

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTION 108A(1) OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

Mr D Eager

v

Equity (incorporating the Variety Artistes Federation)

(No 3)

Date of Decision

15 February 2012

DECISION

Upon application by Mr Eager ("the claimant") under section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

1. I refuse to make the declaration sought by the claimant that, on or around May 2011, Equity breached a rule to be implied into rule 40.2 of its rules by using its resources to campaign for one side of the argument in a referendum on the alteration of its rules.
2. I refuse to make the declaration sought by the claimant that Equity breached rule 46.4 of its rules on or about May 2011 by allegedly holding a referendum on a change of rules without having previously discussed the general subject matter of the alteration to rule 4 as required by rule 46.4.

REASONS

1. Mr Eager is a member of Equity (incorporating the Variety Artistes Federation) ("the Union" or "Equity"). By an application received at the Certification Office by email on 13 September 2011 he alleged breaches of the rules of the Union in relation to the referendum of Equity's members on proposed rule changes which took place in April/May 2011.
2. Following correspondence with the claimant, two complaints were confirmed by him in the following terms:

Complaint 1

That on or around May 2011 Equity breached a provision to be implied into rule 40.2 by way of custom and practice that the Union (the Council, the General Secretary and Senior Staff) should not use the Union's resources, not available

to other members, to campaign for one side of the argument in a rule change referendum.

Complaint 2

That on or around May 2011 Equity breached rule 46.4 by not discussing, at any representative conference or open meeting of members, the general subject matter of alteration to rule 4 prior to the referendum seeking to implement new rules 4.8.1, 4.8.2 and 4.8.3.

3. I investigated the alleged breaches in correspondence. A hearing took place on 1 February 2012. At the hearing, the claimant represented himself. Evidence for the claimant was given by himself and Mr Ian Seale, both of whom produced a written witness statement. The witness statement of Mr Eager addressed only his second complaint. Mr Eager also submitted written witness statements, in the form of emails, from Yvonne Gerry, Claude Starling, Michael Earl, Brenda Marsh and Roy Radford. The Union was represented by Ms Rebecca Tuck of counsel. Evidence for the Union was given by Ms Christine Payne, its General Secretary, who also produced a witness statement. Mr Eager and Ms Tuck each provided skeleton arguments. There was also in evidence a 205 page bundle of documents consisting of letters and other documentation supplied by the parties, including the 2009 rules of the Union, to which a further document was added during the hearing.

Findings of Fact

4. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follows:
5. Mr Eager has been a member of Equity for about 40 years. He has served on the Council of Equity for the last 20 years, apart from a break of two years between 2008 and 2010, during which time he served on the Rules Revision Working Party. Mr Eager was a Vice President of the Union between 1992 and 1994.
6. In or about January 2007 there was some publicity in the national press about Simone Clarke, a ballerina, arising out of her membership of the British National Party. Ms Clarke was also a member of Equity and a Deputy (the Union's equivalent to a shop steward). The Union felt unable to discuss her membership of the BNP with her as it was advised that to do so might be seen as a breach of rule 3.2.17, which is one of the powers/duties of the Union and provides as follows:

"To acknowledge the right of individual members to hold and express their personal political and other beliefs both in their private and professional capacities."

Nevertheless the Union offered her assistance to deal with the protests outside her place of work.

7. In May 2007 the Union held its Annual Representative Conference in Cardiff. A motion was submitted to Conference by the Union's Minorities and Ethnic Members Committee ("MEM Committee") which would have removed rule 3.2.17. This motion was defeated. The MEM Committee submitted a further motion

which called for a referendum to add rules 3.1.1.7 and 3.1.1.8 to the rules of the Union. The former proposed rule would include the promotion of equality as an object of the Union and the latter would similarly include active opposition to all forms of harassment, prejudice and unfair discrimination. This resolution was successful and the proposed rule change was accordingly put to a referendum at which it was approved.

