

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

**IN A MATTER OF COMPLAINTS MADE AGAINST THE
BRITISH ACTORS EQUITY ASSOCIATION (EQUITY)**

**APPLICANTS MR D EAGER
 MS S TREBLE
 MR R BAKER**

Date of Decisions:

18 JULY 2000

DECISIONS

- 1.1 The Trade Union and Labour Relations (Consolidation) Act 1992 was amended, on the 27 October 1999, by section 29 and schedule 6 of the Employment Relations Act 1999. One of the effects of the 1999 Act amendment was to insert, into the 1992 Act, sections 108A to 108C.
- 1.2 Under section 108A-(1) of the Act 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) of section 108A may apply to me for a declaration to that effect.

- 1.3 The matters referred to in section 108A-(2) are set out in paragraph 1.14 below.
- 1.4 Under section 108B(2) of the Act I am empowered to make or refuse to make the declaration sought. In each case I am required to give the applicant and the union an opportunity to be heard and whether I make or refuse the declaration sought, I am required to give reasons for my decision in writing.
- 1.5 Where I make a declaration, I am required, unless I consider to do so would be inappropriate, to make an enforcement order imposing on the union one or both of the following requirements -
- (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;
 - (b) to abstain from such acts as may be specified with a view to securing that a breach or threat of the same or a similar kind does not occur in the future.
- 1.6 On the 7 January 2000, following correspondence with Mr D Eager a member of Equity, I accepted a complaint from him that the union was alleged to be in breach of its rule 43(4) in the balloting of its members relating to the union's rule change referendum. (Complaint One).
- 1.7 On the 12 January I received a similar complaint from Ms S Treble, another member of the union. In view of the common issues involved I sought a combined response from the union although I made it clear to both applicants and the union that I would treat the two applications as separate complaints and that both Mr Eager and Ms Treble would be given the

opportunity to respond to the union's reply.

- 1.8 On the 3 February 2000 I received, by fax, a further letter from Ms Treble requesting that I re-examine a further complaint made in her letter received on the 12th January relating to a breach, by the union, of its rules 31 and 35. On the 8 February 2000 I wrote to Ms Treble and the union accepting this further complaint. The complaint was, it was alleged, that the union were in breach of its rules 31 and 35 in refusing a petition for the holding of a Special General Meeting and failing to refer the matter to the union's Appeal Committee and that this was a matter referred to in section 108A(2)(d) of the Act which refers to the constitution or proceedings of any executive committee or any decision-making meeting. (Complaint Two).
- 1.9 On the 28 February I received a completed notification of a complaint form from a third applicant, Mr R Baker. In his application Mr Baker made the same complaint as Ms Treble, that the union were in breach of its rules 31 and 35 in refusing a petition for the holding of a Special General Meeting and failing to refer the matter to the union's Appeal Committee. Again I indicated to the parties that I would treat the two applications as separate complaints and give each applicant an opportunity to reply to the union's response to the breach.
- 1.10 On the 4 March 2000 Mr Eager wrote to me again and submitted a further notification of complaint form. This letter was accepted by me, as a complaint that it was alleged that the union had breached its rules 24(1) and/or 30(2) in cancelling a properly constituted ballot of the membership and that this was a matter referred to in section 108A(2)(c) or (d) of the Act. (Complaint Three).
- 1.11 I investigated each of the three complaints in correspondence and decided that a formal

hearing, to hear arguments on each of the three complaints, should be held. The hearing was held on the 25 May 2000. The union were represented by Mr C Donnison of Douglas-Mann and Co. Solicitors. Each of the three applicants attended the hearing and spoke for themselves. The applicants produced a number of witness statements and both sides called witnesses in person, including, for the union, Mr I McGarry the union's General Secretary. I found this particularly helpful in my determination of the three complaints.

1.12 For the reasons which follow:

“I declare that the British Actors Equity Association was in breach of its rules 31(2) and 35 where in refusing a petition from the members for the holding of a Special General Meeting it failed to refer the matter to the union's Appeal Committee and that this was a matter referred to in section 108A(2) (d) of the Act.”

For the reasons which also follow, I consider it would be inappropriate to make an enforcement order on the union in respect of this breach of rule.

1.13 Also for the reasons which follow, I decline to make the declarations sought in respect of the other two complaints before me.

