

**DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE UNDER
SECTION 55 OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

**IN THE MATTER OF COMPLAINTS AGAINST
THE PUBLIC AND COMMERCIAL SERVICES UNION**

Date of decisions

3 June 1999

DECISIONS

- 1.1. Under section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) any person having sufficient interest who claims that a trade union has failed to comply with any of the requirements of sections 46 to 53 of Chapter IV of Part I of the 1992 Act concerning the need for, and conduct of, elections to certain positions may apply to me for a declaration to that effect.

1.2. Whether I make or refuse to make the declarations sought, I am required to give, in writing, the reasons for my decisions.

1.3. On 25 September 1998 I received a letter from a member of the Public and Commercial Services Union (PCS) complaining about the election process in the union's elections for its National Executive Committee (NEC). Under Chapter IV of Part I of the 1992 Act elections to the union's principle executive committee have to satisfy certain specific requirements. Although the letter concentrated on the election to the NEC, it made several references to the election of the President which was carried out along with the NEC election. In subsequent correspondence the complaints were clarified and at the hearing it was clear that the complaint related to both the NEC election and that of the President. Indeed the complainant treated them as if they were all part of the same election. The complainant alleged, in relation to the union's NEC elections, which were held between 5 June and 3 July and which were elections covered by the statutory requirements, that:

- the union had failed properly to appoint Unity Security Balloting Services (UBS) as the Scrutineer (and one of two independent persons) for the elections and had also
- failed to appoint Centurion Press Limited (CPL) as one of two independent persons for the same elections.

This complaint was treated as an application under section 55 of the Act that section 49(1), (2), (3) and (4) and sections 51A(1), (2), (3), (5) and (6)(a) of the 1992 Act had been breached. (Complaint 1).

- 1.4. In the letter of 25 September 1998 a further complaint was made, that the PCS failed to ensure that UBS and CPL carried out their respective functions, that there was no interference with the carrying out of those functions which would make it reasonable for any person to call UBS's or CPL's independence in relation to the union into question, and that it failed to ensure that the risk of unfairness or malpractice was minimised by UBS and CPL.
- 1.5. I dealt with this complaint in two parts, firstly that this was an application under section 55 of the Act that section 51A(6)(b) of the 1992 Act had been breached in that the union had failed to ensure that the independent person appointed by it, duly carried out his functions (complaint 2). Secondly that the union by requiring CPL to include an insert with the ballot paper had breached sections 49(6), 51A(3) and 51A(6)(b) of the Act (complaint 3).
- 1.6. I investigated the complaints in correspondence and decided that a formal hearing should be held to hear argument on all three complaints. The hearing was held on the 25 February 1999. The union was represented by Mr David Cockburn of Pattinson and Brewer Solicitors. The complainant spoke for himself.

Declarations

1.7. For the reasons which follow:

“I declare that the Public and Commercial Services Union in respect of its National Executive and Presidential Elections having appointed Unity Security Balloting Services as an independent person to distribute the ballot papers failed, contrary to section 51A(6)(b), to ensure that the person appointed under that section duly carried out this function.

I further declare that in respect of its Presidential election the Public and Commercial Services Union by requiring Centurion Press Limited to include an insert with some ballot papers but not others, failed to ensure that the requirements of section 51A(6)(b) (read in conjunction with section 51A(3)) on the independent person to minimise the risk of any unfairness or malpractice were respected. This constitutes a further breach of section 51A(6)(b).

The union decided before this case was heard by me that in all future ballots it would not send any member material describing candidates in any way, other than the candidates description of themselves or distinguish between candidates on political grounds. I am satisfied this will avoid future breaches of this nature.”

Also for the reasons which follow I decline to make the declarations sought in respect of the other matters before me.

Requirements of the Legislation

1.8. The relevant statutory requirements in respect of the complaints are as follows:

49.-(1) The trade union shall, before the election is held, appoint a qualified independent person ("the scrutineer") to carry out -

(a) the functions in relation to the election which are required under this section to be contained in his appointment; and

(b) such additional functions in relation to the election as may be specified in his appointment.

(2) A person is a qualified independent person in relation to an election if -

(a) he satisfies such conditions as may be specified for the purposes of this section by order of the Secretary of State or is himself so specified; and

- (b) *the trade union has no grounds for believing either that he will carry out any functions conferred on him in relation to the election otherwise than competently or that his independence in relation to the union, or in relation to the election, might reasonably be called into question.*

An order under paragraph (a) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

- (3) *The scrutineer's appointment shall require him -*

- (a) *to be the person who supervised the production of the voting papers and (unless he is appointed under section 51A to undertake the distribution of the voting papers) their distribution and to whom the voting papers are returned by those voting;*

(aa) ...

