

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

**IN A MATTER OF A COMPLAINT MADE AGAINST
UNISON - THE PUBLIC SERVICE UNION**

APPLICANT MR S HILL

Date of Decision:

31 AUGUST

2000

DECISION

- 1.1 The Trade Union and Labour Relations (Consolidation) Act 1992 was amended, on 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 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.
- 1.4 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 so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.
- 1.5 On 6 March 2000, following correspondence with Mr Hill a member of UNISON (the “Union”), I accepted a complaint from him that the union was alleged to be in breach of its rule D2.2.4 in that a Ms Stephenson continued to act as a member of the National Executive Council (NEC) of the union contrary to rule D2.2.4. It was alleged that Ms Stephenson occupied a reserved seat on the Council, that seat being reserved for a female member earning less than a basic hourly rate of £5.25 (as at October 1998) and that Ms Stephenson, by virtue of her hourly rate increase, had ceased to be eligible for such a seat on the union’s executive.

1.6 I investigated the complaint in correspondence and decided that a formal hearing, to hear argument, should be held. The hearing was held on 13 July 2000. The union was represented by Ms T Gill QC. The applicant attended the hearing and spoke for himself. The union called Mr D Picking its Head of Conferences and Constitutional Matters as a witness. I found this helpful in my determination of the complaint.

1.7 For the reasons which follow:

“I declare that UNISON was in breach of its rule D2.2.4 in allowing Ms Stephenson to remain in office from October 1999 when, by reason of her hourly rate of pay, she no longer met the requirements of the seat on the union’s executive to which she was elected.”

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

Requirements of the Legislation and the relevant union rules

1.8 It may be helpful, at this point, if I set out the relevant statutory requirements of the Act to which I have referred in this decision and the union rules which have a bearing on this application. 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).....”

1.9 The union’s rules regarding its National Executive Council (NEC) were set out in rule D2 under the heading National Executive Council. Under the sub heading of rule 2.2 Regional Representatives rule D2.2.4 provided:

“Any member elected to the National Executive Council shall remain in office only for the period for which she/he meets the requirements of the seat to which she/he was elected unless otherwise provided for in these Rules.”

1.10 It may also be helpful if I set out the provisions of the union rule D2.2.1. This provided:

“Each Region shall elect representatives according to the following table:

<i>Regional membership</i>	<i>No of representatives</i>	<i>Conditions</i>
<i>Less than 100,000</i>	<i>2</i>	<i>1 female, 1 male</i>
	<i>+ 1 reserved seat</i>	<i>*(see below)</i>
<i>100,000 or more and</i>	<i>3</i>	<i>2 female, 1 male</i>
<i>less than 150,000</i>	<i>+ 1 reserved seat</i>	<i>*(see below)</i>
<i>150,000 or more</i>	<i>4</i>	<i>At least 2 female, 1 Male</i>
	<i>+ 1 reserved seat</i>	<i>*(see below)</i>

** Candidacy for the reserved seats is restricted to female members earning less than a basic hourly rate of £5.25(Oct 1998) to be uprated annually by the increase in median earnings, as defined by the New Earnings Survey in the October immediately preceding the election.”*

1.11 That then is the background, relevant legislation and union rules. I now set out the complaint, and arguments put to me by the parties to the complaint and the reasons for my decision.

The Complaint (that the union was alleged to be in breach of its rule D2.2.4 in that Ms Stephenson continued to act as a member of the National Executive Council (NEC) of the union contrary to its rule D2.2.4. It was alleged that Ms Stephenson occupied a reserved seat on the Council that seat being reserved for a female member earning less than a basic hourly rate of £5.25 (as at October 1998) and that Ms Stephenson, by virtue of her hourly rate increase, had ceased to be eligible for such a seat on the union's executive.)