Requirements of the Legislation

1.14 It may be helpful, at this point, if I set out the relevant statutory requirements of the Act to which I have referred to in this decision. The relevant statutory requirements are as follows:

“108A.-(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) the appointment or election of a person to, or the removal of a person from, any office;

(b) disciplinary proceedings by the union (including expulsion);

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

(d) the constitution or proceedings of any executive committee or of any decision-making meeting;

(e) such other matter as may be specified in an order made by the Secretary of State.

(3).....”

Complaint One (that the union was in breach of its rule 43(4) in the balloting of its members relating to the Union’s rule change referendum)

Union rule 43(4)

2.1 The union's method of alteration of its rules was set out in rule 43 of its rule book. This provided that, subject to the provisions of this rule and another rule of the union (which is not relevant to this complaint), the alteration of the rules of the union were to be made either at a General Meeting (of the union) or by means of a ballot of the entire membership of the union. Rule 43(3) provided that the proposed alteration of any of the rules detailed in that section "... *shall only be effective if made (or approved) by referendum:*". Amongst the rules mentioned in the rule 43(3) was rule 20 "*Duties of the Executive Committee*".

2.2 Rule 43(4) stated:

"Notwithstanding (1) and (3) above 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 a Special Representative Conference or a Special General Meeting, or at two or more open meetings of the members held under Rule 32, notice of which shall have been given in the trade press and which one at least shall have been held in London."

The Applicants' Case

2.3 The applicants' case was that the union by seeking to change the union's complaints

procedure was in breach of rule 43(4) because the subject matter of the alteration had not been discussed within a period of two years prior to the holding of the referendum at any Annual or Special Representative Conference or a Special General Meeting of the union as required by rule 43(4).

2.4 It was argued by the applicants that in the case of the union's complaints procedure, the Council (of Equity) specifically decided not to hold discussions.

2.5 I was referred to union rule 20(2)(b) which, under the general heading of rule 20 "*Duties of Executive Committee*", provided:

"(b) To investigate all complaints made by or against the Members to the Secretary, and give a decision there-on."

2.6 It was argued, by Mr Eager, that the rule change referendum of the union sought to alter the union's complaints procedure in several ways. He argued that the new proposals (in the referendum) deleted rule 20 completely (including the complaints procedure under rule 20(b)) and that the proposed new "Principle Executive Body" of the union would not have the same function.

2.7 Mr Eager explained that rule 20 was a specific rule referred to in rule 43(3). He argued that by seeking to remove reference to the Executive Committee under other proposed rule changes, the union were effectively removing a stage of the complaints procedure from the

membership and this was confirmed by other rule changes (which Mr Eager detailed in correspondence).

2.8 It was argued that the proposed new rules provided no specific authority for the (new) Council to “*investigate all complaints*” which was a current role of the union’s Executive Committee.

2.9 Mr Eager further argued that the union’s assertion that the precise nature of the rule changes were known to the complainants, before the referendum, was wrong. He argued that, while the November 1999 meeting of the Council did indeed alter the rule change proposals, no further information was sent to the council members and that the first time he had the opportunity to read the rule change proposals was when he received the referendum voting paper in December 1999. Ms Treble argued that the debate at the November Council meeting (which she felt was one of the most important in Equity’s history) was sidelined by other matters on the agenda and that when she left (to fulfil a professional engagement) at 4.00pm the debate had not started.

2.10 The applicants argued that rule 20(2)(b) gave specific responsibility to the Executive Committee, that this responsibility was clear and not subject to interpretation and that any alteration to the rules (which they felt provided the basis of a contract between the membership and the union) should be made in a clear and unambiguous manner and it was this protection which was provided by rule 43(4).

2.11 It was argued that the Special Representative Conference only discussed the general overall subject matter of the size and composition of the proposed principle executive body and that the duties of the Council and Executive were not discussed. Mr Eager commented that an argument that, by discussing the size and composition of the principle executive body this constituted discussions of rule 20 and, in particular, the removal of the duty identified, required a leap of logic.

2.12 Finally it was argued that rule 43(4) was specific and give no scope for further definition. The rule provided for a check on the ability of any group of members who try to manipulate the process of altering Equity's rules and ensured that the fullest opportunity was given to all members to be aware of, and to participate in, any proposals for the alteration of the rules.

The Union's Response

2.13 In its response to this complaint, Mr Donnison on behalf of the union explained that the referendum consisted of two questions put to the members and that only the first question concerned this complaint.