8. The holding of referenda by the Union is a longstanding practice and was much valued by all those who gave evidence. I was informed that the nature of the work performed by Equity members makes it difficult for them to attend regular meetings and so the ability for major issues to be decided by a referendum has particular importance. Indeed, rule 46.3 provides for 14 rules which can only be amended if the amendment is made or approved by a referendum. One of these rules which is so protected is rule 3, dealing with the Union's objects, powers and duties.
9. In the spring of 2010 the MEM Committee revisited this general subject matter. It proposed a motion to the Annual Representative Conference that year which would have added words to rule 3.2.17. The words it proposed adding were as follows: "*except where the expression of those beliefs incites hatred or discrimination on grounds protected by equalities legislation*".
10. Upon receipt of this motion, the Union took legal advice. Its advice was to the effect that the wording proposed in the motion would not achieve its intended purpose. It was said to confuse hate crimes in criminal law with "equalities legislation" and so restrict the coverage of the types of discriminatory conduct to race and religion.
11. The Union's Annual Representative Conference in 2011 was held on 24 May. At that Conference there was a heated debate of the motion proposed by the MEM Committee. In essence, there were those who believed in freedom of expression and saw no reason for the Union to go beyond the law of the land in these matters. On the other hand, there were those who believed in the freedom of association and that members had a right not to associate with those who had conducted themselves in a certain way. Towards the end of this debate the General Secretary explained to the Conference that the Union had obtained legal advice that the proposed motion was worded inappropriately and Conference decided to remit the motion to Council for further consideration.
12. Council considered this matter in the coming months and obtained further legal advice. It was advised that different words should be added to the end of rule 3.2.17, namely:

"as long as the expression of personal political and other beliefs or other conduct or activities relating to those beliefs do not cause a breach of rule 3.1.1.8 by unfairly discriminating against, harassing or victimising other persons because of their sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age, or other status or personal characteristic."
13. It was further advised that there was no point in being able to expel a member for such conduct if the same person could immediately reapply for membership and

could not be refused. Accordingly the Union was advised to insert rules 4.8.1, 4.8.2 and 4.8.3. The proposed rule 4.8.1 was in the following terms:

“The Council may reject an application for membership if in its opinion the conduct or activities of the applicant have at any time been such as would amount to a breach of Rule 3.2.17 had the applicant for membership been a member at the time.”

Rules 4.8.2 and 4.8.3 were procedural rules that Council would follow in its application of rule 4.8.1.

14. At its meeting in November 2010, Council decided to hold a referendum on these matters and at its meeting in December 2010 it decided upon the precise rule changes to be put in the referendum. Although the additions to rule 4 did not require a referendum, it was decided that the most cost effective and democratic way to proceed was to include the proposed additions to rule 4 in the same referendum as the amendment of rule 3 as they were considered to be inter-dependent and related to a single matter of principle.
15. On 25 January 2011 Council voted to accept a motion from the MEM Committee calling for the Union to campaign to persuade members to vote “Yes” in the forthcoming referendum.
16. On 26 January 2011 Mr Eager sent an email to Mr Malcolm Brown, the then Acting General Secretary, stating that the Council’s policy to campaign for a particular side of the referendum question amounted to a misuse of Union funds. The Union obtained legal advice on this assertion and was assured that it was not acting wrongfully.
17. On 14 February 2011, Mr Eager again emailed the Union with a complaint. He asserted that the general subject matter of the referendum had not been discussed, as required by rule 4.6.4. He suggested different rule changes to those agreed by Council, including new rules 4.6 and 4.7 which he acknowledged had not been the subject of prior discussion as required by the rules. The Union again obtained legal advice and was assured that it was not in breach of rule, the general subject matter of the proposed changes having been discussed at the Annual Representative Conference on 24 May 2010. Mr Eager was informed that the Union did not accept that it had acted wrongfully.
18. In February 2011 Council approved a timetable for the referendum. Rule 4.0.2 provides that in any referendum a summary of arguments for and against the question, proposal or resolution shall be included in the referendum paper circulated to the membership. In accordance with past practice, members of Council were invited to write either the Statement in Approval of the rule change or the Statement in Disapproval. Two members of Council, Peter Barnes and Sanita Simms (the MEM Council member) volunteered to write the Statement in Approval. Barbara Hyslop (a former Council member) volunteered to write the Statement in Disapproval.
19. In or about late March 2011, the General Secretary held a meeting with those who had drafted the Statements in Approval and Disapproval, as was usual in these circumstances. The General Secretary checked the statements for

