

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

MR M WALBOURN

v

BRITISH AIR LINE PILOTS ASSOCIATION

Date of Decision:

14 July 2005

DECISION

Upon application by the Claimant under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

- (i) I refuse to make the declaration sought by the Claimant that rule 24(1) of the Rules of the British Air Line Pilots Association (“the Association”) was breached in or about September 2004 by the conduct of a ballot of its members by the British Airways Company Council (“the BACC”) which was allegedly not authorised by the Association’s National Executive Council.
- (ii) I refuse to make the declaration sought by the Claimant that Rule 24 and Appendix 1(9)(ii) of the Rules of the Association were breached in or about September 2004 by the BACC section of the Association conducting a ballot of its members in which the ballot paper contained a number of questions, each question of which was not treated as a separate ballot for the purposes of voting in the ballot.
- (iii) I refuse to make the declaration sought by the Claimant that Rule 24 and Appendix 1(13) of the Rules of the Association were breached in or about September 2004 by the BACC section of the Association conducting a ballot of its members in which the ballot paper did not contain a warning proscribing the making of any marks on the ballot paper.
- (iv) I refuse to make the declaration sought by the Claimant that Rule 24 and Appendix 1(27) of the Rules of the Association were breached in or about September 2004 by the BACC section of the Association conducting a ballot of its members in which the ballot papers were not stamped with the seal of the Association or with some other mark capable of authenticating each particular ballot paper.
- (v) I refuse to make the declaration sought by the Claimant that Rule 24 and Appendix 1(29)(iv) were breached in or about September 2004 by the BACC section of the Association conducting a ballot of its members in which the ballot paper allegedly contained material enabling the Association to identify the voter.

REASONS

1. By an application dated 20 January 2005 the Claimant made a complaint against his union, the British Air Line Pilots Association (“BALPA” or “the Association”). The Claimant alleged a breach of the Association’s rules relating to a pay ballot conducted by the British Airways Company Council (“BACC”) section of BALPA in or about September 2004. This is a matter within the jurisdiction of the Certification Officer by virtue of section 108A(2)(c) of the 1992 Act. The alleged breaches were that:-

Complaint 1

In or around September 2004 the British Airways Company Council (BACC) section of BALPA conducted a ballot of its members which was not authorised by the Association’s National Executive Council (NEC) and this was a breach of Rule 24 (1) of the rules of the Association.

Complaint 2

In or around September 2004 the BACC section of BALPA conducted a ballot of its members asking them to vote on a number of questions, which questions were not each treated as a separate ballot for the purposes of voting in the ballot and this was a breach of Rule 24 and Appendix 1(9) (ii) of the rules of the Association.

Complaint 3

In or around September 2004 the BACC section of BALPA conducted a ballot of its members in which the ballot paper did not contain a warning proscribing the making of any marks on the ballot paper and this was a breach of Rule 24 and Appendix 1 (13) of the rules of the Association.

Complaint 4

In or around September 2004 the BACC section of BALPA conducted a ballot of its members using a ballot paper which was not stamped with the seal of the Association or with some other mark capable of authenticating that particular ballot paper and this was a breach of Rule 24 and Appendix 1(27) of the rules of the Association.

Complaint 5

In or around September 2004 BACC section of BALPA conducted a ballot of its members using a ballot paper which contained material enabling the Association to identify the voter and this was a breach of Rule 24 and Appendix 1(29) (iv).

2. I investigated these alleged breaches in correspondence. As required by section 108B(2)(b) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 23 June 2005. The Association was

represented by its General Secretary, Mr J McAuslan. Mr R Allen, the Head of Legal Services of the Association gave evidence on its behalf and provided a written witness statement. The Claimant acted in person and gave evidence on his own behalf. A bundle of the relevant documents was prepared for the hearing by my office. The rules of the Association were also in evidence. The Association presented a skeleton argument.