2.14 The question, I was told, concerned rule changes which replaced the union's existing "Executive Committee" and "Council" with a single governing body also to be known as the "Council". This, it was explained, had the effect of transferring various functions of the Executive Committee to the new Council.

- 2.15 It was explained that Rule 20 (Duties of the Executive Committee) was deleted (by the proposed rule change) and that elsewhere (in the rule changes), reference to the Executive Committee was replaced by reference to the Council.
- 2.16 Mr Donnison, on behalf of the union, explained that the changes brought about by the referendum followed a report of the union's "Constitutional Working Party", the publication of a union "Green Paper", a "Special Representative Conference", held on 25 May 1999, and a very extensive consultation process at all levels of the union.
- 2.17 Mr Donnison argued that the union's "Green Paper" suggested a number of options and, as could be seen from the minutes of the Special Representatives Conference, four of the five options discussed entailed the replacement of the Executive Committee by a single governing body - the new Council.
- 2.18 He explained that the effects of the referendum rule change were that rule 20 was removed in its entirety and another rule of the union (rule 24(4)(c)(vii)) which had previously provided that the General Secretary be responsible for "*Reporting any complaints made by a Member against a Member or other person or persons; laying the evidence before the Executive Committee at the earliest possible opportunity; and making such investigation as the Executive Committee may direct.*", had been amended to substitute "Council" for "Executive Committee". He added that the practice before the rule change was that the General Secretary would investigate complaints as directed by the Executive Committee and that rule 20(2)(b) did not mean that the Executive Committee investigated complaints itself, but that

rather it provided for the General Secretary to investigate complaints when directed to do so by the Executive Committee.

- 2.19 It was argued that rule 20(2)(b) never provided a means by which members of the union could complain which was independent of rule 24(4)(c)(vii). Rule 20(2)(b) it was argued, provided that the Executive Committee had responsibility for investigating member against member complaints and that rule 24(4)(c)(vii) provided the mechanism for the initial investigation of such complaints. Both rules, the union stated, were complementary and that the removal of rule 20(b) by referendum did not amount to a substantive change in the rules but was rather an amendment consequential on the establishment of a single governing body of the union.
- 2.20 The union stated that Mr Eager was wrong in contending that the rule change would alter the emphasis so that it was the General Secretary who would carry out the investigation, and in asserting that there had been a removal of a complaints procedure stage. The union argued that it had always been the practice for the General Secretary to carry out investigations himself (or to deputise the task) subject to the General Secretary making a full report to the Executive Committee and, under the rule changes, member against member complaints would continue to be dealt with under rule 24(4)(c)(vii) (now renumbered 23(4)(c)(vii)). The removal of Rule 20(2)(b), the union contended, did not affect the power of the Council or General Secretary in relation to such complaints nor the procedure to deal with them.
- 2.21 Mr Donnison, for the union, stated that while there was no equivalent of the (deleted) Rule 20(2)(b) in the new rules, it was clear from rule 23(4)(c)(vii) that the General Secretary would be directed by the Council and that therefore there had been no change to the complaints procedure.

2.22 Mr Donnison, for the union, conceded that none of these matters were specifically discussed at the Special Representative Conference. However, he argued that the substantive changes which brought them about, the establishment of a single governing body, was discussed and debated at the Conference, at length, pursuant to rule 43(4) and was a debate in which Mr Eager himself took part. He agreed, on behalf of the union, that the (old) Council of Equity decided not to discuss the complaints procedure at the Special Representative Conference but explained that the question of the complaints procedure was quite distinct from the rule changes effected by the referendum. He explained that the union had, for some time, wished to overhaul its entire complaints procedure, but at its meeting on the 11 May 1999 it had decided the overhaul of the complaints procedure should follow the changes to the union's governing body.

Reasons for my Decision

2.23 I found that the general subject matter before the union at its Special Representative Conference was the replacement of the Council and Executive Committee, of the union, by a single governing body "the Council". This was on the agenda and discussed at the Special Representatives Conference which was held within the period provided for in the union's rule 43(4). This I believe satisfies the requirements of that rule.

2.24 In addition, the union had made other attempts to inform and consult the membership about the changes before the union. I refer here to the union's journal and its circulars to branches. These were not called for by the rules but were made, as I stated, to inform and consult.