accuracy and defamation and to ensure that they covered the subject of the proposed rule changes. After a number of amendments of fact were agreed by the parties, the General Secretary approved the Statements for publication.

20. The referendum documents were despatched to members on 6 April 2011, together with the Spring edition of the Union's journal, 'Equity'. The referendum material was composed of an 11 page A5 referendum booklet which included the voting paper. The booklet contained a letter from the General Secretary, the Statements in Approval and Disapproval, the proposed new rules and the voting paper. The letter from the General Secretary informed members that the Council of Equity urged them to vote "Yes" in the referendum. The Statements in Approval and Disapproval were set out underneath the question that was being put, namely "*Do you approve of making changes to the Equity rules as set out on page 10 of this document?*" The voting paper set out the same question with a box for "Yes" and a box for "No". The Statements in Approval and Disapproval each contained arguments which refer to the position of people seeking to join the Union.
21. The Spring edition of 'Equity' contained an article by the General Secretary in which she commented that Council had for the first time decided to urge members to vote "Yes" in a referendum on a proposed rule change. It also contained an interview with a member who also urged members to support the rule changes. On 14 April 2011 the Union sent an email to all members effectively reproducing the General Secretary's letter that was in the referendum booklet. On 5 May 2011 all members were again emailed and encouraged to vote before the deadline on 18 May. The Union found it necessary to send this email as the voting paper had referred in error to the closing date for the referendum being 6 May. The Union's website also contained material which recommended that members vote "Yes" in the referendum.
22. Shortly before the referendum result was declared, on 3 May 2011, Mr Eager made a complaint to the Union under its rule 29 complaints procedure. He alleged a breach of rules 3.1.1, 3.1.1.7 and 44.2. In his evidence to me, Mr Eager explained that, in essence, his complaint was that the Union had acted in a sectarian manner by the way it was campaigning for one side of the referendum question. Council considered and rejected this complaint on or about 7 June 2011. Mr Eager appealed to the Union's Appeal Committee and his appeal was heard on 2 August. Some 2 or 3 weeks later, Mr Eager was informed that his appeal had been rejected. The Appeals Committee concluded its decision with a recommendation, which was in the following terms:

"It was accepted by both sides that Council has in the past made clear its support for one side of a referendum question, but that in supporting a campaign for a YES vote, the conduct of this referendum departed from previous practice. Whilst rejecting the Appellant's complaint, and recognising that Council was not in breach of Equity's rules, the Appeals Committee is concerned that there are members who feel that the Council's presentation of the issues was not fair to those arguing for a NO vote. We believe these changes in the way the debate is presented should not become a precedent without further discussion within the Union."

23. Mr Eager made a further complaint on the day of his hearing before the Appeals Committee. This complaint was brought as a disciplinary matter under rule 28 and was against the General Secretary, President and Council. The complaint was discussed at the Council's meeting on 6 September 2010 in Mr Eager's presence. The General Secretary asked generally how such a disciplinary issue could be progressed. In the absence of any satisfactory response, Council voted that no further action should be taken on it.
24. The results of the referendum were announced to Council on 22 May 2011. There were 1,906 votes in favour of the rule changes with 1,150 votes against, a majority of 62% of those voting on a turnout of about 9%, with 35,809 members having been entitled to vote.
25. Mr Eager commenced this complaint to me by an email of 13 September 2011.

The Relevant Statutory Provisions

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

Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

(a) ...

(b) ...

(c) the balloting of members on any issue other than industrial action

(d) – (e) ...

