Act.

26. To determine this question I must first look to the 1992 Act. That Act does not however expressly define the meaning of "member".

27. Another possible source of definition is a union's rule book. However I do not think that the fact that a person falls within a category described as members in a union rule book will always mean that they are to be treated as a member for the purposes of the Act, although it is evidence that the union considers those persons to be "members". Equally the fact that someone is described otherwise than a member in a union rule book is not conclusive. If this were not the case a union might, by careful drafting of the rule book exclude individuals who are really members, from being treated as members under the Act.
28. In order to determine the meaning of member I must look elsewhere. My starting point is to consider the basis of the nature of the organisation of which membership is being claimed. A trade union, is defined by section 1 of the 1992 Act. For present purposes the relevant provisions are that a trade union is:-

"an organisation (whether temporary or permanent);

- (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or ..."*

29. It is of note that the 1992 Act envisages that a union can include in its constitution persons other than workers provided the majority of the composition of the union are workers. "Worker" is defined by section 296 as meaning:-

"an individual who works, or normally works or seeks to work

- (a) under a contract of employment; or*
- (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his or*

(c) *in employment under or for the purposes of a government department (otherwise than as a member the naval, military or air forces for the crown) insofar as such employment does not fall within paragraph (a) or (b) above.*”

30. At the very least, in order to satisfy the definition of trade union, the majority of a union’s composition must be individuals who work, normally work, or seek to work. They have combined for purposes which include the regulation of relations between workers and employers in a particular sector or sectors of employment. It seems to me, therefore that workers as defined in the 1992 Act who participate in a union must be treated as members for the purpose of that Act.

31. I am confirmed in this view by the way that the 1992 Act allows on occasions for members to be excluded from certain requirements of the 1992 Act. A good example of this can be found in section 50 (which is relevant to elections for executive members and specified national officers). Section 50(2) permits a union, under its rules, to exclude from voting the following :-

- (a) members who are not in employment;
- (b) members who are in arrears in respect of any subscription or contribution due to the union;
- (c) members who are apprentices, trainees or students or new members of the union.

32. Sub-section 3 further permits a trade union to restrict entitlement to vote to members who fall within particular classes. In my judgement these provisions demonstrate that Parliament contemplated member to include unemployed members, members in arrears with subscriptions, apprentices, trainees, students and new members even where they are

not described by the rule book as “full” members. Otherwise there would be no need for section 50(2).

33. On this construction if a subscriber to the union - however described in the rule book - satisfies either the definition of a worker or falls into one of the categories of members who can be excluded from voting - he or she is without doubt a member of the union for the purposes of the Act.
34. Before me, it was explained on behalf of the complainant that he was effectively an unemployed member who could obtain employment in the industry if work were available. This was not disputed by the union. If he gained employment in a qualifying sector (see paragraph 8(a)) he would again become a “full” member. It was accepted that when he reaches his retirement age he will automatically (under the rules of the union) be entitled to become a retired member.
35. In these circumstances I am satisfied that the complainant despite being described by the rule book as “a limited member” meets the test set out in paragraph 33. He thus falls within the definition of member used by the 1992 Act and, in such circumstances must be treated as a member of the union for the purposes of that Act.
36. I should at this stage deal with two further points. First the union made much of the fact that Rule 4 under the general heading of membership had a specific category (a) which was headed “Full Membership” and that included the phrase “in these rules the expression ‘member’ means full member unless otherwise stated”. I have already indicated in paragraph

27, that in my view the terms used in the rule book are not conclusive on the issue of membership. Nor do I attach great weight to Rule 4(a) as at (k) under the same Membership general heading there is a specific heading at Membership which states -

“The following members shall be the members:-

- (i) All members of the National Union who are eligible to be Full Members ...*
- (ii) All Limited Members admitted by the Area Council ...*
- (v) All Associate Members admitted by the Area Council”.*

37. Secondly even on the test advocated by the union (paragraphs 16-20) a Limited members interests and participation in the union as described by the complainant (paragraphs 23-24) would lead me to the view that such a member was a member for the purposes of section 54.

38. The definition of the trade union explained above does envisage that it may also comprise a minority of people who are not workers. It follows that persons comprising a trade union who are not workers will sometimes be members. It is not necessary in this case for me to decide the extent to which persons who are not workers (or otherwise are to be treated as a member of a trade union by construing section 50) should be regarded as members but it might be helpful if I made some observations on the point.

