

D/1/2000

DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION UNDER  
ARTICLE 22 OF THE TRADE UNION AND LABOUR RELATIONS (NORTHERN  
IRELAND) ORDER 1995

IN A MATTER OF A COMPLAINT MADE AGAINST THE NORTHERN IRELAND  
MUSICIANS' ASSOCIATION (NIMA)

APPLICANTS      MR I GILLILAND  
                         MR J WILSON

Date of decision :

25th September 2000

DECISION

- 1.1 Under Article 22(1) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 ("the 1995 Order") any person having sufficient interest who claims that his or her trade union has failed to comply with any of the provisions of Part III of the 1995 Order 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 declaration sought, I am required to give, in writing, the reasons for my decision and, if I make a declaration, I am required to specify the provisions with which the trade union has failed to comply.
- 1.3 On 25 November 1999 I received a letter from Mr Ivan Gilliland, a member of the Northern Ireland Musicians' Association (NIMA) in which he alleged that the union "had for some years failed to comply with the legal requirements contained

in the Industrial Relations (NI) Orders...". As his letter made only general allegations I was unable to accept it as a complaint.

- 1.4 On 15 December 1999 I received a further complaint from Mr Gilliland, and a similar letter from Mr John Wilson, who is also a member of NIMA. The applicants made a number of complaints against NIMA, including a complaint that it had failed to properly appoint a scrutineer, as required by Article 15 of the 1995 Order, in an election for the post of President which took place in October 1999, and which was an election covered by the statutory requirements. Each of the applicant's stated

*"NIMA held an election for the vacant post of President in 1999. I do not believe that a scrutineer was appointed under Article 15 of the Trades Union and Labour Relations (NI) Order 1995".*

With their consent, the applicants letters of complaint were treated as one application, viz Article 15 of the 1995 Order had been breached.

- 1.5 Provisions of the Employment Relations (Northern Ireland) Order 1999 (the 1999 Order) which amended my powers in certain respects, were commenced on 15 December 1999, the same day as the complaints were received, and it may be helpful if I therefore set out, at this point, the changes to the 1995 Order, made by the 1999 Order.

- 1.6 The first way in which the 1999 Order amends the 1995 Order, is in relation to my role in determining applications of a breach of the 1995 Order provisions regarding the duty on trade unions to appoint a scrutineer (Article 15). I am now

required to make such enquiries as I think fit and, before I make or refuse to make the declaration asked for, to give the applicants and the trade union the opportunity to be heard.

1.7 Where I make the declaration sought, the 1999 Order amendment to the 1995 Order now also requires me, unless I consider to do so would be inappropriate, to make an enforcement order imposing on the union one or more of the following requirements of Article 22(5A) of the Order : -

- "a) to secure the holding of an election in accordance with the order;*
- b) to take such other steps to remedy the declared failure as may be specified in the order;*
- c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or similar kind does not occur in future."*

1.8 In any such order issued under (a) or (b) above, I am required to specify the period within which the union is to comply with the requirements of the order and, if I order a fresh election, I am required to specify that the election be conducted in accordance with Part III of the Order, and with any such other provisions as I may make in the order.

1.9 I shall now deal with the second way in which my powers have been changed since 15 December 1999. Prior to the 1999 Order amendment to the 1995 Order, I was required by Article 70 (1)(b) of the Industrial Relations (Northern Ireland) Order 1992 (the 1992 Order) to make such provision, as seemed appropriate, for

restricting the circumstances in which the identity of the applicant was disclosed to any person. Until the introduction of the 1999 Order, on the 15 December 1999, it was my practice only to disclose the applicant's name where he or she had no objection to my doing so, and not to name the applicant in my decision. However, the 1999 Order amendment now requires me to disclose the applicant's identity to the union, unless I think circumstances are such that it should not be so disclosed. Since the 15 December 1999 therefore, it has become my normal practice to disclose the identity of the applicant to the trade union (and to such other persons (if any) as I think fit), to name the applicant in my decision and to name the applicant in any enforcement order issued.

1.10 As the complaints from Mr Gilliland and Mr Wilson were received on 15 December 1999 their complaints were determined using the 1995 Order as amended by the 1999 Order.

1.11 I investigated the complaints in correspondence with the parties and their representatives and decided that a formal hearing should be held to hear argument on the complaint. The hearing was held on the 23 August 2000. The union was represented by Mr Paul Shevlin of Thompsons Mc Clure, solicitors. One of the applicants, Mr Gilliland, attended the hearing and spoke for himself. Mr Wilson did not attend. I reserved my decision and reasons at the end of the hearing.

1.12 Before the hearing Mr Shevlin wrote to me on behalf of NIMA conceding that the election of Mr D Lyttle to the post of President in 1999 was not conducted in accordance with the requirements of the 1995 Order. He also told me that Mr

Lyttle, had, in fact, later resigned and another election to the post of President had taken place in the year 2000. The letter stated that :

*"NIMA accepts that the law is not clear as to whether a Scrutineer should be appointed in circumstances where only one nomination is received for the position of President. NIMA accepts that case law, as it presently stands, dictates that a Scrutineer should be appointed."*

1.13 At the hearing Mr Shevlin confirmed that the union had conceded this complaint.

He added that the President, Mr Lyttle, who had been elected in October 1999 had resigned in April 2000 and a new election for President had already taken place in July 2000 with a scrutineer appointed in accordance with Part III of the 1995 Order.

