

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

**IN THE MATTER OF A COMPLAINT AGAINST THE ASSOCIATION OF
TEACHERS AND LECTURERS**

Date of decision

22 July 1999

DECISION

1. Under section 55 of the Trade Union and Labour Relations (Consolidation) Act (“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.
2. Whether I make or refuse to make the declaration sought, I am required to give, in writing, the reasons for my decision.
3. On 23 February 1999 I received a letter from a member of the Association of Teachers and Lecturers (“ATL”) complaining about a letter from the ATL President concerning the forthcoming election for the post of General Secretary. The letter, circulated to members, advised that there were two candidates for the post and that one of the candidates was

Peter Smith, the present post holder. The President reported that, following a meeting at which information supplied by the candidates had been considered, the Executive Committee “recommends to the membership that they should vote for Peter Smith as being the more suitable candidate for the role of General Secretary of ATL.”

4. The complainant alleged that this letter “seemed to fly in the face of natural justice” and questioned the approach adopted by the Executive Committee. In subsequent correspondence the complaint was clarified and the complainant alleged that the letter issued by the President constituted an integral part of the General Secretary's election address and that the same facilities to produce and distribute such a letter were not provided to the other candidate in the election. The complaint was treated as an application under section 55 of the Act that section 48(6) of the 1992 Act had been breached.

5. For the reasons set out below I refuse to make the declaration sought. I made enquiries of both the complainant and the union in this matter and gave them the opportunity to make representations (which they did). I decided it was not necessary in this instance to hold a formal hearing before making my decision. This was a case where there was no material dispute about facts and the only issue between the complainant and the union was how the law should be applied to those facts.

Requirements of the Legislation

6. The relevant statutory requirements with regards to election addresses are as follows:

48. -(1) *The trade union shall -*
- (a) *provide every candidate with an opportunity of preparing an election address in his own words and of submitting it to the union to be distributed to the persons accorded entitlement to vote in the election; and*
 - (b) *secure that, so far as reasonably practicable, copies of every election address submitted to it in time are distributed to each of those persons by post along with the voting papers for the election.*
- (2) *The trade union may determine the time by which an election address must be submitted to it for distribution; but the time so determined must not be earlier than the latest time at which a person may become a candidate in the election.*
- (3) *The trade union may provide that election addresses submitted to it for distribution -*
- (a) *must not exceed such length, not being less than one hundred words, as may be determined by the union, and*
 - (b) *may, as regards photographs and other matter not in words, incorporate only such matter as the union may determine.*
- (4) *The trade union shall secure that no modification of an election address submitted to it is made by any person in any copy of the address to be distributed except -*
- (a) *at the request or with the consent of the candidate, or*
 - (b) *where the modification is necessarily incidental to the method adopted for producing that copy.*
- (5) *The trade union shall secure that the same method of producing copies is applied in the same way to every election address submitted and, so far as reasonably practicable, that no such facility or information as would enable a candidate to gain any benefit from -*
- (a) *the method by which copies of the election addresses are produced, or*

(b) *the modifications which are necessarily incidental to that method, is provided to any candidate without being provided equally to all the others.*

(6) *The trade union shall, so far as reasonably practicable, secure that the same facilities and restrictions with respect to the preparation, submission, length or modification of an election address, and with respect to the incorporation of photographs or other matters not in words, are provided or applied equally to each of the candidates.*

(7) *The arrangements made by the trade union for the production of the copies to be so distributed must be such as to secure that none of the candidates is required to bear any of the expense of producing the copies.*

(8) *No-one other than the candidate himself shall incur any civil or criminal liability in respect of the publication of a candidate's election address or of any copy required to be made for the purposes of this section.*

7. That then is the background and relevant legislation.

Facts

8. The position of the ATL General Secretary is one covered by the statutory provisions governing trade union elections. With the end of the five years maximum period allowed under the 1992 Act before fresh elections are required approaching, the ATL set in hand the process to elect a General Secretary. Having received two nominations for the post there was a need to conduct a ballot and arrangements were made for this. At the same time the ATL Executive Committee considered biographical details submitted by the candidates together with their election addresses. The outcome of this was the following undated letter sent by the President in early February to all ATL members:-

“Dear Colleague,

You will probably be aware by now that there is a contested election for the post of General Secretary of the ATL. An election is required by law every five years for the General Secretary of all trades unions. In this election there are two candidates: Peter Smith, the present post- holder, and Gill Sage. In the next few days the official election material from both candidates will be sent to you together with a ballot paper. This material comprises an address by each candidate and biographical details provided in answer to relevant questions.