- (b) *to take such steps as appear to him to be appropriate for the purpose of enabling him to make his report (see section 52);*

(c) *to make his report to the trade union as soon as reasonably practicable after the last date for the return of voting papers;*
and

(d) *...*

(4) *The trade union shall ensure that nothing in the terms of the scrutineer's appointment (including any additional functions specified in the appointment) is such as to make it reasonable for any person to call the scrutineer's independence in relation to the union into question.*

(5) *...*

(6) *The trade union shall ensure that the scrutineer duly carries out his functions and that there is no interference with his carrying out of those functions which would make it reasonable for any person to call the scrutineer's independence in relation to the union into question.*

51A.-(1) *The trade union shall ensure that -*

(a) *the storage and distribution of the voting papers for the purposes of the election, and*

(b) *the counting of the votes cast in the election, are undertaken by one or more independent persons appointed by the union.*

(2) *A person is an independent person in relation to an election if -*

(a) *he is the scrutineer, or*

(b) *he is a person other than the scrutineer and the trade union has no grounds for believing either that he will carry out any functions conferred on him in relation to the election otherwise than competently or that his independence in relation to the union, or in relation to the election, might reasonably be called into question.*

(3) *An appointment under this section shall require the person appointed to carry out his functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice.*

(5) *Where the person appointed to undertake the counting of votes is not the scrutineer, his appointment shall require him to send the voting papers back to the scrutineer as soon as reasonably practicable after the counting has been completed.*

(6) *The trade union -*

(a) *shall ensure that nothing in the terms of an appointment under this section is such as to make it reasonable for any person to call into question the independence of the person appointed in relation to the union,*

(b) *shall ensure that a person appointed under this section duly carries out his functions and that there is no interference with his carrying out of those functions which would make it reasonable for any person to call into question the independence of the person appointed in relation to the union, and ...*

1.9. That then is the background and relevant legislation. I now set out the arguments put by the parties on each of the complaints and the reasons for my decisions.

Complaint 1 (that the union had failed to properly appoint Unity Security Balloting Services (UBS) as the Scrutineer (and one of two independent persons) for the elections and had also failed to appoint Centurion Press Limited (CPL) as one of two independent persons for the same elections.)

Facts:

2.1. On 28 February 1998, John Hickey, the Balloting Officer of the Civil and Public Services Association (CPSA) wrote to Anne Hock of UBS seeking a tender from UBS to carry out the functions of scrutineer for forthcoming elections, of the soon to be formed, Public and Commercial Services Union (PCS). The PCS was to be formed by an amalgamation between the CPSA and PTC, but its formation had been delayed by complaints before me and a subsequent appeal against my decision. A similar letter had been sent to UBS's main competitor, ERBS. No tender document was sent to CPL. On 1st March Anne Hock replied enclosing a tender. In the letter of tender they said:

“It has been our experience for Centurion, and through Centurion, BMS, to undertake the print and dispatch of ballot material as the independent person under the terms of the legislation. We would propose that USBS continue to prepare the artwork for the ballot papers to meet the technical requirements of its computer scanning systems, and that we work with Centurion to meet all the timetable requirements for the print and dispatch.”

2.2. UBS's tender included no tender details for the charges for services to be rendered by CPL: indeed its charges covered only those for being scrutineer, preparing the artwork, liaising with CPL and for the receiving, opening and counting of the voting papers. On 16 March, Barry Reamsbottom, Joint General Secretary of the PCS wrote to Anne Hock, informing her that UBS's bid to act as the independent

scrutineer for national elections had been successful. On 3 April, Anne Hock wrote to Mr Hickey, confirming that she had received the proposed Regulations relating to the elections and that no issues arose from them. On the same day she asked to inspect the Register of Members. The union provided no correspondence between it and CPL relating to these elections.

- 2.3. There was no dispute that UBS acted as scrutineer in these elections and also carried out some of the functions under section 51A which are required to be carried out by an independent person. Nor was it in dispute that CPL had carried out the other functions under section 51A required to be carried out by an independent person. Indeed this is recorded in the scrutineer's report. The question is whether UBS or CPL were appointed properly under the Act.

The Complainant's Case

- 2.4. There were two strands to the appointment's complaint. It was the complainant's view that UBS were appointed to be the scrutineer for the election but were not properly appointed as required by section 49(1) and (2) of the Act. He further argued that CPL as distributor of the ballot paper for this election were not appointed at all.
- 2.5. In relation to UBS as the scrutineer, he drew my attention to section 49(3) of the Act which, he stated, listed the things that the scrutineer's appointment by the union

requires and that section 49(4) "... specifies what must not be in the terms of the scrutineer's appointment". He contended that the Act required a written appointment, meeting the standards set out in the Act"(my emphasis). This he argued required the union to write to the scrutineer (and separately to the independent person if there was to be one) setting out the functions (including any additional ones not specified in the legislation) to be performed. It was the complainant's case that this had not been done.

2.6. The complainant accepted that the union had invited tenders to perform the job of scrutineer for the election and had, by its letter of 16 March 1998, accepted UBS's tender. While that was a form of appointment it did not, in the complainant's view, meet the standards required in the Act and did not cover all of the functions the union subsequently required of the scrutineer.

2.7. As far as CPL as distributor of the ballot paper was concerned, he referred me to a letter dated 6 August 1998, that he had received from the union. This stated:

"No separate letter of appointment was made by the PCS in respect of a distributor but the distributors are, as you know, Centurion Press ..."

2.8. He stated, in correspondence, that the first time he became aware that CPL had been involved was when he received a copy of the scrutineer's report of the election which stated that CPL had been appointed as the independent distributor

of the ballot material to members. He claimed this was the first such mention of a separate appointment of an independent person as a distributor, that it did not appear in the union's issued electoral regulations and that no mention was made at the union's National Executive Council (NEC) meeting (which his wife attended as a member of the NEC and saw all the relevant papers). He also produced to me a copy of the envelope in which his election material (including the voting papers) had been received and drew my attention to the wording on the front which stated:

“This material has been distributed by Unity Balloting Services Ltd.”