Findings of Facts

3. Having considered the oral and documentary evidence and the submission of the parties, I find the facts to be as follows:
4. BALPA is a trade union with about 8000 members. It is recognised for the purposes of collective bargaining by 26 companies, which together employ some 7000 of its members. The remaining 1000 members are employed in about 250 other companies with which the Association does not have recognition. About 3000 of the Association's members are employed by British Airways. The Union has what was described as a federal structure with significant functions being delegated to the elected members of Company Councils. One such council is the British Airways Company Council ("the BACC").
5. Company Councils are encouraged to keep in close touch with their relevant members and the Handbook for BALPA representatives, approved by the National Executive Council ("the NEC"), suggests that one of the channels of communication to be considered is "surveys and polling". For the last five years at least, Company Councils have regularly conducted consultative ballots of their members and that in 2004 there were 35 consultative ballots held to determine whether negotiated agreements were acceptable. None of these ballots was conducted under the procedures provided for in Rule 24 and Appendix 1. Mr. Allen stated that such ballots are the norm, with experience showing that difficulties can arise when they are not held.
6. In September/October 2004 the BACC conducted a consultative ballot of its members on a three-year pay offer that it had recently negotiated with British Airways. This ballot was not called by nor did it receive the prior approval of the NEC. On the 16 September the BACC wrote to all its members "*in order to understand how you wish to proceed regarding the latest pay offer*". The letter is headed "Pay - Consultative Ballot September 2004". It enclosed a document describing the pay offer, a prepaid envelope and a voting paper similarly headed "Pay - Consultative Ballot September 2004". The final sentence of the letter stated, "*You need to be aware the BACC will accept, or reject, the pay offer on your behalf based on the answers given.*" The ballot paper contained three questions. The first question was whether the member wished to accept the pay offer. The other two questions were only to be answered if the member voted to reject the offer. A warning was given that the alternative options were likely to require industrial action to be taken.

7. On 24 September 2004 Mr Walbourn wrote to the General Secretary informing him that the ballot did not conform with the regulations set out in Appendix 1 to the rules. He requested that BACC voided the current ballot and reissued it in conformity with the Rules. No response to this letter was received by Mr Walbourn.
8. On 13 October 2004 the result of the ballot was announced. There had been 2,766 ballot papers distributed. Of the 70% of ballot papers returned, 71.5% voted in favour of the pay offer. The notice containing this information also stated that the pay agreement had been signed and would be implemented that month. The pay agreement was signed on behalf of the Association by members of the BACC.
9. Despite a further letter from Mr Walbourn of 13 October 2004 and an email of 25 October, the General Secretary did not reply to him until 1 November. The General Secretary informed Mr Walbourn that the BACC ballot was not called by the NEC and was not in the category of ballot that fell within Rule 24 and Appendix 1. Mr Walbourn wrote to the Union on subsequent occasions but received no satisfactory response. At the hearing before me, the General Secretary candidly accepted that Mr Walbourn's correspondence had not been dealt with as effectively as the Union would have wished, for which he unreservedly apologised.

The Relevant Statutory Provisions

10. The provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") which are relevant for the purpose 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 Union Rules

11 The rules of the Association relevant to this application are as follows:-

Rule 3

OBJECTS

The objects of the Association shall be:

- (1) To promote the highest possible level of safety and security within civil aviation for both members and the travelling public alike.*
- (2) To advise on all commercial, scientific, educational and technical matters relating to air transport.*
- (3) To advance the technical knowledge of members and potential members and the aviation industry as a whole and to provide training and learning opportunities.*
- (4) To uphold the interests of members, improve their terms and conditions, regulate relations with their employers and generally to assist them.*

Rule 14

GOVERNMENT AND POWERS OF THE NATIONAL EXECUTIVE COUNCIL

14(13) It shall have power and authority to construe the Rules and to determine all questions on which the Rules are silent; and its construction or determination shall be binding and shall remain in operation until the next Annual Delegates Conference or Special Delegates Conference to which the issue shall be referred.

Rule 23

DUTIES OF COMPANY AND LOCAL COUNCILS

(2) It shall further be the duty of each Company and Local Council (under such directions as may from time to time be given by the National Executive Council) to endeavour to establish and maintain contact with the management of any organisation which employs any member of the Association represented by the council. However, no Company or Local Council nor any member of the Association may take any executive action whatsoever relating to or connected with the objects of the Association without the express authority of the National Executive Council.