The Applicant's Case

- 2.1 Mr Hill stated that, at the time of the 1998 election (to the union's NEC), Ms Sue Foster was the incumbent and that Ms Stephenson sought nomination for the seat. At that time, Mr Hill stated, people did not believe Ms Stephenson was eligible to stand for the seat because of her hourly rate of pay.
- 2.2 Mr Hill explained that he complained, at the time of the election and before the ballot was held, to the returning officer for the election, but that his complaint was not upheld.
- 2.3 Mr Hill commented that his belief was that Ms Stephenson had a pay increase in October 1998, backdated to 1 April that year and that that increase, although modest, was above the rate of inflation, and took Ms Stephenson above the hourly rate to be eligible for the seat on the union's NEC.

- 2.4 In the following year, Mr Hill added, the pay increase agreement date was again delayed but was above inflation. He believed that eligibility (for the seat) was taken on trust by UNISON and that the member was not required to produce evidence of earnings.
- 2.5 Mr Hill expressed his belief that he had no doubt women had not stood (for the seat) on the basis that their earnings were so close to the limit that they would have gone over the limit during their term of office as a pay increase would have taken them above the hourly rate.
- 2.6 Mr Hill referred to a letter sent, on 8 July 1998, to all NEC Members by Mr Picking the union's Head of Conferences and Constitutional Matters. In the letter, Mr Hill stated, Mr Picking had emphasised to individual members (of the NEC) that if there was any change in their circumstances which took them above the (shown) hourly rate (this was shown in the letter as £5.02) the member must advise the office accordingly which may result in them having to vacate their seat. Mr Hill asked me to note that the word "must" in the letter was in bold type and underlined.
- 2.7 Mr Hill referred me to a union letter of 13 August 1999. This was again issued by Mr Picking to all NEC members. Mr Hill asked me to note that the letter again placed members under strict obligation to notify changes in their hourly rate to the office. The letter stated:

"... individuals occupying reserved seats must ensure that they meet the criteria as set out in Rule D 2.2.1(the current hourly rate being £5.02).

The obligation is on the individual member to advise of any change in employment status which may affect their right to hold office ...”

Mr Hill added, and the union conceded at the hearing, that the rate shown in this letter, given its date must be wrong and should have stated £5.25.

2.8 Mr Hill continued that he tried to raise the matter by sending an e-mail to the union’s General Secretary in November 1999 but had not received a response. He added that he again attempted to raise the matter at the union’s December 1999 NEC (of which he was a member) meeting, and was informed that a letter would be sent out asking members if they still qualified. He commented that information as to Ms Stephenson’s hourly rate would have been helpful and added that, if the union had been more forthcoming, he might not have needed to bring his complaint before me.

2.9 In referring to the union’s written response to my initial enquiries of it, Mr Hill referred me to a paragraph in the union’s response which stated:

“The purpose of Rule 2.2.1 is to ensure that there is a minimum representation among regional representatives of low earning female members who are a large group among the membership. Rule 1.4 specifically provides that the principles of proportionality and pay representation shall be observed in the election of delegates in accordance with guidelines drawn up by the National Executive Council. The purpose of Rule D.2.4 (sic) is to underline the policy reasons for having such reserved seats by ensuring that members who hold them genuinely are low paid.”

Mr Hill argued that this was correct and endorsed rule D2.2.4 that members elected to the reserved seats should be genuinely low paid and below the limit set in rule D2.2.1.

- 2.10 Mr Hill argued that the union's response in the letter's next paragraph, that to interpret rule D2.2.4 as requiring female members in reserve seats to stand down immediately their hourly rate increases went above the rate, would mean a continual series of by-elections or, if the vacancy arose within six months of the general election, the seat remaining vacant until the next general election, was not correct. He explained that by-elections in the union are extremely rare and that there would only be by-elections if people stood who were extremely close to the hour rate limit.
- 2.11 He informed me that during the period of the last elected NEC, from 1 July 1998 to 30 June 2000, two seats on the NEC, in the West Midlands and South West Regions of the union had been vacant for the two-year period and the union had not sought nominations in order to have by-elections.
- 2.12 Mr Hill argued that there was no logic in the union's argument that, if a person was properly elected in the June (and their rate then in the next one to four months went above the hourly rate), that they could then stay on the executive for a further twenty to twenty-three months. Mr Hill argued that this was contrary to the purpose and intent of the union's rules and would deter other genuinely low paid people from standing.