2.25 I find the applicants' argument, effectively that the general subject matter discussed (at the Special Representatives Conference) covered rules 15 to 17 (the Managing Body,

Qualification for Council and Election of Council and Officers) but not rules 19 and 20 (Duties of the Council and of the Executive Committee) to be flawed because it would be impossible to replace the Council and Executive Committee and still leave, in the rule book, rules relating to the duties of the Council and the Executive Committee.

- 2.26 There is a further argument that what should have happened was that rules 19 and 20 should have been made duties of the new governing body, but there is nothing in the rules to say this is required and it was sensible for tidying up (of the rule book) to occur.
- 2.27 Those Council members who had concerns about the changes could have endeavoured to see that their concerns were considered in the statement against the relevant rule changes which, under the union rules, were issued to the membership as part of the referendum.
- 2.28 The applicants focussed particularly on rule 20(2)(b) (the investigation of complaints). However, I accept the union's evidence that nothing has changed as a result of this rule being dropped. The General Secretary will still be required to investigate complaints and now, he is required to report to a directly elected body (the Council). I find therefore that the rights of the members had not suffered a detriment.

For these reasons I dismissed this complaint.

Complaint Two (that the union was in breach of its rules 31 and 35 in refusing a petition for holding of a Special General Meeting - without referring the matter to the union's Appeals Committee)

Union rules 31 and 35

2.29 The union's rule 31 was headed "Special General Meetings". Rule 31(2) provided:

" A Special General Meeting shall (subject to rule 35) be called by the Council within two months of the receipt by the Secretary of a petition for the holding of such meeting signed by at least 40 Members in full benefit which must state the purpose for which the meeting is to be called. Such meeting shall be held at the earliest practicable date after the meeting is called. No other business except that which is stated in the petition will be permitted at such Special General Meeting."

2.30 Rule 35 was headed "The Appeals Committee" and stated:

"If the Council decides that a Special General Meeting demanded by petition under rule 31(2) or a referendum demanded by petition under Rule 34(2) would be contrary to the best interests of the Association then it shall within three weeks of the receipt of the petition or immediately after the first Council Meeting called after receipt of the petition if sooner, inform the petitioners of its decision and refer the matter to the Appeals Committee (elected in accordance with Rule 17(B)) which shall meet within 21 days after such referral. The Appeals Committee shall hear argument from both sides and its decision (for which it shall not be obliged to give reasons) shall be final and binding. If such decision is in favour of the petitioners then the Special General Meeting or the referendum shall be called or proceeded with as soon as practicable."

The Applicants Case

- 2.31 The applicants informed me that in accordance with the union's rule 31(2) they had submitted, to the General Secretary of the union, a petition calling for the holding of a Special General Meeting(SGM). The petition was signed by at least 40 members in full benefit as required by rule 31(2). The petition in accordance with rule 31(2) stated the purpose for which the meeting was to be called. The reason given on the petition was “ *The SGM instructs the Council to cease forthwith the implementation of any referendum which seeks to alter the constitution of the Council.*” The petition, which was dated November 1999, was submitted by Mr Baker under cover of an undated letter.
- 2.32 On the 2 December 1999 Mr McGarry, the union's General Secretary wrote to Mr Baker acknowledging receipt of the undated letter. In this letter, Mr McGarry indicated that the receipt of the requisition would be reported to the Council, but sought clarification from Mr Baker of the terms of the subject matter to be discussed at a Special General Meeting.
- 2.33 Mr Baker replied to Mr McGarry on the 4 December 1999 and stated the undersigned (members to the petition) were concerned with (1) the way the Council/Working Party had ignored the submissions from its members, and (2), concerned about the circumstances under which the Council debated the issues, especially when it resulted in only 15 Councillors voting in favour out of 67 on the subject matter being put to referendum.
- 2.34 Mr McGarry acknowledged this letter on the 7 December 1999 and indicated that he was consulting his fellow officers and the solicitors to the Association to seek their advice on how

to proceed.

2.35 Having taken legal advice, Mr McGarry wrote to Mr Baker on the 15 December 1999 stating:

“... I am writing to inform you that a special meeting of the Equity Council was held yesterday to consider the SGM requisition in your name and more than 40 member of full benefit.

The Council decided not to accept the requisition as a valid requisition under the Rules given that the subject matter proposed was one which would involve the union being in breach of its own rules. This decision was based upon legal advice presented to the Council meeting, a copy of which I am enclosing.”.

2.36 The applicants argued that the union rules 31(2) and 35 were specific and that, under the rules, if the Council refused a petition for a Special General Meeting then the Council must, under rule 35, refer the petition to the Appeals Committee and that such a referral (under the rules) should have been automatic.