At a meeting on Saturday 6 February, the Executive Committee considered the information provided by the candidates. In the light of its knowledge and understanding of the role of the General Secretary, and the crucial importance of that role to the well-being of the Association, the Committee passed the following resolution:

That the Executive Committee, after careful consideration of all the available information, recommends to the membership that they should vote for Peter Smith as being the more suitable candidate for the role of General Secretary of ATL.

In deciding to make this recommendation the Executive Committee was very conscious of the need to allow for a proper democratic vote. The Committee also felt that it had a clear duty to give a lead in this matter.

The Executive Committee urges you to consider very carefully its recommendation before you vote.

*Yours sincerely
John Beattie
President”*

9. It was this letter that gave rise to the complaint that the union had breached section 48(6) of the Act.

The Complainants Case

10. The complainant’s case was that the employment legislation sought to “ensure that any facilities and restrictions concerning the preparation, submission and length of election addresses are provided or applied equally to all candidates.” He argued first that the letter from the President formed an integral part of the General Secretary’s election

address and consequently the same facilities used in the preparation and distribution of that letter should also have been made available, under section 48, to the other candidate. The complainant recognised that the merits of this approach rested entirely on whether or not the letter from the President formed part of the General Secretary's election address. It was argued that a common sense definition of an election address was: -

“an election address is any material both (a) communicated and personally addressed to the members of a trade union, and (b) circulated officially by the controlling officers of the trade union, during the period between the calling of and the balloting for a union election, which is intended to influence the outcome of an election in favour of one candidate or candidates and to the detriment of another or others.”

11. It was further argued that the circulation, by an individual in a senior position facing an election, of a letter on official paper advising the electorate to re-elect him or her for a further term of office would be an election address and would not be legitimate canvassing. On this basis it was believed that the President's letter was not legitimate canvassing but formed part of the General Secretary's election address. The failure to provide facilities to the other candidate to organise a similar mail drop resulted in a breach of section 48(6)

12. Alternatively, if this approach was rejected, it was argued that the President's letter, arriving as it did one day before the ballot papers, constituted a modification of the General Secretary's election address and, as such, breached section 48(6). Addressing the issue of whether a modification could precede that which was modified he gave, as an analogy, the example of a firm sending out a modification to a construction kit on one day followed by the construction kit itself the following day. If a customer received the items in the order in which they had been sent out it would be perverse to argue that the term

modification was inappropriate. In ordinary language use, it was claimed, a modification may precede, succeed or accompany the entity it modifies.

13. On the question of whether the General Secretary's election address could be modified by a letter not written by the General Secretary the complainant contended that the content of the President's letter was such that it could have been written by the candidate. If the letter had been written by the General Secretary there would be no difficulty. Therefore to suggest that two letters identical in content, one of which is and one of which is not a modification to the General Secretary's election address made no sense. Whether or not the General Secretary had seen the President's letter before it was sent out had no bearing on the content of the letter nor on whether or not it was a modification of his election address. In the complainant's view what made it a modification within the meaning of the Act was that the President's letter was an unreasonable intrusion from a higher level (the Executive Committee) into a lower level (the General Secretary's election address).

14. The complainant dealt in length with the meaning of modification. It was argued that, because the President's letter recommended support for the General Secretary, it shared the same intent as that of the candidate, which was to ensure the re-election of the General Secretary. In recommending support for one candidate the Executive, by emphasising the suitability of that candidate for the post in question, had modified the message contained in that candidates' election address. It was also contended that, in focussing on the issue of the ballot papers due to arrive next day, the President's letter implied that no notice need be taken of the election address of one candidate. Having evaluated the candidates

the Executive recommended that a vote be cast for a particular candidate. In naming both candidates and in drawing attention to their election addresses the President's letter was a modification, to the benefit of one candidate and a corresponding detriment to the other, of both election addresses. Modification was clearly intended by the use of headed notepaper with an official logo, the employment of bold type for the resolution and the use of certain words all deliberately aimed at reducing the electoral standing of one candidate.