2.13 Referring to Ms Stephenson, Mr Hill stated that unless there was proof of her hourly rate at the time of the election, he doubted she was properly elected. He explained that at the time of nomination in 1998, candidates had to sign an acceptance, on the nomination form, which stated:

“Reserved Seat:

I confirm that my earnings do not currently exceed a basic hourly rate of £ 5.02 and that it is anticipated my rate of pay will not increase beyond that limit for, at least, one year.”

Mr Hill added that at the time of her nomination, and election, Ms Stephenson was earning £5.01 and that she signed the candidate’s acceptance on the nomination form. He argued that it “beggared belief” that Ms Stephenson signed the declaration, in effect signing that in the next year she would not receive a pay increase taking her above the £5.02 limit and that she knew what she was doing.

2.14 Mr Hill argued that there were no checks, by the union, to ensure that Ms Stephenson was eligible or that the signed statement was honest, truthful and accurate despite his challenges to the union and returning officer. He felt that at an earnings level of £5.01 she qualified as a candidate because the rule (D2.2.1) stated £5.02. However, he questioned whether the acceptance statement was honestly signed and argued that the union had responsibility to ensure compliance with the rules on an on-going basis and added his opinion that both the union and Ms Stephenson were aware of the false declaration.

- 2.15 In response to the union's argument that Ms Stephenson would not have been aware of whether any pay increase was likely and, if one was agreed, at what rate, Mr Hill stated that Ms Stephenson was a member of the union's Health Service body which appoints negotiators on UNISON's behalf in the Health Service. He further stated that it received reports from the delegates, determined pay claims, monitored negotiations and usually agreed or endorsed settlements. He added that Ms Stephenson was not just a branch secretary but one of long standing, that she had been a deputy convener for a number of years and, as such, was the second most senior person in the union's Northern Region. To argue that there was confusion on her part regarding the hourly rate and that she did not think she would get any pay increase in the year after her election, was far fetched in the extreme and not truthful.
- 2.16 He argued that there would not be a series of continual by elections as UNISON has difficulty in persuading low paid women to stand. He stated that a high number of seats are uncontested and in the circumstances of the seat held by Ms Stephenson, should a by election be necessary, there would have been a high possibility of only one nomination of the seat.
- 2.17 In response to my questions at the hearing, Mr Hill stated that for twenty five percent of positions within the union there were no candidates while, in a further twenty five percent a single candidate was elected without a ballot. Only in fifty percent of positions, he stated, was there a contest. Asked, by me, what should happen if the incumbent's earnings went over the limit in October 1999 (ie within the last eight months of their term of office), Mr Hill felt the officer should not stand down as there would not be time for a by election.

2.18 Summing up, Mr Hill argued that the intention of the rule was to tighten up and avoid exploitation of loopholes. It was designed, he stated, to prevent a person standing and remaining in office when not the intended beneficiary of that rule.

The Union's Response

2.19 The union confirmed, in correspondence, that Ms Stephenson was elected in 1998 and that her term of office expired in June 2000. At the time of her election, the union stated, her earnings were less than the basic hourly rate provided for in the rules which, at that time was £5.02.

2.20 During 1999, the union stated, Ms Stephenson's earnings became more than the hourly rate provided for in the rules and that it was for this reason that she would not be seeking re-election in June 2000.

2.21 In correspondence the union confirmed the purpose of rule D2.2.1 as being to ensure that there is a minimum representation among regional representatives of low earning female members. The purpose of rule D2.2.4, they wrote, was to underline the policy reasons for having such reserved seats by ensuring that members who hold them genuinely are low paid.