2.37 It was argued that the union had broken rules 31(2) and 35. The petitioners had, I was informed, complied with rules 31(2) in requesting a SGM. It was the applicant’s case that the Council had breached rule 35 in refusing the SGM request and failing to refer the petition to the Appeals Committee.

2.38 It was further argued that custom and practice, of the union, confirms that a Council, if it was

decided that a petition was not in the best interests of the Association, had always referred the matter to the union's Appeals Committee in accordance with rule 35. It was argued that if Equity were mindful of its members' concerns, the referral procedure would have only taken three weeks and that, as the Council meeting which considered the request was held on the 14 December 1999, the decision of the Appeals Committee would have been reached before the closing date of the referendum.

2.39 The Council should, it was argued, following its decision (not to grant a Special General Meeting) have referred the matter to the Appeals Committee and have argued its case in that forum. Not to do so was, the applicants stated, a breach of rule 31(2) and a failure of the union to comply with rule 35.

2.40 Mr Baker also commented that to call a Council meeting in December to discuss the petition was unfair. He argued that December was traditionally a busy time for members in the profession and this resulted in only 23 out of 67 members of the Council attending the meeting. The result of the Council vote on the matter was 15 for, 7 against with one abstention. This, Mr Baker argued, was not a fair representation of 33,000 members.

The Union's Response

2.41 The union commented that the petition for the SGM was received by the union after the referendum papers have been sent out to the members. It was therefore argued that, as union rule 34(4) stated;

“A referendum shall be decided by a simple majority of votes actually cast and the

result thereof shall be binding in accordance with its terms. ...”,

a result in the referendum was a foregone conclusion and that nothing in rule 34(4) qualified that fact.

2.42 It was argued, for the union, that Equity’s view, confirmed by legal advice sought at the time, was that to call a SGM to question a referendum which had already been voted on would have been ultra vires and a breach of the union’s own rules by allowing a SGM to be called for the purpose of preventing the implementation of a referendum which had already been voted on.

2.43 It was further argued that the matter was specifically covered by rule 31(10) which prevents the discussion at an SGM of subject matters which would be outside the objects powers, and duties of the union.

2.44 Alternatively Mr Donnison argued, that the union’s Council was faced with an unprecedented situation where the principles governed by rule 34(5)(a):

“ Notwithstanding anything contained in rule 31(2) “individual members shall be precluded from petitioning for a Special General Meeting if the purpose thereof would be to reverse the substance of a decision made or approved in a referendum ...”

should apply, but where the rules were silent. Accordingly, Mr Donnison argued that rule 19(10):

“ The Council shall at all times act in the best interests of the Members ...”

applied giving the Council authority to make the decision it did without the need to refer the matter to the union’s Appeal Committee.

2.45 It was argued that, although not on all fours with the circumstances of this case, case law (National Union of Mineworkers (Kent Area) v Gormley and Others and British Actors Equity Association v Goring) justified the union’s decision to refuse a SGM in that both decisions stressed that referenda of the whole membership of the union should prevail over alternative methods of voting where only a small proportion of the membership participated.

2.46 Finally it was argued for the union that the referendum was the ultimate decision making process within the union, that once the referendum papers had been sent out, the votes could not be stopped, that the union would have been acting in breach of its rules if it had attempted to thwart the results of the referendum vote and that there would be no purpose in allowing the SGM to go ahead as any motion based on the subject matter could not have been implemented.

Reasons for my Decision

2.47 I do not believe the union had the authority to take the option of refusing to refer the petition either to a Special General Meeting or to the union’s Appeals Committee. Not to take one of these options was a breach of the rules of the union.

2.48 The union should have either called a Special General Meeting as required by rule 31(2) or, if they decided that a Special General Meeting would be contrary to the best interests of the Association, have referred the petition to the Appeals Committee under rule 35.

2.49 The union may have formed the view that to take either of these options would have been pointless, but the rights of substantial numbers of members should have been protected and been treated as paramount. Mr Justice Morrison at the Employment Appeals Tribunal (EAT) in the case of CPSA v England (EAT 24/98) commented (in respect of my duty) that “*The statute provides protection for all the members, whether they are part of the mainstream of the union, or members of a particular interest group, or members of what might be called, in military terms, “the awkward squad”. Everyone should have the chance to make their contribution, and it is the Certification Officer’s duty, as we see it, to be vigilant to protect minority interests as well as to have regard to the will of the majority.*”

2.50 In this case, the union should have complied with its rules and have protected the rights of what it might have regarded as minority interests, by referring the matter to the union’s Appeal Committee. At the time the petition was received the results of the referendum were not known and the union should have safeguarded the rights of the membership by acting in accordance with union rule. It could have presented its own argument to that directly and separately elected body.