15. In summing up the arguments that the President's letter was a modification of the General Secretary's election address the complainant said that; it was a modification according to any ordinary language definition of the term; its motivation was identical to the General Secretary's election address; it drew attention to the election itself; the stricture in "his own words" (S48(l)(a)) seemed to refer to the election address not to modification; the distribution of the President's letter was presumably co-extensive with the distribution of ballot papers and the election addresses. The complainant concluded: - "If this letter was not a modification of [the General Secretary's] electoral address, it is difficult to envisage anything which would meet these common sense criteria I have described for determining what is a modification."

16. Turning to the question of equality of treatment the complainant stated that the President's letter clearly put one candidate at a disadvantage and that the cost involved in producing and distributing the President's letter was likely to be considerable. The contender for the post was not offered the same facility. On the ground of logic that candidate could not have been treated equally. It would have been absurd for the Executive to have recommended, simultaneously, support for both candidates.

The Union's Response

17. The union contended, in response to my enquiry to them, that the President's letter was not an election address within the meaning of section 48 of the 1992 Act. It stated that it had long been recognised as legitimate for a union to express support for one or more candidates as against others and the letter from the President to members was entirely proper. To make clear that the President's letter was not part of the General Secretary's election address the union set out the chronology of events that led to the letter being written. The key events were as follows: -

14 January 1999 - election addresses from both candidates for the post of General Secretary received by Electoral Reform Society - the Returning Officer and independent scrutineer ("ERS");

22 January 1999 - meeting of Executive Committee which adopted the principle to consider details of candidates for post of General Secretary with a view to making a recommendation;

6 February 1999 - Executive Council met to consider information received from ERS and agreement reached to recommend support for the current post holder.

11-12 February 1999 - Despatch of President's letter.

15 February 1999 - Despatch of ballot papers.

This, argued the union, indicated that the President's letter was entirely discrete from the election addresses. It set out the Executive's recommendation which itself was made upon consideration of the candidates' biographical details and election addresses.

18. In deciding whether it would be helpful to members to have guidance from the Executive regard was given, by the union, to Harvey on Industrial Relations and Employment Law which advised at paragraph 1026 of section M:

“The union is obliged to be even-handed in the preparation and circulation of election addresses. But there is no wider requirement that the union should stand neutral in the general conduct of the election campaign. A union may legitimately express support for one or more candidates as against other, and to that end it may legitimately circulate other campaign literature, as distinct from election addresses, which is blatantly partial. Similarly, it may circulate such other material on behalf of one or more candidates without affording the same opportunity to all.”

Therefore, it was argued even if the President's letter had been “blatantly partial” it would have been permissible. However, far from being partial, it did no more than set out the Executive's recommendation which was made on the basis of entirely objective criteria, whilst stressing that the Executive was very conscious of the need to allow for a proper democratic vote.

19. The union also stressed that the General Secretary had played no part in the decision or in the writing or dispatch of the President's letter. He had not been present at any meeting when any aspect of the election was considered and had not seen a copy of the letter until after it had been sent out. The union also drew my attention to the fact that my concern was not with conduct which may violate the law governing general elections, a point which had been raised by the

complaint, but with the statutory requirements of the 1992 Act and whether there had been a breach of section 48(6) of the 1992 Act.

20. In support of their argument the ATL drew my attention to two of my previous decisions. In the Union of Shop, Distributive and Allied Workers (D/1-2/94 at para 1.17) I had found that the requirement for even handedness in section 48(6) relates to election addresses only and not to other literature. ATL had been entirely even-handed in the facilities afforded to the candidates with regard to their election addresses. In the Union of Shop, Distributive and Allied Workers (D/2/97 para 11) I had found that a leaflet, distributed on behalf of the union in support of one candidate was a campaigning leaflet and not an election address within the meaning of the 1992 Act. I had held that there were no statutory restrictions on the circulation of other material by anyone and that the circulation of campaign material had not led to an infringement of the requirements relating to election addresses.

21. The union submitted that, in light of the clear wording of section 48(6) of the 1992 Act and my previous decisions, there were no grounds on which the complainant's case could be upheld. The union made no comment on the complainant's argument that the President's letter was a modification of the General Secretary's election address.