2.22 By way of background the union explained that the hourly rate for rule D.2.2.1 is set each October and female members, standing for reserve seats, must earn less than that rate. It was explained that the nomination process started in January and closed in mid-February with the election in April. The successful candidates took up their seats at the end of the union's

conference and remained in office for a two-year term.

2.23 The reserve seat system, the union informed me, had been in existence since the union was formed in 1993. One of the union's founding principles, the union stated, was to ensure proper representation on the NEC. The definition, in rule D2.2.1, I was told was introduced in 1997.

2.24 Rule D2.2.4, the union explained was introduced in 1998 and that prior to this complaint no issue in relation to women in reserved seats had arisen. The rule, it was stated, was introduced, not in relation to reserved seats, but in relation to two serving members of the executive (the NEC) who were members in employment. Both were made redundant and early retirement was part of the redundancy package. Under the union's rules retired members in receipt of a pension could only stand for office in the retired members organisation (of the union). The men argued that because they were made redundant they were unemployed not retired. Therefore, for clarity, in 1998, rule D2.2.4 was introduced. The union added that it could be argued that the rule should have been placed elsewhere in the rule book, but felt that it covered all eventualities.

2.25 Turning to the application made to me by Mr Hill, Ms Gill, for the union, first clarified the complaint. She stated that the complaint was not related to the election of the member to the NEC adding that that election happened in 1998 and any such complaint, under the Statutory provisions, would be out of time. Neither, Ms Gill argued, was the complaint that Ms Stephenson ceased to qualify to be a member of the NEC. The actual complaint, she stated,

was that Ms Stephenson continued to act as a member (of the NEC) and that this was the alleged breach of rule.

2.26 Ms Gill suggested that I should not look at the union's rules as statute, but that they should be looked at taking into account what the union was looking to achieve by the rule in question and how the rules interact. She referred me to the case of *Wise and another v the Union of Shop, Distributive and Allied Workers* (1996) IRLR 609 in which reference was made to the comments of Lord Wilberforce in the case of *Heatons Transport v TGWU*. His Lordship stated "Trade Union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members ...".

2.27 Ms Gill argued that the purpose of D2.2.1 was positive discrimination as provided by the Sex Discrimination Act to encourage female members onto the union's executive in a union which, although its members were predominately female, was dominated by men. That, Ms Gill stated, was what rule D2.2.1 was about and that it would not be consistent with that rule to have a series of resignations. She suggested the rules should be interpreted in such a way as to ensure seats on the executive were filled.

2.28 Ms Gill argued that Mr Hill's evidence supported this position. He had argued, she stated, that the October benchmark is appropriate to measure the members pay increase announced around that time and that, until October 1999, Ms Stephenson's rate was below the benchmark.

2.29 The only possible area of difference, Ms Gill argued, was in the autumn of 1999 when Ms Stephenson was told her increase was above the October 1999 benchmark. Ms Gill questioned

whether, in these circumstances, Ms Stephenson should serve out the remaining term of her office or stand down and have the negative result of a vacant seat.

2.30 It was argued by Ms Gill that the union's approach was consistent with the rules, that therefore there was no breach of rule as Ms Stephenson's hourly rate was below the October 1998 benchmark. It was argued that I first need to give an appropriate construction of rule D2.2.1 then rule D2.2.4 and that because rule D2.2.4 states you should only remain in office for the time you meet the requirements of the seat so, in order to decide whether or not Ms Stephenson, or any other member, meets the requirements, I have to first of all give an appropriate construction of rule D2.2.1 then decide whether or not a breach of rule D2.2.4 followed on.

2.31 The consequences of a member standing down, Ms Gill commented, was another election (if the union could find another candidate for the seat), or that the seat would remain vacant. If more than one candidate should be forthcoming, an election would be needed which would be expensive.