2.51 It is for these reasons that I found the union to have breached its rule’s 31(2) and 35. I did not issue an enforcement order because the members have made their decision on the matters

of substance in the referendum (the detailed conduct of which has not been successfully challenged). Moreover the revised rule book they approved has been implemented. However the union should note and take on board a decision of this nature.

Complaint Three (that the union was in breach of its rules 24(1) and/or 30(2) in cancelling a properly constituted ballot of the membership)

Union rules 24(1) and 30(2)

2.52 Union rule 24(1) under the rule heading “Duties of General Secretary” provided:

“The General Secretary shall act as the chief executive officer and spokesman for the Association and shall, subject to the Rules and the law, at all times act in accordance with the directions given, and with the policies approved, by the Council.”

2.53 Rule 30(2) under the heading of rule 30 “Representative Conferences” stated:

“(a) If any ordinary motion is passed by the Representatives Conference by a two-thirds majority of those Representatives and Members of the Council present and voting on such a motion, it shall be binding on the Council. However the

Council may, if it so decides, submit the motion to a referendum vote of the whole membership under rule 34(1). In which case, the motion shall only become binding if confirmed by the referendum.

An ordinary motion which is passed by the Representative Conference, but fails to achieve such a two-thirds majority, shall be considered by the Council which shall decide what action is to be take on it. The council shall report its decision in writing to the Committee or Branch which originally proposed the motion (or the Committee of the body of members from which the motion originated) giving the reasons for its decision; and also publish this to the Members.

(b) If any rule change motion is passed by the Representative Conference by a two-thirds majority of those Representatives and Members of the Council present and voting on such a motion in accordance with rule 43(1), The Council shall submit the motion to referendum vote of the whole membership with such drafting amendments to the motion and consequential amendments to the Rules of the Association as the Council shall consider to be desirable solely for the purpose of clarity. Such a rule change motion shall only become effective if confirmed by a referendum.”

2.54 Under the union’s rules any alteration of those rules could be made either at a General Meeting (of the union) or by means of a ballot of the entire membership known as an alteration by referendum.

2.55 The union’s referendum rule (rule 34), rule 34(4) provided:

“ 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 Association.”

2.56 I was told that it was the practice for the summary of arguments for and against the question (in this case rule changes) to be exchanged (prior to issue in the referendum) and that, at that time, both sides could raise any objections to facts (not opinions) contained in the statements.

The Applicants' Case

2.57 The applicants' case was that having issued a referendum ballot to the membership on proposed changes to rules 17A(7) and 17(A)11 relating to the relationship between the timing of the Annual Representative Conference (ARC) and the election of Council, the General Secretary of the union exceeded his authority and breached the rules of the union by cancelling this rule change referendum.

2.58 Mr Eager explained that he had been approached and had agreed to write a statement against these proposed rule changes and that, in accordance with the union's rules, this would be issued to the membership together with the proposed rule change and a statement written in support of the proposal.

- 2.59 Having consulted some of his colleagues on the union's Council, Mr Eager submitted his statement against and two of his colleagues attended the exchange of statements on his behalf.
- 2.60 On the 13 November Mr Eager received documentation (the introduction and rules) from the union regarding the referendum. Mr Eager was concerned that the information received was different from that which he had received when he agreed to write the statement against and contacted the union (by e-mail) indicating his concern and stating that he would need to restructure and re-write his statement against.
- 2.61 Mr Eager then heard, from fellow Council members (who had attended the exchange meeting), that they had been informed that the union had taken legal advice concerning the rules for which he had been requested to write the statement against. Mr Eager contacted the union for written confirmation of the verbal advice said to have been taken by the union.
- 2.62 Correspondence, by e-mail, then took place between Mr Eager and the union in an attempt to clarify the legal advice and arrange a further meeting about the exchange of statements.
- 2.63 A meeting was attempted but was not held and the General Secretary issued an "Erratum" to members which was titled:

" Rule Change Referendum

Rules 15,16,17A,19,20 and 10.