Rule 24

THE DETERMINATION OF QUESTIONS BY BALLOT OF THE MEMBERS OF THE ASSOCIATION

(1) The National Executive Council shall have power to submit any matter or question, including any election or ballot required under these Rules, to a ballot vote of members of the Association in accordance with this Rule. The provisions of Appendix 1 to these Rules shall have effect for the purposes of any ballot conducted under this Rule and shall be construed as if they formed part of this Rule. Nothing in these Rules shall be taken to require a ballot to be held at an uncontested election.

(3) Entitlement to vote in any ballot conducted under this Rule shall be accorded equally to all persons who, at the date determined under sub-Rule (2)(i) above, are:

- (i) *members of the Association, or*
- (ii) *members of the Association falling within a class of member defined for the purposes of that ballot by the appropriate Rules.*

A member who at the date of the issue of the ballot paper in question has been suspended from membership (under Rule 8(9) or otherwise) shall not be entitled to vote in that ballot; and nothing in these Rules shall entitle an associate of the Association to vote in any ballot.

APPENDIX I
REGULATIONS FOR THE CONDUCT OF BALLOTS UNDER RULE 24

(9) *In the case of a ballot conducted for the purposes of Rule 24 and where industrial action (whether a strike or industrial action falling short of a strike) is under consideration:-*

- (i) ...
- (ii) *Two or more questions may be included in a single ballot paper, provided that every member who is entitled to vote in the ballot is entitled to vote in answer to all the questions included in the ballot paper. In any such case, each question shall be treated as a separate ballot for the purposes of voting in the ballot, counting the votes cast and declaring the result thereof.*
- (iii) ...

(13) *The ballot paper shall contain a mark or stamp, in accordance with Regulation (27) below together with the instructions for voting referred to in Regulation (8) as are appropriate in any given case and the following instructions (or instructions to like effect):*

'Do not make any mark on the ballot paper or envelope by which you can be identified. When you have voted, place the ballot paper (and nothing else) in the envelope provided, seal it and post it to [the place determined under Rule 24(2)(ii)] to arrive not later than [the date and time determined under Rule 24(2)(ii)]. The ballot papers will be counted at [the place, date and time determined under Rule 24(2)(iii)]. Any failure to comply with these instructions may result in your ballot paper not being counted'.

Validation of Ballot Papers

(27) *Each ballot paper shall be stamped with the stamp or seal of the Association or with some other mark capable of authenticating that particular ballot paper. No ballot paper shall be used for voting which is not so stamped or marked.*

(29) *In addition to any other conditions of validity under these Regulations, a ballot paper shall only be regarded as valid if:*

- (i) – (iii)....
- (iv) *no mark is made on any part of the ballot paper or envelope inserted in the envelope which might in any way identify the voter, provided this condition shall not apply to any mark or number placed on the ballot envelope pursuant to a determination by the Returning Officer under Regulation (28) above.*