- 2.9. He further argued that the union had failed, in relation to the election, to appoint CPL as the independent person responsible for the distribution of the voting papers for the purposes of the election as required by section 51 A(1), (2) and (3) of the Act.

- 2.10. He concluded by stating that it was “all very vague”, and that there was no mention of CPL in the union's letter to UBS dated 16 March 1998. While he accepted that it was not necessary to put everything in a letter, and while there might be an argument that UBS was appointed, (albeit not properly) it was clear to him that CPL was never appointed at all.

The Union's Response

2.11. In response to my enquiry to them, the union contended it had properly appointed UBS and CPL. It relied upon the correspondence between the union and UBS. The letter dated 28 February 1998 to UBS included a sentence, in respect of the union's 1998 national elections, "We would require you to provide all services as outlined in the 1992 and 1993 Acts.", and continued "In addition, we would require you to be consulted, as our rule 7.22 dictates, concerning the issuing of regulations ...". Other correspondence produced by the union, included the response of UBS dated 1 March 1998 which included a reference to their use of CPL to despatch the ballot material as the independent person under the terms of the legislation, and another company (BMS) to undertake the printing. A further letter sent by the union to UBS dated 16 March 1998 confirmed that the UBS bid, to act as independent scrutineer for the election in question, had been successful. The union contended that the appointment was in writing and evidenced by the correspondence.

2.12. Regarding the appointment of CPL, the union directed my attention to the response to the union's tender letter from UBS dated 1 March 1998, which included the statements that:

"UBS would propose to undertake its duties for these elections following the procedures previously used by CPSA"

and that:

“UBS charges to undertake all the duties as independent scrutineer under current legislation to supervise the production and distribution of ballot material, including working with an independent person (Centurion), ...”

- 2.13. The union in its response to me indicated that this was using CPL to print and dispatch under the scrutiny and supervision of UBS.
- 2.14. The union therefore submitted that in accepting the UBS bid for the work, the union considered that the tender document, submitted by UBS, constituted a joint proposal, from both organisations and that the organisations were agreeing to provide the services set out in the invitation to tender documents.
- 2.15. They also stated, at the hearing, that there was no similar exchange of correspondence with CPL but that the UBS tender letter of 1 March 1998 was regarded as a joint proposal (from UBS and CPL) and that the union understood that in accepting the tender of UBS, they were in effect appointing both UBS and CPL.
- 2.16. The union confirmed, at the hearing, that no formal notice of appointment setting out the statutory (and any extra) functions was made to either UBS or CPL but

argued that the Act does not require such a formal document to be issued. The union argued that the appointment does not require formality, and that both companies knew they were appointed. It was pointed out to me, by the union, that the Act does not require a written appointment and that the appointment could therefore be express or implied, oral or in writing (even a mixture of the two) and that in this case UBS were appointed as the independent person (the scrutineer) both for the purposes of section 49(1) of the Act and to undertake the storage of the voting papers and the counting of votes cast in the election for the purposes of section 51(A)(1) of the Act. They further argued that CPL were appointed as the independent person responsible for the printing and distribution of the voting papers in accordance with section 51(A)(1) of the Act.

2.17. The union further submitted that the price for the work undertaken by CPL was agreed verbally, at a subsequent meeting with CPL. The union added that both UBS and CPL had been used before (by the forerunners of the present union) and everyone knew what had to be done. Furthermore, they added, the union regarded UBS as highly responsible and to have a supervisory role in respect of CPL who were to distribute the voting papers.

2.18. It was argued by the union that there was a contract between the union and CPL (whether implied or otherwise) for the printing and distribution of the voting papers. The union received and paid invoices for the work done.

2.19. In short the union contended that UBS was appointed, that there was evidence in writing of that appointment, and that it was legally binding. In respect of CPL they argued that there were communications, meetings, discussions and a decision to appoint and that the union's letter of 16 March 1998, in relation to the UBS letter of 1 March 1998, was notification of the joint bid (from UBS and CPL) being successful. They concluded that both companies were appointed, did the work and were paid for it.

Reason for my Decision

2.20. It is not disputed that both UBS and CPL were involved in the elections in question: UBS as the scrutineer (and independent person for certain purposes) and CPL performing the remaining functions of an independent person.

2.21. I have seen the exchange of correspondence between the union and UBS and I am satisfied that that exchange of correspondence was an invitation to UBS to tender a bid to act as the independent scrutineer for the union's forthcoming elections. I am satisfied that the tender invitation intended that the bid should cover the performance of the functions required to be performed by an independent person under section 51A of the Act. I am also satisfied that a tender was submitted. It was a detailed bid including background information, details of how UBS would undertake its functions, costings and additional comment. I am also satisfied that the bid was accepted by the union, on 16 March 1998, when the union replied to

UBS notifying it that the bid to act as the independent scrutineer (for the elections in question) had been successful. I therefore find as a fact, that the union appointed UBS to act as scrutineer in these elections. But did the union make the appointment in accordance with the Act?

2.22. Section 49 of the Act (which sets out the duty to appoint a scrutineer and the functions he must perform) does not require the appointment to be set out in a single written document, nor that all the statutory functions must be set out in such a document. However, in my judgement, the appointment must have formality and be clear and unambiguous. Without a written appointment, concerns may arise that the appointment is not one made at “arms’ length” and with sufficient distance between the parties to ensure that the independence of the scrutineer is not called into question. I am not saying that it is a statutory requirement that appointments must always be in writing, but in the absence of a written appointment, establishing that a formal appointment has been made is considerably more difficult for the union. It is not sufficient simply to say the job was done. It has to be clear that the person carrying out the functions knew exactly what they had been appointed to do and what requirements were placed on them in carrying out those duties.