Rules covering the Governing Body of Equity and related matters" and stated:

"On the voting paper on page 24 of the Rules change referendum booklet

(Rules 15,16,17A,19, 20 and 10) enclosed with the December 1999 issue of the Equity journal, there is a note asking members to use the same pre-paid envelope to return the completed paper for this referendum and for the Rule Change Referendum on Rule 17A(7) and Rule 17A(11).

Please note that for reasons beyond Equity's control, the Rule Change Referendum on Rule 17A(7) and Rule 17A(11) is not now taking place. There is, therefore, only one voting paper for members to return."

- 2.64 Mr Eager's argued that, by cancelling a referendum ballot on changes to the union's rules 17A(7) and 17A(11) (the rules changes for which he had written the statements against), the General Secretary had exceeded his authority and duty under the union's rules.
- 2.65 Mr Eager argued that rule 24(1) requires the General Secretary to act "... *subject to the rules and the law, ...*" and that it was therefore necessary for the General Secretary to act (as stated in rule 24(1)) "*in accordance with the directions given, and with the policies approved, by the Council.*" Mr Eager further argued that the ability to determine policy was not a right which the Council had relinquished to the General Secretary and that following the passing of a motion at the union's Representative Conference, the rule changes, in accordance with rule 30(2), had been submitted to a referendum vote of the whole membership. Mr Eager further argued that the General Secretary's ability to act was limited to implementing policy or to take decisions under very specific and clear guidelines. This argument was, Mr Eager added, re-enforced by union rule 17A(5)(e)(ii) which required that (the General Secretary)

“ will at all times act in accordance with the direction and policies of the Council as required by these Rules.”

2.66 At the hearing of this complaint, Mr Eager argued that the General Secretary could, in accordance with the union rules, have dismissed his statement and himself have written the statement against. What the General Secretary could not do, Mr Eager argued, was to cancel the referendum. This, he argued, was to exceed the authority of the General Secretary by cancelling a referendum called by the union’s ARC.

2.67 Mr Eager argued and produced witness statements to support his argument that the General Secretary’s duty and responsibility was to ensure the timetable (for the referendum) went ahead and that the General Secretary did not have the authority to cancel a referendum approved by the ARC. Mr Eager argued that the witness statements confirmed his assertion that the General Secretary had set a precedent by cancelling a referendum which had been approved by Council decision.

2.68 Summing up Mr Eager argued that the referendum should have gone ahead. He stated that statements had been exchanged, the union had sought legal advice and the General Secretary had then breached the rules of the union by cancelling the referendum on this issue. An act for which the General Secretary did not, under the rules of the union, have the authority.

The Union’s Response

- 2.69 The union stated that the rule change referendum which was the subject of this complaint followed a resolution of Equity's ARC in April 1999 and would have amended the union's rules 17A(7) and 17A(11). The purpose of the change was to effect a long term aim, of the union, of breaking the link between the ARC and the election of the Equity Council.
- 2.70 The union explained that, in a rule change referendum, in accordance with its rules, it was the union's custom to issue, with the proposal or resolution which was the subject matter of the referendum, a summary (or statement) of arguments for and against the rule change.
- 2.71 The union had a member of its Council willing to write the statement in favour of the proposed rule change, but by the 4 October 1999 had been unable to find a member to write the statement against. Mr McGarry, on that day, therefore wrote an open letter to all the members of the Council seeking a volunteer to undertake the task. Following a brief exchange of e-mails Mr Eager, on the 7 October, indicated that he would be willing to write the statement against.
- 2.72 The union explained that under rule 34(4) there was a procedure for the General Secretary to approve statements in support or against the referendum. Having received Mr Eager's statement against the proposed rule changes the General Secretary considered (having taken legal advice) that the statement contained some fundamental errors concerning the effects of the proposed rule changes.
- 2.73 The union explained the efforts made to agree the statement against with Mr Eager but, the

union stated, agreement proved impossible.