39. It seems to me that there are extremes of “membership”. There are those members who clearly are members (see paragraph 33 above) within the meaning of the Act. There may be others. Some people described as members will have no history of working in the industry or trade in question, pay no subscription and receive no benefits. They may be

unable to stand for office or speak at union meetings and may only have an association with the union following an invitation to become an “honorary” or “associate” member. It seems to me in such circumstances their interest in the union, determined by examining any rights they have in, and any duties they owe to the union is of such a “de minimus” nature that they should not be treated as members for the purposes of the Act. Between these two extremes however will fall individuals who have a tangible interest in the union. Whether or not they are to be treated as members of the union for any of the purposes of the Act will depend on the extent of their interest in the affairs of the union and this is determined by considering the cluster of rights and duties relevant to their relationship with the union.

Conclusion

40. Having considered all the arguments put to me at the hearing and in the submissions before the hearing I conclude for the reasons given above that Limited Members are members within the meaning of section 54 of the 1992 Act and that I do therefore have jurisdiction to hear this complaint under section 55 of the Act about the alleged non-election of the executive and officers of the NUM (Yorkshire Area).

Part II - The Substantive Complaint

41. As I indicated at the outset the complaint was that the union had failed to ensure that members of the union’s executive committee and in particular Mr F Cave (Assistant General Secretary) had not been elected within the previous five years as is required by statute.

The Law

42. Part I of Chapter IV of the Act at section 46 provides 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 the 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.*
- (2) The positions to which this Chapter applies (subject as mentioned below) are -*
- (a) members of the executive;*
 - (b) any position by virtue of which a person is a member of the executive;*
 - (c) president, and*
 - (d) general secretary. ...”*

The exceptions implied in (2) relate to such matters as new unions and employees nearing retirement age which it is common ground do not apply in this case.

43. Subsequent sections specify the conditions to be met include the following:

Section 48(1)

- “The trade union shall -*
- (a) provide every candidate with an opportunity of preparing an election address in his own words and of submitting it to the union to be distributed to the persons accorded entitlement to vote in the election; and*
 - (b) secure that, so far as reasonably practicable, copies of every election address submitted to it in time are distributed to each of those persons by post along with the voting papers for the election ...”.*

Section 48(1)

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

Section 51(4)

“So far as is reasonably practicable, every person who is entitled to vote at the election must -

- (a) have sent to him by post, at his home address or another address which he has requested the trade union in writing to treat as his postal address, a voting paper which either lists the candidates at the election or is accompanied by a separate list of those candidates; and*
- (b) be given a convenient opportunity to vote by post”.*

Section 51(5)

“The ballot shall be conducted so as to secure that -

- (a) so far as is reasonably practicable, those voting do so in secret ...”.*

What is the relevant executive

44. The first question I have to decide is what is the executive committee of the union for the purposes of section 46. The complainant initially specified that it was the Area Council. He based his view on an extract from the minutes of a Special Executive Committee meeting of the union held in Barnsley on 16 January 1989 which under the heading “The Employment Act” stated “It was agreed unanimously that the ‘Principal Executive Committee’ be the Area Council Meeting”.

45. However a week after the issue of jurisdiction was decided the union informed me that in their view the relevant executive committee was the Area Executive Committee (AEC) and not the Area Council (AC). They argued that although the two bodies exercised

similar functions, the AEC was the executive committee primarily because the Area Council was a very large and unwieldy organisation, originally comprising 250 delegates. I was told that the AC “dealt with policy decisions and ratified some AEC decisions. But serious and detailed discussions would largely be dealt with by the AEC”. The union did point out however that the distinction of functions between the two bodies had reduced “since now there is less business to be conducted in general and because the number of Delegates in the Area Council has become close to the number in the AEC... Thus the AEC is still the body which deals with the majority of executive functions, both under the rules and in practice”. To illustrate this the union pointed to the recent transfer of engagements arrangements, which had been “dealt with by the AEC and then reported to the Area Council”.

46. The union further explained that the AEC was directly responsible for the detailed organisation, membership and contributions of the union and the everyday union business including executive matters and some collective bargaining functions. The AEC had a series of sub-committees such as finance, education and compensation and legal matters, which held frequent meetings during the year. Union business on staff reductions and how they should be carried out had been handled by the AEC as well as proposals for rule changes.
47. The AEC by comparison was comprised of local officials there to represent their Branch. The main functions of the AC were to deal with policy decisions and ratify some AEC decisions. The amount of business was of a lower order than that handled by the AEC.

48. I find these telling arguments and wholly in tune with the view taken in a decision of one of my predecessors (D/5/87 G Stone/National Association of Teachers in Further and Higher Education). Paragraph 7 of that decision, which has close parallels with this case stated that in deciding which of two bodies was the executive committee, “a crucial consideration must be the amount of business handled by each of the two bodies”.
49. Against this background I decided and stated at the hearing on 14 April that the Area Executive Committee is the relevant committee for the purpose of section 46.