2.23. But in this instance we have an exchange of formal documents. We have an offer and acceptance. In my judgement the union formally appointed UBS as scrutineer, following on from a formal tendering exercise. That process expressly covered the

carrying out of the statutory functions placed on a scrutineer for these elections, (and even included some additional ones).

2.24. I now need to determine whether UBS or CPL, or both of them, were appointed to perform the functions of an independent person as required under section 51A.

2.25. There is no doubt that UBS carried out some of the functions required to be carried out by an independent person under section 51A. UBS' letter of tender bid for the duties of scrutineer and included costings for carrying out some, but not all, of the duties to be carried out by the independent person. UBS indicated that in the past it had arranged for others to carry out the printing and dispatch.

2.26. As already noted, there is no separate tender by CPL to the union, nor any documentary evidence of an appointment by the union. The tender documents between UBS and the union cannot, in my judgement, be read as a joint tender. The reason for this is that they contain no details of the costings of CPL, nor that the bid is dependent on the appointment of CPL. Nor does the letter appointing UBS as scrutineer make any reference at all to CPL. Nothing in writing exists which would corroborate the view that CPL had been properly appointed by the union to distribute the ballot papers in these elections. Neither the union, UBS nor CPL have provided any supporting documentation establishing this.

2.27. As I say above, in my judgement, appointments under the Act must have formality. I think that they must make clear if the scrutineer is not to perform all or some of the functions of an independent person, that this is the case. It is to be remembered that the duty to appoint the independent person is a duty falling on the union. So where it appoints someone other than the scrutineer to act for these purposes, it should be clear to both the scrutineer and the independent person that this is the case. This is particularly necessary where more than one person is to perform the functions under section 51A (as in this case). In the absence of clear written appointments the union runs the risk of it not being clear at all who is to do what, and if it is unclear I do not think the appointment would comply with the Act. Where a dispute arises as to whether there has been an appointment, I would expect a union to be able to establish, with corroborating material, both the date and nature of the appointment.

2.28. It should be noted that the union's letter to UBS of 16 March 1998 made no reference of the union accepting any "bid" from CPL or appointing that organisation as one of two independent persons in respect of the elections. This position is confirmed by the union's letter of 6 August 1998 to the complainant which stated:

"No separate letter of appointment was made by the PCS in respect of a distributor but the distributors are, as you know, Centurion Press ..."

2.29. I am reinforced in the view, that no proper appointment of CPL to act as the independent person for the distribution of the voting papers was made by the union, by the fact that the ballot material envelope received by the complainant (which contained the voting paper) stated on the front:

“This material has been distributed by Unity Balloting Services Ltd....”

2.30. The union, at the hearing, gave no explanation for this other than that it was a mistake that once spotted, was rectified.

2.31. In these circumstances, I find that although it did enter into arrangements with CPL to print and distribute the ballot papers, the union did not appoint CPL in accordance with the Act to act as an independent person for any of the functions of section 51A.

2.32. This leaves the question of whether the UBS appointment was to carry out some or all of the functions under section 51A(1). In investigating this matter, I reached the conclusion that neither the union, nor UBS drew clear distinctions between the role of scrutineer and that of persons appointed as independent persons. It is undoubtedly the regular practice of UBS to act as scrutineer and carry out at least some of the section 51A functions and to arrange for CPL to print and dispatch ballot papers in union elections. The roles are not always distinct. For example in the hearing it became clear that the union’s case was that CPL would print and

distribute the ballot papers. UBS would store them. It was unclear whether UBS had in fact stored the ballot papers between their printing and their dispatch. My conclusion is that when the union appointed UBS to be scrutineer it intended the appointment to include an appointment to carry out all the functions of an independent person under section 51A or to make arrangements for some of those functions (dispatch of ballot papers) to be carried out by CPL.

2.33. In short I find that UBS was properly appointed to carry out the functions under section 51A of the Act, as the independent person and that CPL was not properly appointed in this capacity by the union.

2.34. If I am wrong in finding that UBS was appointed to carry out all the functions under section 51A, then it would follow (from my finding the CPL were not properly appointed) that no independent person was appointed to carry out the function of dispatching the ballot papers, contrary to section 51A(1) of the Act.

2.35. Because I have found that the union properly appointed UBS to carry out the functions under section 51A there was no duty on the union to appoint CPL and thus no breach has occurred and I dismiss complaint 1. The fact that CPL carried out the printing and dispatch of the ballot papers is dealt with in complaint 2.

COMPLAINT 2. (that the union failed to ensure that the independent person carried out his function.)

2.36. The second complaint is that, contrary to section 51A(6)(b) of the Act, the union failed to ensure that the independent person appointed by it, duly carried his functions.

2.37. Put simply the complaint is that UBS were appointed in accordance with the Act to carry out all the functions of an independent person in respect of these elections, but did not, in fact, distribute the ballot papers: CPL (who were not properly appointed to perform this function) actually did this: therefore the union breached section 51A(6)(b) of the Act.

2.38. The union, as already set out, contended that it had properly appointed CPL to distribute the ballot papers. The complainant said no one had been appointed to carry out this function.