The Relevant Rules

27. The rules of the Union which are relevant for the purposes of this application are as follows:-

3 Objects, Powers and Duties

3.1 Objects

3.1.1 As a non-party political and non-sectarian Union:

3.1.1.2 to promote, protect and further the artistic, economic, social and legal interests of its members in their professional capacity;

3.1.1.7 to promote equality for all including through: (i) collective bargaining, publicity material and campaigning, representation, union organisation and structures, training, organising and recruitment, the provision of all other services and benefits and all other activities; and (ii) the Union's own employment practices;

3.1.1.8 to oppose actively all forms of harassment, prejudice and unfair discrimination whether on the grounds of sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age or other status or personal characteristic;

3.1.1.9 to promote, protect and further freedom of artistic expression and to assist performers and others working in the performing arts nationally and internationally who are suffering oppression, persecution or hardship in the pursuit of their profession.

3.2 Powers and Duties

3.2.17 To acknowledge the right of individual members to hold and express their personal political and other beliefs both in their private and professional capacities.

4 Qualification and Application for Membership

4.1 Any person who exercises professional skill in the provision of entertainment in accordance with criteria laid down from time to time by the Council shall be eligible for membership.

16 Powers and Duties of the Council

16.3.6 The Council shall at all times act in the best interests of the members in accordance with the Objects of the Union and shall determine anything wherein the Rules are silent but in no case shall it alter or depart from the Rules of the Union

23 Duties of the General Secretary

23.1 The General Secretary shall act as the chief executive officer and spokesperson for the Union and shall, subject to the Rules and the law, at all times act in accordance with the policies approved by the Council.

23.2 The General Secretary shall use his or her best endeavours in accordance with principles and policies laid down by the Council to ensure that:

23.2.1 ...

23.2.2 representation of the Union and its members to the press, broadcasting and other media and in the editorial policy of the official publication of the Union, advances the interests of the Union's members and the policies of the Council.

40 Referendum

40.1 The Council has power to conduct a vote of the entire Union [in these rules called a "referendum"] on any question, proposal or resolution whenever the Council deems it necessary.

40.2

A referendum shall be decided by a simple majority of the votes actually cast and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal or resolution which is the subject matter of the referendum shall be included in the referendum paper circulated to the membership in such form as the General Secretary considers appropriate in accordance with the Rules of the Union.

46 Alteration of the Rules

46.1 Subject to the provisions of this Rule, alterations to the Rules shall be made either at an Annual Representative Conference or Special Representative Conference, or by means of a ballot of the entire membership under Rule 40. The former procedure shall be

referred to as "Alteration by Conference" and the latter as "Alteration by Referendum".

46.3 Notwithstanding Rules 46.1 and 46.2, in the case of a proposed alteration of any of the following Rules, the alteration shall only be effective if made [or approved] by Referendum:

Rule 3	Objects, Powers and Duties
Rule 13	The Governing Body
Rule 14	Qualification for Council
Rule 15	Election for Council
Rule 16	Powers and Duties of Council
Rule 17	Officers
Rule 18	Election of Officers
Rule 19	Election of the Vice Presidents and Honorary Treasurer
Rule 22	Election of the General Secretary
Rule 27	Duties of Appeals Committees
Rule 32	Appointment of Trustees
Rule 37	Representative Conferences
Rule 40	Referendum
Rule 46	Alteration of Rules

46.4 Notwithstanding Rules 46.1 and 46.3, any alteration by referendum shall not be effective unless the general subject matter of the alteration has been discussed within the period of two years prior to the holding of the referendum at an Annual or Special Representative Conference, or at two or more open meeting so members held under Rule 38, notice of which shall have been given in the trade press and of which one at least shall have been held in London.

46.5 An Alteration by Referendum shall come into effect at the conclusion of the meeting of the Council at which the result of the referendum is announced. ...

46.6 Before putting any rule change motion to referendum under Rules 46.3 or 46.5, the Council may make such drafting amendments to the motion and include in the referendum such consequential amendments to the Rules of the Union as the Council shall consider desirable solely for the purpose of clarity.