Did I have a valid complaint to consider

50. In its letter of 13 April and again at the hearing on 14 April the union argued that as no complaint had been made about the AEC there was no case for me to hear or for them to answer.
51. My Office had indicated to the complainant in November 1993 that he had to demonstrate that the body to which he referred was the union’s Executive Committee, as my writ only runs in relation to elections to such executives. At that stage, for the reasons indicated in paragraph 44, the complainant was adamant that the Area Council was the relevant body. Aware however of past difficulties in deciding which body is the relevant executive my Office when first telling the union of the complaint asked the union if the Area Council was its executive and if it was not which body was. A letter of 22 December 1993 then proceeded to ask questions about how the body, which the union thought was its executive, and its officers had been elected. From the outset then I made clear that in the

light of the complaint I had received I was investigating whether the union's executive, however designated, and its officers had been properly elected.

52. Even if this were not the case the complainant made clear at and on the day before the hearing that he was complaining about the union's executive however designated. So on 13 April I certainly had a complaint about the AEC, I carried out my investigation of that and gave the union a chance to be heard on 14 April (answering questions first posed sixteen weeks earlier). I am in no doubt that I had a valid complaint to consider and followed the proper procedures in considering it.

The election of the executive and officers of the National Union of Mineworkers (Yorkshire Area)

53. The three officers of the union are Mr K Homer (Area General Secretary), Mr J Walsh and Mr F Cave (each of whom is described as Agent/Assistant General Secretary). All three sit on the AEC but only in the case of Mr Homer would there be a statutory requirement for an election if he did not sit on the AEC. The union described how these officers came to fill their posts as follows:

- (1) Mr Homer was elected Financial Secretary in an individual pit head ballot supervised by the Electoral Reform Society and took office on 1 April 1980;
- (2) Mr Walsh was elected North Yorkshire Area Agent in a similar type of ballot in November 1980;
- (3) Mr Cave was similarly elected an Area Agent and took office on 3 May 1982.

There was disputed evidence about how the three subsequently assumed their present roles of General Secretary and Agent/Assistant General Secretary and of the significance of these changes. However the union did not contend that any of the three had been elected by a subsequent ballot, and certainly not by one satisfying the statutory requirements.

54. As far as the other twelve members of the executive are concerned the method of election is for branches to nominate candidates. A list of candidates is then circulated to each branch. Then at a branch meeting those present vote by a show of hands on an order of preference accorded to each candidate. The branch then sends its preferences to the union headquarters where the branch preferences are counted on the single transferable vote system. There is an election of this kind for half of the members each year and each member serves for 2 years.
55. The union did not contend that any of these procedures satisfied the statutory requirements.

Reasons for making my decision

56. For the reasons set out in Part I and in paragraphs 50 to 52 I was satisfied that I had a valid complaint from a member of the union that the officers and executive of the National Union of Mineworkers (Yorkshire Area) had not been properly elected according to statute.

57. Once I had taken that view the union did not contend that their procedures satisfied the statute. It is clear from the union's description of the way the officers and members of the executive have been elected that no attempt has been made to satisfy the requirements for elections which have been in force in some form since 1984.
58. It is my duty to specify the provisions with which the union has failed to comply. I suspect they have not satisfied any of the detailed provisions so I will specify only the general provisions they have not met.
59. First. The General Secretary has not been elected by any ballot since 1980 - and certainly not one satisfying the requirements in section 46(1) for a secret postal ballot of all members at least every five years.
60. Secondly. The method of electing the executive does not
- (i) give every member of the union a voting paper at their home address and thus offends section 51(4)(a);
 - (ii) provide that those voting to do in secret and thus offends section 48(5)(a);
 - (iii) provide candidates with the opportunity to prepare an election address and thus offends section 48(1)(a).

Conclusion

61. For the reasons given above I find that the General Secretary and executive committee of the National Union of Mineworkers (Yorkshire Area) have not been elected in accordance with Part I Chapter IV of the 1992 Act.

Remedial Steps

62. The union's solicitors wrote to me on 27 April saying

“The union is proposing to call an emergency Rules Revision Conference giving six weeks’ notice as required under Rule 43 and rule changes will be adopted in line with the rules governing the election of NEC members and which will require a postal ballot and supervision of the election by the Electoral Reform Society. Further the existing General Secretary Mr K Homer is retiring from his position on 10th June 1994. A postal ballot of all members of the union to elect all members of the Area Executive Committee will be held as soon as possible after that date.”

E.G.WHYBREW