Reason for my Decision

2.39. I have already found as a fact that UBS was to perform all the functions required to be carried out by an independent person, including the distribution of the ballot

papers. There is also no dispute that CPL was responsible for the printing and distribution of the ballot papers in these elections.

2.40. It flows from these findings that one of the functions required to be carried out under section 51A(1) of the 1992 Act was not duly carried out by the person appointed (namely UBS). The union knew this function was being carried out by CPL, indeed it made arrangements for them so to do. The union therefore failed to ensure that UBS carried out this function and allowed a person not appointed by the union in accordance with the Act to carry out this function. This is a breach of section 51A(6)(b) and for these reasons I make the first part of the declaration set out in paragraph 1.7.

Complaint 3. (that the union by requiring CPL to include an insert with the ballot paper had breached sections 49(6), 51A(3) and 51A(6)(b) of the Act.)

The Complainant's Case

2.41. The complainant initially cited two areas where he felt the scrutineer and distributor had not acted independently and in a manner designed "to minimise the risk of ... any unfairness or malpractice". He first referred to a "ballot insert" which had been signed by the general secretary of the union and which had been included in the ballot material sent to some members of the union.

- 2.42. This insert had been sent, in with the ballot material, only to those members of the union in the Administrative and Allied Grades Category of membership. The insert listed candidates in the union's elections for the President, Vice Presidents and National Executive Council (NEC) under two headings. The first headed "National Moderate Group" and the other headed "Left Unity" with the sub - heading "(Broad left/Socialists Caucus Socialist Party - formally known as Militant - and Broad Left '84)"
- 2.43. He argued that the leaflet itself was unfair because although it claimed to "...give you, in the interests of democracy, the fullest possible information about the president, vice-president and the NEC elections.", it did not in fact do so and was, moreover, selective and misleading.
- 2.44. The complainant cited the election for the union's president. The ballot insert, he stated, listed two candidates for the election one, Peter Donnellan was shown under the heading "National Moderate Group". The complainant added that an asterisk appended to Mr Donnellan's name referred to the bottom of the list where it indicated "*supported by NMG.". The other candidate mentioned on the insert was Stella Dennis. No asterisk was shown against her name and she was listed under the column "Left Unity" with the sub - heading "(Broad left/Socialists Caucus Socialist Party - formally known as Militant - and Broad Left '84)". The complainant added that in addition to the support of "Left Unity" Ms Dennis had the support of

another faction called “Unity” but that there was no asterisk against her name giving this additional information.

- 2.45. The complainant informed me that in addition to the two candidates for the union’s Presidency shown on the form, there were also two other candidates whose names were not shown. Instead the insert stated that there were two main groups standing and commented that:

“There are other candidates who are not part of the two major groups and who stand as individual candidates. They are listed on the ballot paper and a study of the election addresses will tell you who they are, and what they stand for.”

- 2.46. The complainant argued that this information, on the insert, did not counter the message that these candidates were not as important (because they had not been named on the insert). Further he felt that the message from the general secretary, Mr Reamsbottom, on the insert which read:

“It is my duty to ensure that you are not misled into voting for a political group that you would not otherwise wish to support”

was in fact misleading by not telling members that Mr Donnellan was a member of the “Membership First” political group. He argued that the leaflets claim to give “the

fullest possible information about the president, vice presidents and NEC elections” and “there are two main groups or factions” was untrue. He explained that the “Membership First” group had a candidate for president and that in the NEC elections covering the executive and allied grade’s category, this group was in competition with the National Moderate Group but the insert gave no information of this. He added that the insert, to fulfil its claim to give the “fullest possible information” should have also disclosed rivalry between, and named, other slates of candidates in the union’s other categories of constituent groups. None of this, he stated, was mentioned and felt that the general secretary’s statement that there were two main groups or factions was thus untrue and that the general secretary knew it to be untrue.

2.47. He further asked that if, as it was claimed to do, the leaflet was issued to “give you, in the interest of democracy, the fullest possible information ...” why then was the insert only issued to the Administrative and Allied category which was only one of five electoral constituencies in the election.

2.48. He argued that this leaflet, was “dressed up as important information...” but was in reality a biased and selective leaflet, issued by a member of one of the factions with the intention of increasing the votes of candidates supported by that faction, at the expense of other candidates. The independent scrutineer by allowing it to be issued demonstrated its lack of independence as “no truly independent scrutineer would have included such a leaflet in the ballot papers for one of five

categories in the election, bearing in mind their duty to minimise the risk of unfairness". The union was also at fault in asking for the leaflet to be circulated as in so doing it ignored the requirements in the legislation to ensure that the appointment of the independent person required them to minimise the risk of any unfairness.

2.49. The complainant argued that while the Act does not prevent the union asking the independent scrutineer or the independent person to send out additional material with the ballot paper, the distributors of the ballot papers have a duty to minimise any unfairness or malpractice in relation to the election. He argued that while the union can ask the distributor to distribute additional material (along with the statutorily required documents), the distributor should not distribute material which is inaccurate or which is accurate but unfair, that the distributor must have standards of accuracy and fairness and that the distributor has a duty to check material to avoid unfairness.

2.50. He felt that the scrutineer or independent person should have been asked for independent advice on the ballot insert and, if not asked, should have given advice. In this case he felt that neither the independent scrutineer nor the independent person took any notice of the content of the insert, that they should have done so and should have made representations to the union but did not do so because they ran the risk of losing future work from the union if they refused to allow the insert

to be sent. He therefore submitted that the scrutineer and independent person did not act independently.