Consideration and Conclusions

Complaint 1

28. Mr Eager's first complaint is as follows:

"That on or around May 2011 Equity breached a provision to be implied into rule 40.2 by way of custom and practice that the Union (the Council, the General Secretary and Senior Staff) should not use the Union's resources, not available to other members, to campaign for one side of the argument in a rule change referendum."

29. Rule 40.2 of the rules of the Union provides as follows:

"40.2 A referendum shall be decided by a simple majority of the votes actually cast and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal or resolution which is the subject matter of the referendum shall be included in the

referendum paper circulated to the membership in such form as the General Secretary considers appropriate in accordance with the Rules of the Union.”

Summary of Submissions

30. Mr Eager did not submit a witness statement in support of this complaint but argued that the conduct of Council in the 2011 referendum was such that the democratic principles of equality and fairness had not been upheld. In particular, he objected to Union resources being used to promote one side of the question, whilst denying the use of such resources to members who supported the other side. He argued that rule 40.2 must be read as requiring the General Secretary to ensure that the referendum process is fair and equal as it is the only rule which sets out the process and conduct of a referendum. Mr Eager further observed that there is no rule which provides for Union resources to be used in this way and that as a referendum has supremacy within the Union’s constitution, no action can be taken which undermines its fairness. Mr Eager submitted that by campaigning for a “Yes” vote in the Union’s journal, by its email of 14 May and on its website the Union had acted in breach of a rule to be implied into rule 40.2 by custom and practice that Union resources should not be used in campaigning for one side of a referendum question. He noted that Council had never before agreed to campaign for one side of a referendum question nor use Union resources to do so. Mr Eager argued that rule 40.2 is designed to protect the interests of individual members and that it was established by custom and practice that this protection extended to the improper use of Union resources.
31. Ms Tuck, for the Union, submitted that Mr Eager had failed to make good his argument that the implied rule for which he contended had been established by custom and practice or otherwise. Counsel noted that the rules were silent on the use of Union resources in a referendum. She further noted that Mr Eager had, in his email to my office of 29 September 2011, not only accepted that there was no rule preventing the Council from campaigning for a particular argument but that he had commented that it would be a nonsense if Council was prevented from doing so. Ms Tuck also relied upon Mr Eager’s comment in this email that, *“The Equity Council for the most part has always taken a view on a referendum question and I believe that this ability is correct and indeed welcome”*. As to the existence of a custom and practice relating to the use of Union’s resources, Ms Tuck submitted that Mr Eager had simply failed to establish any custom and practice, having regard to the traditional tests of whether the usage is “notorious, certain and reasonable and not contrary to law”.

Conclusion – Complaint One

32. Mr Eager commented during his submissions that his concern was not so much with the particular rule change being proposed in this referendum, but with the fairness of the referendum process, which he regarded as being central to democracy with the Union. However, it is not my role or responsibility to interfere in the internal democratic processes of the Union outside the jurisdictions I have been given by Parliament. The Union’s internal processes are to be decided by its membership in accordance with its rules and the relevant statutory provisions. On the facts of this case, it is not for me to decide whether the Council or General Secretary acted fairly or not but to decide whether the Union acted in breach of an express or implied rule which is within my jurisdiction. Mr Eager was unable to find any express rule which covered this particular complaint and

he therefore makes his case by reference to a rule which he argues must be implied by reason of custom and practice.