The Submissions

12. Mr Walbourn submitted that the consultative ballot should have been conducted in accordance with the procedures set out in Rule 24 and Appendix 1 of the Rules. He alleged that the ballot failed to comply with Appendix 1 in a number of material respects. He alleged that, in breach of Regulation 9(ii), the format of the questions was defective, that in breach of Regulations 13 and 27, the ballot paper did not contain the required mark or stamp or the prescribed voting instructions and that in breach of Regulation 29(iv) the ballot paper invited the voter to mark the paper in such a way as might identify that voter. However, Mr Walbourn accepted that Appendix 1 had no freestanding application and is only relevant to ballots or elections triggered under Rule 24. He submitted that Rule 24 is the only rule dealing specifically with balloting procedures and that accordingly there was an obligation for the BACC to conduct its consultative ballot under the Rule 24 procedure. He argued that this point was strengthened by the heading to Rule 24, which is in the following terms: “*The Determination of Questions by Ballot of the Members of the Association*” and by the reference in Rule 24(1) to balloting on “*any matter or question*”. In Mr Walbourn’s submission, the Company Council should have asked the NEC to conduct a Rule 24 ballot, as by Rule 23(2) the Company Council could not “*take any executive action whatsoever relating to or connected with the objects of the Association without the express authority of the National Executive Council.*” He argued that whilst a purely consultative ballot would not constitute executive action, this particular ballot was executive action as the BACC had indicated in its covering letter of 16 September 2004 that it would be bound by the result.
13. For the Association, Mr McAuslan accepted that the BACC consultative ballot had not been conducted in accordance with the detailed requirements of Appendix 1 but he maintained that there was no need for it to have been so conducted. He submitted that Rule 24 is an enabling rule, giving the NEC the power to call a ballot or election if it sees fit, and that the conduct of a consultative ballot by the BACC was not a breach of that rule. He further argued that, in any event, Rule 24 would be inappropriate for the conduct of such ballots as, by Rule 24(3), it only applied where all members of the Association are to be balloted. Mr McAuslan stated that it had been the practice of the Association over many years for its Company Councils to hold consultative ballots on pay and that this practice was well known to and approved by the NEC. He commented that the BACC’s decision to hold a consultative ballot on this occasion was valid and made under guidance issued from time to time by the NEC under Rule 14(13). He further submitted that the Rule 24 balloting procedure was inappropriate for such consultative ballots. He considered that such ballots were not only expensive but that they could weaken the Association’s negotiating position by being unduly cumbersome and possibly over revealing to the relevant employer. Mr McAuslan did not accept that the BACC required the consent of the NEC to hold a consultative ballot as he did not consider that the holding of such a ballot was executive action for the purposes of Rule 23(2). He also did not accept that the

BACC was necessarily bound by the result of a ballot which was expressed to be consultative. In his view, the Company Council would have to decide whether to accept the offer on all the information available to it, including the size of any majority and its appreciation of the members' willingness to take industrial action. Mr McAuslan principal submission, however, was that Rule 24 had no bearing on the facts of this case and Appendix 1 was not therefore engaged.

Conclusion

14. It was accepted by both parties that the success or failure of each of Mr Walbourn's five complaints depended upon him establishing that, under the rules of the Association, the consultative ballot conducted by BACC in September/October 2004 had to be conducted in accordance with the requirements of Rule 24 and Appendix 1. Each of Mr Walbourn's complaints therefore depended upon his establishing his first complaint, which was in the following terms:

In or around September 2004 the British Airways Company Council (BACC) section of BALPA conducted a ballot of its members which was not authorised by the Association's National Executive Council (NEC) and this was a breach of Rule 24 (1) of the rules of the Association.

15. Rule 24(1) of the Rules of the Association states:

(1) The National Executive Council shall have power to submit any matter or question, including any election or ballot required under these Rules, to a ballot vote of members of the Association in accordance with this Rule. The provisions of Appendix 1 to these Rules shall have effect for the purposes of any ballot conducted under this Rule and shall be construed as if they formed part of this Rule. Nothing in these Rules shall be taken to require a ballot to be held at an uncontested election.

16. The terms of Rule 24(1) do not impose a requirement on the Association to take any action. They are permissive. The NEC did not take or purport to take any action pursuant to Rule 24 and accordingly Rule 24 was not engaged on the facts of this case. In my judgment, it does not follow from the absence of any other provision in the rules dealing expressly with ballots that all ballots must be conducted under the procedures set out in Rule 24 and Appendix 1. Those procedures are extremely formal and it is expressly provided that they are the procedures which are triggered by a decision of the NEC. This finding is sufficient to dispose of the present application but, out of respect for the able arguments addressed to me by Mr Walbourn, I will consider two further matters.
17. Mr Walbourn emphasised the wide scope of the "matters or questions" that the NEC can submit for election or ballot under Rule 24. The "matters or questions" that can be put to a ballot under Rule 24 are undoubtedly wide but the NEC's powers in this regard are circumscribed by Rule 24(3). Under this rule, any matter or question can be submitted by the NEC to a ballot of either the whole membership or "members of the Association falling within a class of member...".