2.51. He concluded that the insert was inaccurate and unfair and was deliberately constructed to be so and designed to increase the votes for some candidates and lessen votes for others and that the insert interfered with the ballot and affected the result. He noted that while the gap between the successful and unsuccessful candidates for President was some 33 percent of the winner's vote, in the NEC election the margin was just 7 votes in over 8,000. He continued that no independent scrutineer or independent person (the distributor) acting in accordance with the Act would have agreed or indorsed the sending out of that leaflet.

2.52. The second area where the complainant felt the scrutineer and distributor had not acted independently was in relation to a leaflet issued (at the time of the elections but separately from the ballot papers) by a faction within the union known as the "National Moderate Group"(NMG). He produced a copy of the leaflet which listed the names of all the candidates of the NMG in the Administrative and Allied and Executive and Allied Grade categories and, to the left of each name, indicated the candidates number on the ballot paper. The leaflet generally urged voting members to support those candidates from the NMG.

2.53. The complainant argued that this information (names and numbers of the candidates) was not made available to other candidates or factions and felt that

either the scrutineers or the distributor (of the ballot) revealed this information to the NMG. He argued that not only was this a statutory breach on its own, but that it indicated a relationship between the scrutineers, distributors and one faction within the union.

- 2.54. However having read the union's witness statement produced at the hearing and listened to the evidence of the union's general secretary, the complainant stated that he was satisfied that in respect of this leaflet no breach of statute had occurred, adding that if the NMG had got the information from the Head Office of the union then this, no matter how unfair, was not a statutory breach and that therefore he did not wish to pursue this aspect of his complaint further.

The Union's Response

- 2.55. In correspondence the union responded, to me, that on 17 May 1995 (in a decision on another complaint) I had held that there was no restriction either under section 51(4) of the Act or any other provision, on material that could be included with the ballot paper. Also that the practice of using a ballot insert was one which had been common in the CPSA (who had merged the previous year with the Public Services Tax and Commerce Union(PTC) to form the PCS) for both national and section/group elections. They stated that in keeping with this practice the decision was taken to include an insert for the administrative (former CPSA) grades in the elections in question.

- 2.56. The union informed me that there was no further correspondence between PCS and the scrutineer/ independent person on this matter as all the parties would have been aware from past experience that the practice was likely to take place.
- 2.57. They argued that the complainant had failed to explain how the inclusion of the insert in the ballot packs had compromised the independence of UBS. They added that in their letter to the complainant of 18 June 1998, UBS had stated that "... the decision on the contents and distribution of any leaflet was made by PCS". The union confirmed that this was the case.
- 2.58. They further argued that the practice of using an insert had taken place for many years in previous CPSA elections and that members "... expected such guidance."
- 2.59. A "ballot insert", the union argued, had, for many years, in the CPSA, been sent to members as part of their ballot material. The union stated that in the CPSA there had been two main grouping, the so called "Moderates" and the "Left" and that the practice of sending members a letter identifying to which of the two main groups candidates belonged arose out of the wish that members should not be misled at local level by the practice of certain branches of issuing circulars recommending candidates on "left slates". It was against this background, they stated, that the union had decided that the balance should be redressed by advising members on a factual basis of the slate to which each candidate belonged, if any. This practice which, they stated, was not an inducement to members to vote for one candidate

or another, was continued by the PCS in the election in question for the members of the PCS who had formally belonged to the CPSA.

- 2.60. The insert, they stated, was prepared by the union's Headquarters staff and sent to CPL who would then be responsible for its printing and distribution with the ballot papers. It was, the union stated, regarded as implicit in the contract between PCS and CPL that they would perform such a task if required to do so by the union.
- 2.61. The decision, whether to send the insert to the Administrative and Allied Grades (the former CPSA members) was the union stated, discussed at the union's NEC meeting but was left for the union's joint general secretaries to decide. They decided that the insert should be included for the Administrative and Allied Grades because, as former CPSA members, they would have expected such an insert.
- 2.62. The union, stated at the hearing that they regarded the ballot information as factual and accurate and that there were no candidates in the election in the Administrative and Allied Grades categories who were members of "Membership First".
- 2.63. They informed me that the approved copy of the insert was given to CPL for printing and that no covering letter was sent to CPL as representatives from CPL were at that time regularly in the union's offices. They added that CPL had been printing and distributing such inserts for many years and so the inclusion of the insert in the ballot papers came as no surprise to them. The only specific instruction, they

added, was that the inset was only going to be included with the ballot papers being sent to the Administrative and Allied Grades. This instruction they say was given orally by the union to CPL.

2.64. The union stated to me that they regarded the insert to be factual and accurate and referred me to my 1995 decision D/1/95 when I had determined:

“In order to decide whether the sending of such a list is unlawful I must therefore decide whether the sending of such material with the ballot paper is made unlawful by the provisions of s51 or by any other provision of Chapter IV of Part I of the Act”

and that:

“Indeed in respect of trade union ballots relating to the approval of an instrument of amalgamation or transfer of engagement, s100C(5) places restrictions on what may be included with the ballot papers in such a ballot. This provision was expressly inserted by the Trade Union Reform and Employment Rights Act 1993. No such express provision has been introduced into Chapter IV of the Act. As there is no other provision excluding inclusion of such a list with the ballot paper in Chapter IV of Part I of the Act, I do not find the inclusion of the list to be unlawful.”