2.32 Ms Gill stated the complaint relates to when and if Ms Stephenson's rate exceeded the benchmark. At the time of her nomination (January/February 1998), the union produced evidence (at the hearing) that Ms Stephenson's hourly rate was £5.01 and that the benchmark at that time was £5.02. Around October 1998 Ms Stephenson, I was told, was informed her hourly rate had increased (backdated to April of that year) to £5.12 and the union's benchmark rate also increase in October 1998 to £5.25. It was only in October 1999, Ms Gill felt, when

Ms Stephenson learned of her 1999 pay increase (again backdated to April of that year) to £5.46 that her earning had gone over the union's set benchmark, which by that October (1999) was then £5.40.

2.33 At that time, Ms Gill argued, the union interpreted the rules in a way that allowed Ms Stephenson to, correctly, remain in office until the expiry of her term in June 2000. That interpretation, she commented was subsequently, confirmed by the union's NEC in April 2000 when it was agreed (by the NEC) to reaffirm the union's interpretation of Rule D2.2.4 to me, that members in reserved seats would continue until the end of their term of office and would be eligible to stand for re-election only if they met the criteria as outlined in the rule book (I had received the union's letter to me, to this effect, on 28 April 2000 during my investigation of the complaint).

2.34 In summarising the union's arguments, Ms Gill first commented that section 108A(2)(a) refers to the "appointment or election of a person to, or the removal of a person from, any office.". She felt that the purpose of the legislation was not to be comprehensive of all the circumstances relating to people holding office. If it was intended in that way, she argued, it would have read "the holding of office", but that it does not do so. She argued that the Act is not concerned with the continuation of office and queried whether the complaint was correctly made under section 108A(2)(a) or indeed whether it was appropriate to any of the sub sections in 108A(2) (see para 1.9).

2.35 Turning to union rule D2.2.1 she directed my attention to the word "candidacy". The rule, she

argued, is directed to whether or not as a “candidate” the candidate’s earnings are less than the hourly rate shown. The rule, she argued, does not provide that that state of affairs has to continue throughout the two-year period of office and certainly not throughout a one year period.

2.36 Commenting on the nomination form, Ms Gill observed that the candidate signing the form has to anticipate their rate of pay will not increase for a one year period. She commented that this does not fit easily with the rules which refer to a two-year term of office. The nomination form, she argued was not part of the union rules, that it was not logical (given the term of office was for two years) and that no one in the union could ascertain why it was written in the way it was. She invited me to take the view that the nomination form was not of great importance in the interpretation of the rules.

2.37 Ms Gill, for the union, felt the NEC interpretation of the rule in April 2000 was sensible and practicable, that was, that once correctly elected the person should stay in office if the only thing that changed was the hourly rate.

2.38 A possible interpretation of the rule, she postulated, was that the member stands in the January (1998) using the October 1997 benchmark. If, in the following October her rate goes above the benchmark, she should stand down. Using this interpretation, she argued, there was no breach of rule as Ms Stephenson’s hourly rate was below the set benchmark until October 1999.

2.39 The most obvious interpretation, she argued, was the union's NEC interpretation of April 2000, that if at the end of the period in office the member was over the limit they should not stand again.

Reasons for my Decision

2.40 In reaching my decision, I found I had three questions to answer. First, do I have jurisdiction in this application? Second, what does the rule mean and third, was that rule breached in relation to Ms Stephenson?

2.41 On the question of my jurisdiction, Ms Gill argued that if Parliament had wanted me to have jurisdiction the Act would have been worded "relating to the appointment or election, or the holding of office and removal from office.". It actually says "... appointment or election of a person to, or the removal of a person, from any office."

2.42 I note that Ms Gill did not argue this point strongly. I am of the opinion that "relating to the removal" must relate to situations where someone holding office should have been removed but was not. A rule that has the effect of saying that someone should be removed is a rule relating to removal. I am therefore satisfied that I have jurisdiction in this matter.