33. The general principles relating to rules or contractual terms to be implied by reason of custom and practice look to a course of conduct extending over a period of time out of which a rule or contractual term can be identified with satisfies the aphorism of being notorious, certain and reasonable. Mr Eager's first problem is that he is not relying upon a course of conduct by the Union but rather upon the absence of any previous similar conduct. Whilst not fatal to his claim, it is more difficult to argue that because a Union has not exercised its general powers in a certain way in the past, it is precluded from doing so in the future. As a general proposition that cannot be correct. If it were to be correct, a Union would be prevented from many new initiatives.
34. On the facts of this case, I note that it is common ground that Council had previously decided to support one side of a referendum question and that it had previously declared that support in the referendum booklet. The departure in this case is that Council expressly decided to campaign for a "Yes" vote. I find that in pursuance of this decision Union resources were expended, albeit that the evidence of any campaign is limited to some mention in one edition of the Union's journal, to one email and to the Union's website.
35. The issue for me to determine is whether Council is prohibited from using Union resources to campaign for a particular outcome in a referendum by reason of an implied rule because it has never previously campaigned in this way. In my judgement, Mr Eager has not adduced sufficient evidence to persuade me that the Union's failure to have done so in the past has crystallised into an implied rule of the Union preventing it from so doing in the future. I find that whilst members may have observed this to have been the position in the past, it does not follow that there is a "notorious" acceptance that this was by reason of an implied obligation under the rules. Accordingly, I find that Council acted in accordance with its broad discretion in deciding to support a campaign to vote "Yes" in this election and so expend Union resources in doing so. I make no comment on the appropriateness of this decision in the context of referenda within Equity and note the comment of the Appeals Committee that it should "not become a precedent without further discussion within the Union". In my judgement the issue to which this complaint gives rise is a matter for the internal democratic processes of the Union. It is not one which can be resolved by an application of the current rules of the Union, express or implied.
36. For the above reasons I refuse to make the declaration sought by Mr Eager that, on or around May 2011, Equity breached a rule to be implied into rule 40.2 of its rules by using its resources to campaign for one side of the argument in a referendum on the alteration of its rules.

Complaint 2

37. Mr Eager's second complaint is as follows

"That on or around May 2011 Equity breached rule 46.4 by not discussing, at any representative conference or open meeting of members, the general subject matter of alteration to rule 4 prior to the referendum seeking to implement new rules 4.8.1, 4.8.2 and 4.8.3."

38. Rule 46.4 of the rules of the Union provides as follows:

“46.4 Notwithstanding Rules 46.1 and 46.3, any alteration by referendum shall not be effective unless the general subject matter of the alteration has been discussed within the period of two years prior to the holding of the referendum at an Annual or Special Representative Conference, or at two or more open meeting so members held under Rule 38, notice of which shall have been given in the trade press and of which one at least shall have been held in London.”

Summary of submissions

39. Mr Eager submitted that the proposed amendments to rule 4 had not been discussed at an appropriate forum within 2 years of the referendum in April/May 2011. He accepted that the Annual Representative Conference in May 2010 had discussed a proposed amendment to rule 3.2.17 but he argued that there was no reference to any amendment of rule 4 in the notice that had convened the 2010 Conference, in the agenda for that Conference nor in the motion that had proposed the amendment of rule 3 in 2010. Mr Eager noted that the Union had made no attempt to inform or consult the membership about the proposed changes to rule 4 in 2010 or 2011. He further argued that the amendment to rule 4 was not consequential to the amendment to rule 3, as it was neither necessary for the coherence of the rules nor could it be properly described as “tidying up”. Mr Eager maintained that there could have been no “discussion” of the proposed amendments to rule 4 at the May 2010 Conference without those attending being aware of any intention to amend that rule.

40. Ms Tuck for the Union, submitted that the general matter of the amendment of rule 4 had been discussed at the Annual Representative Conference in May 2010, which was within 2 years of the April/May 2011 referendum and that accordingly there had been no breach of rule 46.4. Counsel accepted that there was no reference to rule 4 in the motion that was put to Conference in 2010 by the MEM Committee but she argued that rule 46.4 does not require the actual rule change to have been the subject of previous discussion, only that the “general subject matter of the alteration” be discussed. Ms Tuck referred to the transcript of the relevant debate at the 2010 conference. She noted that the debate had lasted for almost an hour and that there were many vigorous contributions by delegates who felt strongly about membership rights being dependent upon the expression of a person’s beliefs. In particular, she referred to a contribution which referred to the case in the European Court of Justice concerning ASLEF which was said to decide that unions should not be forced to accept into membership individuals opposed to the basic principles of the union. She also referred to a contribution which raised the issue of applications for membership by reference to the Union’s position should someone of known right wing views wish to join the Union. Ms Tuck commented that only a pedantic reading of the debate could lead someone to conclude that the general subject matter of the proposed amendment to rule 4 had not been discussed.