And stated that they had regarded this decision to be legal confirmation that it is lawful to include the balloting insert with the ballot paper.

2.65. On the question of the numbering system used on the ballot papers being disclosed to factions, the union explained that the complexity of these, the PCS' inaugural elections, were such that a number of senior officials at PCS headquarters had been asked to check that the blank voting paper and the election address booklets were correct prior to these documents going to print and that because of the numbers involved in the election, a greater number of union staff than previously, had dealt with the election process and that given these points it was not surprising that individuals would be able to deduce the likely numbering system and that the information given to UBS had come from PCS alone.

2.66. At the hearing the union explained how, after the close of nominations a completed master list of nominated candidates was sent to UBS who undertook the necessary art work on the voting papers. This artwork was then returned to the union for checking prior to printing. The union added that while there was a relatively high degree of security surrounding access to the balloting office, this list of candidates might have been seen by any member of staff working there. The union advised that thirteen named staff worked in this area and other staff involved also had access to the information.

- 2.67. In addition the union also had to check and approve five election booklets relevant to the five different categories of membership of the union. They explained that these booklets contained the election address of all the candidates in each particular election as well as the candidates standing in each of the nine constituencies. The union added that in total there were 155 candidates and more people than was usual were involved in the checking and proof reading process. Further they explained that when the election address booklets had been printed the two general secretaries and the balloting manager of the union each received six copies which were then distributed to other officers of the union.
- 2.68. Given these circumstances, the union stated it was not surprising that individuals would be able to deduce the likely numbering system.
- 2.69. They dismissed what they regarded as the complainants sweeping allegations that the NMG had abused their access to the national election office adding that tight security had surrounded the balloting office (as the union had explained to me in another case the previous year).
- 2.70. In conclusion they stated that they had no knowledge of, or reason to even suspect that either UBS or CPL received any improper approaches from the NMG or communicated any confidential information to the NMG or that the NMG purported to issue instructions to either of these organisations.

Reason for my Decision

2.71. I note first that the complainant withdrew his allegation that the scrutineer's independence was thrown into doubt by the circulation of a leaflet from the National Moderate Group containing candidates numbers as shown on the ballot papers. He was right to do so in the light of the evidence that the information on the numbering system or numbers used probably came from a union source rather than the scrutineers.

2.72. That said complaint 3 relates solely to the inclusion with the ballot paper of an insert which was sent to some, but not all, members of the union. This insert contained information about some of the candidates standing in the administrative and allied grade's category election. The information contained in the insert related only to candidates who were standing on one or other of two particular "slates". It identified the relevant slate to which the candidate belonged or, in the case of one of the candidates for the position of President of the union, that that candidate was supported by the "national moderate group". The insert was only enclosed with the ballot papers sent to members of the administrative and allied grades category. It was sent to no one else. The constituency for the Presidential election was a national one. Consequently, apart from those in the administrative and allied grades category, no other member of any other group received the insert.

2.73. Section 51A(3) requires that an appointment made under that section must require the person appointed to “*carry out his functions so as to minimise the risk of any contravention of requirements imposed by or under any enactment or the occurrence of any unfairness or malpractice*”. The inclusion of the insert was said to be unfair or a malpractice or a breach of the statutory provisions, and therefore to place a requirement on a person appointed under section 51A to include it with the ballot paper was contrary to section 51A(6)(b). It was also alleged that to do this was a breach of section 49(6).

2.74. Before turning to the question of whether or not either of the statutory provisions complained of had been breached it seems to me that I first have to decide whether the inclusion of the insert itself was contrary to an express statutory provision or was unfair or a malpractice.

2.75. I first have to decide whether a union breaches any express statutory provision by requiring that material, in addition to a return envelope, the instructions for the ballot, and the election addresses are included with the ballot paper when it is sent out to members. If a union may lawfully require that such material is included, the next question for me to consider is whether there are any restrictions on what can be included. If I am satisfied that there are limitations on what may be included I then need to decide whether in this case what was required to be included broke the law.

- 2.76. On the first question I find that there is no statutory provision relating to elections falling within the 1992 Act which expressly prevents the inclusion of material other than the election addresses, instructions for the ballot, and the return envelope, with the ballot paper. This position should be contrasted with the provisions on trade union mergers found in section 100C of the Act. There, a union is prevented from including anything other than prescribed material with the ballot paper when it is sent to a member.
- 2.77. The union is correct that I have previously held that nothing prevents the inclusion of additional material, and nothing in the complainant's arguments has persuaded me that I have been wrong to so hold in the past. I therefore find, that the inclusion of an insert with the ballot paper which is neither an election address, nor instructions on how to complete the ballot paper nor the return envelope, does not, of itself, constitute a breach of the 1992 Act.
- 2.78. The second question I must answer is more difficult. Is the union constrained as to what it might include? Section 48 of the Act effectively prevents a trade union from amending an election address submitted by a candidate in an election. What must be included with the ballot paper is the candidates' election addresses in their own words. Section 51(3)(a) requires that every member of the union, who is entitled to vote at the election, is allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees. Section 51A(3) requires every appointment of any independent person to require that the person

appointed carries out his functions so as to minimise the risk of any contravention of the requirements imposed by or under any enactment or “the occurrence of any unfairness or malpractice.”