2.43 The second question was, "what does the rule mean?" First I agree with Ms Gill that I should not look at the union's rules as if it was statute. Rule books are not drafted by Parliamentary draftsmen. I agree the right test is to look at the way the rule is written and how it would be understood by the members.

- 2.44 That is not an easy question to answer. Indeed the union was unsure itself as to what the rule meant. The letters of 8 July 1998 and 13 August 1999 sent to all NEC members indicated the person may need to stand down if their pay exceeded the stated limit. Further Mr Picking in evidence to me confirmed that that was his view at the time. But the NEC interpretation argues that it means an individual must satisfy the requirement at the candidacy stage and, if elected, then stays in office until the next election irrespective of what happens to their hourly rate. A third interpretation which seemed to be being argued by the union at one stage is that if the rate went above the adjusted limit in the first October the incumbent should resign but not if it did so in the second October after the election.
- 2.45 The nomination form is of some help in determining which of these views I should adopt. If the rule meant that the earnings limit had to be met only at the candidacy stage why are candidates asked to declare that (a) they are below the limit now and (b) that they do not expect to go above it for a year? This argument may not be conclusive but taken with all the other evidence before me I am clear that the ordinary member of the union would read the rule book as meaning that at any point when the pay of a person holding a reserved seat goes above the limit specified for that seat they should cease to be a member of the National Executive.
- 2.46 The third question I have to answer, is “was there a breach of rule in relation to Ms Stephenson”. The answer to this question now turns on the facts about which there is no dispute and which I shall summarise. In January 1998 Ms Stephenson signed her candidacy form to the effect that her pay was less than the then limit for this reserved seat which was £5.02p. At the time her pay was £5.01p. A ballot took place in April 1998 and she took up

her seat in June 1998. In October 1998 Ms Stephenson received a pay increase back dated to April 1998 taking her hourly rate to £5.12. At about the same time the limit for this reserved seat was raised (in line with the New Earnings Survey) to £5.25. In October 1999 Ms Stephenson got a further pay increase this time back dated to April 1999 and taking her pay to £5.46. Also in October 1999 the limit was raised to £5.40.

2.47 This means that between April 1998 and October 1998 Ms Stephenson's pay rate was in excess of the limit but while she should have realised this would be the case when she signed the declaration in January 1998 she did not know for certain what her pay rate was and was not actually receiving it. From October 1998 to April 1999 her pay rate was, and was known by her to be, under the newly adjusted limit. From April to October 1999 her rate again exceeded the prevailing limit but as during the same period in 1998 she did not know this for sure and nor was she actually receiving it. From October 1999 to April 2000 her rate exceeded and was known by her to be in excess of the limit relating to her reserved seat on the Executive. In October 1999 Ms Stephenson's earnings clearly and demonstrably went over the benchmark; she did not resign and the union allowed her to remain in office. On what I regard as a proper interpretation of the rules, she should have offered or been asked to resign. It is for that reason that I have declared that the breach complained of occurred.

2.48 I now have to turn to the question of remedy. By the time this case was determined Ms Stephenson had ceased to be a member of the NEC. Any mischief caused by this breach is a matter of history and was probably not very serious, though I take Mr Hill's point that some others might have stood for election had they known that earnings of £5.01 in February 1998

did not disqualify them. As to the future, the reasons the union gave for not wanting the rule to have the effect which I believe it does have were cogent and convincing and, up to a point, accepted by Mr Hill. The union now have the opportunity to set out the rules in terms of the policy that it wants to pursue and that are clear to the members. Currently the rule is unclear to the members and the union, and does not have the effect the union require.

2.49 I can understand why the union wants to avoid members, in this position, having to stand down in under two years. Therefore while I find there was a breach, I do not intend to issue an enforcement order as I believe the union understands that clarification is needed and that it should take the opportunity to look at tightening up the rules in such a way as to better secure the union's objectives in a transparent way.

E G Whybrew
Certification Officer