However, “*a class of member*” can only be balloted under Rule 24 if that class is “*defined for the purposes of that ballot by the appropriate Rules*”. The correct construction of the phrase “*a class of member*” would seem to be not without difficulty. The Association originally contended that these words sought to distinguish between ordinary and associate members but this cannot be correct as the position of associate members is dealt with expressly at the end of Rule 24(3). If it were necessary, I would find that “*classes of members*” for the purposes of this rule are those groups of members, less than the membership as a whole, who can only be balloted under Rule 24 if defined for the purposes of that ballot by the rules. This is the case with regard to industrial action ballots (Rule 25) and elections to Company Councils (Rule 22). Under the rules, only those members being asked to take industrial action can vote in a ballot on that industrial action and only those members of the relevant Company Council can be balloted on who is to represent them. This restriction on the scope of Rule 24 ballots is perhaps not surprising having regard to the detailed manner in which such ballots are regulated under that Rule and Appendix 1, incorporating as they do the various statutory requirements where appropriate. I accept Mr McAuslan’s argument that a union may wish to consult with sections of its membership on a range of issues with varying degrees of formality, dependent upon the circumstances. It is not to be readily inferred that the author of this rule intended all consultative exercises from the most trivial and most local to the most fundamental and most wide-ranging to be constrained by the same prescriptive regime.

18. Mr Walbourn placed considerable weight in his submissions on the sentence in Rule 23(2) which states, “*However no Company or Local Council nor any member of the Association may take any executive action whatsoever relating to or connected with the objects of the Association without the express authority of the National Executive Council.*” The correct construction of “*executive action*” in the context of these rules is also not without difficulty. On one level, it could apply to any act or transaction within the objects of the Association; to include relatively trivial administrative transactions necessary for the proper functioning of the Company Council, such as the purchase of office equipment, stationery and even stamps. It cannot have been the intention of the authors of the rules for all such transactions to require the express authorisation of the NEC. Further complicating factors include the inclusion of the word “*member*” within the constrained group and the fact that the objects of the Association were amended at the Annual Delegates Conference in 2004, reducing their number. In addition, as noted above, the Association is said to operate as a federal body, with considerable autonomy being delegated to Company Councils. I was informed that in practice the requirement on Company Councils to obtain the express authority of the NEC has been limited to executive action which could have an effect on members generally. Be this at it may, both parties were in agreement that the mere holding of a consultative ballot did not in itself constitute executive action within the meaning of Rule 23(2). According to Mr Walbourn, however, the holding of this consultative ballot became executive action as a result of the

statement in the BACC's letter of the 16 September 2004 that it would "... *accept, or reject, the pay offer on your behalf based on the answers given*". I disagree. In my judgment, the inclusion of this sentence did not have the effect for which Mr Walbourn contended. An executive act is normally defined by its nature, not by any description of its future consequences. In any event, the sentence upon which Mr Walbourn relies is itself ambiguous. In my judgment this sentence did not commit the BACC to accept or reject the offer on any majority, no matter how slim and with no matter how many caveats. It advised members that its decision to accept or reject the offer would be based on the "*answers given*". This required an appreciation of the ballot paper as a whole, including the readiness to take industrial action, not just the response to the first question. Accordingly, with or without regard to the sentence relied upon by Mr Walbourn, I would find that the holding of a consultative ballot by a Company Council is not executive action and that, on the facts of this case, there was no requirement on BACC to obtain the written authority of the NEC before proceeding with its consultative ballot.

19. For the above reasons, I find that the rules of the Association did not require the BACC to conduct the consultative ballot of its members in September/October 2004 in accordance with the provisions of Rule 24 and Appendix 1 or to obtain the authority of the NEC for the holding of that ballot. Accordingly, I dismiss each of the five complaints made by the Claimant.

Observation

20. I was informed by Mr McAuslan that the Association is to consider the possible amendment of some of its rules at its annual delegate conference to be held in November 2005. The Association may wish to consider whether greater clarity could be given to those rules which have formed the basis of Mr Walbourn's complaints.

David Cockburn
The Certification Officer