2.79. Each of these provisions is intended to limit what a union may do. The first allows a candidate to address the electorate in his own words. The second prevents the union from interfering with the process of voting. The third is intended to ensure that the independent person is required to perform his functions so as to minimise the risk of breaches of any legislation, and the occurrence of any unfairness and malpractice. It seems to me that certain information which could be included with a ballot paper, could fall foul of these provisions. I therefore draw the inference that whilst a union may include extraneous material with the ballot paper, this freedom is not an absolute one.

2.80. For example, were a trade union to include the ballot paper and other required material for an election together with a huge mass of advertising or other extraneous material, so as to obscure the balloting material and effectively invite immediate destruction of the entire package, this might be considered to be an interference with the member’s voting. It also seems to me that if a union attempted to influence the outcome of an election, by statements about a particular candidate which were malicious or which were known to be untrue, this too might be considered to be an interference with members’ voting. Even if it were not an interference, it might be seen as an unfairness or malpractice within the meaning

of section 51A(3). It would be an act contrary to the requirement of section 51A (6)(b) to require the person distributing the ballot papers to include it.

2.81. In my judgement therefore there are limits on the type of material which the union may lawfully require an independent person to include with the ballot paper.

2.82. Having so concluded, it then falls for me to determine whether in this case what was included falls within the permitted or unpermitted categories. In my judgement, there is no difficulty if the document relates to the election in hand and gives factually accurate information about each of the candidates in the election in an even handed way and provided it is distributed to all the voting members. So, an insert which accurately describes the slates of every candidate standing on a slate in an election, would be acceptable. If however what is included constitutes blatant canvassing for one or more candidate or is factually wildly inaccurate, or sent to only a proportion of the voters, real questions arise as to whether its inclusion with the ballot paper gives rise to the occurrence of any interference, unfairness or malpractice.

2.83. In this particular case I note that the insert complained about did not suggest that members should vote for a particular faction, and having considered the matter carefully I do not think that in relation to the Presidential election the failure to mention Mr Donnellan's alleged support by Membership First or Miss Dennis's membership of Unity were materially important omissions. No factual inaccuracies

were proved before me. I find no evidence supporting any argument that the contents of the insert involved unfairness or a breach of any duty which should have been imposed on the union, scrutineer or independent person, or indeed of any interference with their functions.

2.84. The insert was sent to all the members of the union's administrative and allied grades category which was one of five such categories in these national elections. Each category could vote only for EC representatives and a vice-president from within its own category. Every member of the administrative and allied grades category received the same information about the slate, if any, on which each of the candidates stood. I have already found the information contained in the insert was not unfair. I find here that the material was supplied to each member balloted in the administrative and allied grades category. I therefore find that there was no unfairness or malpractice in the conduct of the election for the administrative and allied grades representatives on the NEC or their vice-president.

2.85. However in the case of the election of the President of the union, it was only the administrative and allied grades category which received the insert. Members in the other four categories entitled to vote in this election did not receive this information along with their ballot papers. It seems to me that this selective dissemination of information by the union to voters in only one of the five categories gives rise to questions of propriety. I find it was an unfair practice and should not have been permitted.

2.86. The question now arises as to which of the statutory requirements mentioned by the complainant were breached by this unfair practice. Certainly it was not section 51A(3) as that relates to certain requirements being included in the appointment of the independent person. I have already found that UBS were appointed to this role and that the form of that appointment required them to undertake the duties prescribed by current legislation. Nor do I believe it was section 49(6) or other similarly worded sections requiring the union to ensure that the independent person or scrutineer carried out his functions in a way that would not call their independence into question. However section 51A(6)(b), when read in conjunction with 51A(3), requires the union to ensure that these functions are carried out in a way that minimised the risk of unfairness or malpractice. By requiring CPL to send out the insert which I have found to be unfair in the case of the Presidential election, the union failed in its duty to ensure the person distributing the ballot papers acted in a way to minimise the risk of unfairness or malpractice. It is for these reasons that I have declared the union to be in breach of section 51A(6)(b) of the Act.

Were the breaches material?

2.87. There was no evidence that UBS or CPL carried out the functions of the independent person in any way that might have influenced the outcome of the election of the Administrative and Allied grades' representatives on the union's national executive. The problem was that the person who carried out some of the

functions of section 51A was not the person properly appointed to do so. I am confident the union will avoid that error in future.

2.88. As far as the Presidential election was concerned I note that the margin of victory was large (33%) and that it is not possible to say in which direction the selective distribution of information worked. Sending it to everyone might have increased or decreased the vote of any of the candidates in the election. I do not believe that the outcome of the election was determined by a breach of the statutory requirements.

2.89. I note also that the union decided before this case was heard by me that inserts categorising candidates by their factional support will not be issued in any future ballot. In accordance with section 55(1)(4) of the 1992 Act this decision is reflected in the declaration made above (see para 1.7).

Observations

3.1. I am empowered by section 55(5) of the Act to make observations on any matter arising from or connected with the proceedings. I do so in this case.

3.2. In several previous cases I have observed that while there are specific statutory requirements relating to elections, e.g. candidacy, election addresses and voting, there is no general requirement in the legislation for elections to be fair. In making those observations I may have given too little weight to the requirements for the

scrutineer to report on arrangements made to minimise the risk of unfairness or malpractice. However these comments have been made only in observations and have not affected the decision I have taken on any case. I remain of the view that there is no statutory bar to a union backing a particular candidate, what it must do is to ensure that there is no interference or risk of unfairness or malpractice in the balloting process.

E G WHYBREW

Certification Officer