Reasons for my Decision

22. I have two issues to decide:

- (a) was the President's letter an integral part of the General Secretary's election address;
- (b) was the letter from the President a modification of the General Secretary's election address.

23. Section 48(1) of the 1992 Act provides that a trade union shall give every candidate the opportunity to prepare an election address and for that election address to be distributed, along with ballot papers to those entitled to vote. In this the ATL have shown that both candidates had, and took, the opportunity to prepare an election address; these election addresses were submitted to the scrutineers almost a month before the President's letter was prepared; these election addresses were distributed with the ballot papers whilst the President's letter was sent out before the despatch of the ballot papers. None of this has been contradicted. Of the tests that could be applied to the President's letter to determine whether it was an "election address" within the meaning of section 48, eg: was it prepared by a candidate and was it sent out with the ballot papers, the letter fails. I have no hesitation in deciding that election addresses prepared by both candidates and sent out with the ballot papers were the election addresses as set out in section 48 and that the President's letter was not an integral part of the General Secretary's election address.

24. The complainant went to great lengths and effort to persuade me that the President's letter was a modification of the General Secretary's election address. However I cannot accept the basic principle that a letter, issued by a union in support of one candidate, or

candidates, separate from the ballot papers, amounts to a modification of an election address or addresses. I believe that it is necessary to go beyond the meaning of one word “modification” and to consider the context in which it is used in section 48.

25. The term “modification” is first used in this section in para (4). This provides that a “..... trade union should secure that no modification of an election address submitted to it is made by any person in any copy of the address to be distributed” (my emphasis). I have no doubt that in this context “modification” means “change”. It is quite clear that the purpose of section 48(4) is to prevent any changes or modifications being made to the election addresses submitted by candidates and which subsequently are copied and distributed to members with voting papers. The President’s letter did not change or modify the election addresses that were distributed with the ballot papers. A member’s perception of the two candidates may have been modified by the President’s letter, indeed that was its intention, but the complainant has not shown that the election addresses circulated with the ballot papers were not in the form submitted by the candidates.

26. I am further strengthened in this view by what follows in section 48(4) at sub paras a) and b). The request or consent of the candidate is required by sub para a) to any modification of an election address. This implies that the change or modification is one that is to be made to the actual address submitted by the candidate before that address is reproduced for distribution. Sub-para b) allows a modification or change to be made where it is necessarily incidental to the method adopted for producing copies of the election addresses. Modification of election addresses is also referred to in section 48(5) and again

clearly relate to modification which may be necessary in the production of copies of election addresses for distribution to members with the ballot papers.

27. Turning to section 48(6) I find that this section also deals with the technical and practical processes involved in the production of election addresses for distribution to members with voting papers. Put simply sections 48(4)(5) & (6) places on trade unions the responsibility to ensure that the election addresses circulated to members with voting papers are a true reproduction of the election addresses provided by the individual candidate. Any modification or change to the candidates' election address is not permitted other than at the request or with the consent of that candidate or because it is necessarily incidental to the reproduction process. The same method of production of election addresses is required to be applied, as far as reasonably practicable to each candidate's election address. To read any more into this section is to make the election process unnecessarily complicated.
28. Having reached the above conclusion I find that the President's letter was not a modification of the General Secretary's election address and consequently did not amount to a breach of section 48(6). It is for this reason that I dismiss the complaint.

Observations

29. Under section 55(5) in giving my reasons I am permitted to make observations on any matter arising from, or connected with, the proceedings. I have previously made observations regarding the fairness or otherwise of the statutory requirements governing trade union elections conducted under the 1992 Act. In this case the complainant, who

had no particular support for either candidate, used such terms as “to fly in the face of natural justice” and “gross injustice” to describe the issue of the President’s letter. I can do no more than to repeat what I have said before:-

“..... however ‘unfair’ a member or candidate might feel it to be, the legislation does not prohibit a union’s executive seeking to persuade members to nominate and vote for one candidate rather than another. The law does provide that the process of preparing and distributing election addresses, of distributing voting papers, of voting and of counting votes shall be done in an essentially even handed way but it does not prohibit the support of the ‘establishment’ candidate. In the circumstances it is not for me to interpret the technical requirements of the election and voting process in a way that seeks to impart a degree of ‘fairness’ not inherent in the legislative provisions.” (D/1-2/94)

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