Conclusion – Complaint Two

41. The issue for me to determine is whether the general subject matter of the proposed amendment to rule 4 was discussed at an appropriate forum within the period of 2 years prior to the referendum in April/May 2011. It was common

ground that the only forum to be considered in this connection was the Annual Representative Conference in May 2010. It was also common ground that rule 46.4 does not require the prior discussion to be of the precise amendment which is subsequently proposed, merely the general subject matter.

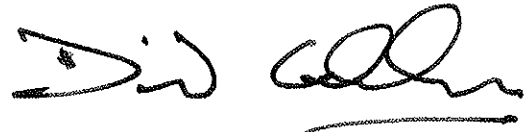
42. The key to determining this complaint is identifying what constitutes “the general subject matter of the alteration”. In this complaint the alteration in question is the proposed amendment of rule 4 by referendum. The words “general subject matter” indicate that a broad approach is to be taken to the alteration and, accordingly, I find that it is appropriate that I examine the principles underlying the alteration which was put to referendum. The proposed new rule 4.8.1 is in the following terms:

“The Council may reject an application for membership if in its opinion the conduct or activities of the applicant have at any time been such as would amount to a breach of Rule 3.2.17 had the applicant for membership been a member at the time.”

The proposed new rules 4.8.2 and 4.8.3 introduce procedural safeguards should rule 4.8.1 be implemented. I also observe in passing that the proposed rule 4.8.1 refers expressly to, and is closely linked to, rule 3.2.17, which rule was expressly considered at the May 2010 Conference.

43. In my judgement, the principle underlying the proposed new rule 4.8.1 is identical to that underlying the proposed amendment to rule 3.2.17. It is whether the expression of a person’s individual beliefs should affect his or her membership of the Union. I recognise that this is a difficult and sensitive issue upon which different views can be genuinely and deeply held. At its essence, it involves a potential conflict of the freedom of expression with the freedom of association. I also recognise that the freedom of artistic expression is a matter of particular concern within Equity. However, I find that there was a discussion of that issue at the May 2010 Annual Representative Conference. That debate was said by Mr Eager to have “*generated strong divisive emotions*” and to have been “*highly charged*”. The nature of the debate is further evidence that it concerned fundamental principles. Although that debate was directed specifically to a proposed amendment to rule 3.1.17 I find that it concerned the same principles and the same general subject matter as that which underpins the related amendment of rule 4. I also derive some support for this conclusion from the forensic analysis of the debate by Ms Tuck and her discovery of various references to joining the Union. Those references, however, are not sufficiently clear or numerous to establish that the delegates to conference were expressly considering the position of potential members under the rules. This is not surprising given the motion being debated did not refer to rule 4. Nevertheless it is relevant that, during the debate, delegates did raise the issue of joining the Union as a matter of general principle. Looking at this debate as a whole, I find that the absence of direct and frequent references to potential members does not detract from my conclusion that the general subject matter under discussion was the effect that a person’s expression of their individual beliefs should have on his or her membership of the Union. Accordingly I find that the general subject matter of the proposed alteration of rule 4 was discussed at the May 2010 Annual Representative Conference.

44. For the above reasons I refuse to make the declaration sought by Mr Eager that Equity breached rule 46.4 of its rules on or about May 2011 by allegedly holding a referendum on a change of rules without having previously discussed the general subject matter of the alteration to rule 4 as required by rule 46.4.

A handwritten signature in black ink, appearing to read 'David Cockburn', with a horizontal line underneath the name.

David Cockburn
The Certification Officer