- 2.74 This the union argued, left the General Secretary with the choice of amending the statement without the consent of Mr Eager or of postponing the referendum on this matter. The General Secretary decided to postpone the referendum on this matter (partly to avoid an allegation of a breach of union rule if he amended the statement).
- 2.75 The union stressed that the decision was merely to postpone (not cancel) the referendum and stated it was the union's intention to hold the referendum on this matter later this year. The General Secretary's decision was subsequently approved at meetings of the union's Council held on the 14 December 1999 and 18 January 2000.
- 2.76 In response to Mr Eager's complaint concerning rule 24(1) (that the General Secretary had exceeded his authority), the union argued that the General Secretary had the express authority under rule 24 (4)(c)(vi) in relation to the calling of ballots (including referenda) and argued that this authority necessarily entailed decisions on timing of such ballots.
- 2.77 It was argued that rule 24(1) requires the General Secretary to act in accordance with the direction given and with the policies approved by the Council, but that the rule did not say that all actions taken by the General Secretary have to be in accordance with the direction given or with policies approved by the Council beforehand.
- 2.78 It was further argued that rule 24(1) provided that the General Secretary is Equity's Chief

Executive Officer and that by definition, this status must presuppose the ability to take urgent decisions, on behalf of the union, and to seek retrospective endorsement by the Council. Mr Donnison, for the union, argued that it would be impossible to run an organisation like Equity if every decision of the General Secretary needed the prior approval of the Council which, Mr Donnison explained, met every other month.

2.79 In relation to Mr Eager's complaint of a breach of rule 30(2), the union argued that this rule did not set out timetables for referenda or that a timetable for a referendum could not be altered and that by postponing (not cancelling) the referendum, the General Secretary was not thwarting a resolution of the ARC to hold the referendum in question.

2.80 For the union, Mr Donnison agreed with Mr Eager that the General Secretary could have rewritten the statement. However he decided not to do so and sought to gain Mr Eager's agreement for amendments to the statement to be made. When this failed, the General Secretary took the decision to cancel the referendum on the rule changes in question. Mr McGarry added that the referendum papers had already been issued to the members and the erratum notice was therefore issued indicating that the ballot on those particular changes would not now take place. It was further stated that there was not time to seek the Council's agreement to this, but that it was discussed at the December 1999 meeting of the Council where the decision to defer the referendum on the rule changes was ratified by the Council. Mr McGarry added that the referendum on this issue was now likely to go to the membership in September 2000, once the union's processes had been gone through.

- 2.81 Mr McGarry, in evidence, confirmed that there was a precedent for an Equity referendum question to be postponed. He quoted and gave details of a referendum issue relating to South Africa that had been postponed.
- 2.82 In summing up for the union, Mr Donnison stated that there was nothing in rule 30(2) that lay down a timetable for a referendum. He stated that I had heard evidence of the reasons for the postponement and that it was not a question of whether the General Secretary was right or wrong in his actions. The question was, did he (the General Secretary) act within his authority as required under rule?
- 2.83 Mr Donnison argued that the General Secretary did not act arbitrarily, feeling that it would not be right to alter or tweak the statement. Instead he acted within his powers and under rule by postponing the referendum on this issue, a decision which was subsequently endorsed and approved by the union's Council.

Reasons for my Decision

- 2.84 I found that the General Secretary clearly had the power (under rule 34(4)) to rewrite the statement against the proposed rule change and that, in evidence both Mr Eager and Mr McGarry provided evidence of precedent to back up argument that the General Secretary could have carried out significant redrafting of the statement. His judgement backed by legal

advice taken at the time was that the subject matter of the errors in Mr Eager's statement against the proposed rule changes was such that the statement gave a false impression of the factual consequences of the amendments.

2.85 He endeavoured to obtain agreement on the statement and held one meeting. There was a dispute as to why a second meeting did not take place, but there was no dispute that an attempt to hold a further meeting was made.

2.86 I heard evidence from Mr McGarry that the union also had precedent, in the form of a delayed referendum on a question relating to South Africa, where having been unable to agree statements, the referendum was postponed for eighteen months. It may have supported the union's defence more had further evidence been produced in respect of this matter.

2.87 Similarly the union's case would have been stronger had it been more consistent in the description of the action taken in respect of the referendum on rules 17A(7) and 17A(11). Various contemporary documents mention the referendum as "cancelled", "not now taking place", "not proceeding" or "deferred". By the time of the hearing though it was clear that the union regarded the referendum as only postponed and indeed indicated that it would now be held in 2000.

2.88 Against that background the question for me is did the General Secretary act within his powers in postponing this rule change referendum? I have no doubt that his actions were reasonable in all the circumstances and well within the area of discretion provided in the union

rules and necessary for the effective operation of a union such as Equity. A view subsequently endorsed by the union's ruling Council.

2.89 For these reasons I dismissed this complaint.

E G WHYBREW

Certification Officer