1.14 After careful scrutiny of the documents and evidence presented, I concluded that the union was correct in conceding the breach of Article 15 of the 1995 Order. I do not accept Mr Shevlin's view that the law is unclear; the law requires a scrutineer to be appointed in such elections. After consideration of the statements by Mr Gilliland and Mr Shevlin at the hearing, I have decided to make the declaration sought. As the remedy has effectively taken effect, I have decided it would not be appropriate for me to make an order requiring the union to re-run the election in question. Had another election not taken place I would have ordered the union to re - run the ballot for President.

1.15 For the reasons which follow:

"I declare that the Northern Ireland Musicians' Association failed to comply with Article 15 of the 1995 Order in relation to the election of the President of the union in October 1999, in that a scrutineer was not appointed to carry out the functions laid down in legislation"

1.16 Also for the reasons which follow, I consider it would be inappropriate to make an enforcement order on the union in respect of this breach of the legislation.

#### Requirements of the Legislation

1.17 The relevant statutory requirements of Part III of the 1995 Order, in respect of the complaint, are as follows:

*"12.-(1) A trade union shall secure -*

- (a) that every person who holds a position in the union to which this Part applies does so by virtue of having been elected to it at an election satisfying the requirements of this Part, (my emphasis)*
- (2) The positions to which this Part applies (subject as mentioned below) are -*
  - (a) member of executive,*
  - (b) any position by virtue of which a person is a member of the executive,*
  - (c) president, and*

*(d) general secretary...*"

*Article 15-(1) requires that:*

*"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 Article to be contained in his appointment; and*
- (b) such additional functions in relation to the election as may be specified in his appointment".*

*Article 15(3) sets out a number of requirements placed on the scrutineer. These include supervising (or in some cases carrying out) the production of voting papers and their distribution and receipt of completed voting papers; inspecting the register of names and addresses of the members of the trade union. He must carry out this last function if a member or candidate alleging inaccuracies in the register asks him to do so and he does not consider the allegation to be ill - founded.*

*Article 15(3)(c) and (d) state that he shall be required:*

- "(c) to take such steps as appear to him to be appropriate for the purpose of enabling him to make his report (see Article 19);*
- (d) to make his report to the trade union as soon as reasonably practicable after the last date for the return of voting papers";*

*Article 15 (8) states:*

*"The trade union shall, before the scrutineer begins to carry out his functions, either -*

- (a) send a notice stating the name of the scrutineer to every member of the union to whom it is reasonably practicable to send such a notice, or*
- (b) take all such other steps for notifying members of the name of the scrutineer as it is the practice of the union to take when matters of general interest to all its members need to be brought to their attention"*

*Article 19 sets out what the scrutineer's report shall contain. It reads:*

*"(1) The scrutineer's report on the election shall state -*

- (a) the number of voting papers distributed for the purposes of the election,*
- (b) the number of voting papers returned to the scrutineer,*
- (c) the number of valid votes cast in the election for each candidate,*
- (d) the number of spoiled or otherwise invalid voting papers returned, and*
- (e) the name of the person (or of each of the persons) appointed under Article 18 or, if no person was so appointed, that fact.*

(2) *The report shall also state whether the scrutineer is satisfied -*

(a) *that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any statutory provision in relation to the election,*

(b) *that the arrangements made (whether by him or any other person) with respect to the production, storage, distribution, return or other handling of the voting papers used in the election, and the arrangements for the counting of the votes, included all such security arrangements as were reasonably practicable for the purpose of minimising the risk that any unfairness or malpractice might occur, and*

(c) *that he has been able to carry out his functions without such interference as would make it reasonable for any person to call his independence in relation to the union into question;*

*and if he is not satisfied as to any of those matters, the report shall give particulars of his reasons for not being satisfied as to that matter.*

(3) *The report shall also state*

(a) *whether the scrutineer -*

(1) *has inspected the register of names and addresses of the members of the trade union, or*

(2) *has examined the copy of the register as at the relevant date which is supplied to him in accordance with Article 15(9)(a),*

- (b) *if he has, whether in the case of each inspection or examination he was acting on a request by a member of the trade union or candidate or at his own instance,*
- (c) *whether he declined to act on any such request, and*
- (d) *whether any inspection of the register, or any examination of the copy of the register, has revealed any matter which he considers should be drawn to the attention of the trade union in order to assist it in securing that the register is accurate and up-to-date,*

*but shall not state the name of any member or candidate who has requested such an inspection or examination”.*

*19(4) requires the report to also cover the performance of any other independent person appointed to count the votes in the election. 19(5) states “The trade union shall not publish the result of the election until it has received the scrutineer’s report”*

*Articles 19(6) to (8) deal with the distribution of the scrutineer’s report to members.*

*Finally, Article 20 states that, “Nothing in this Part shall be taken to require a ballot to be held at an uncontested election”.*

### **The Applicants’ case**

2.1 The applicants were seeking a declaration that NIMA had acted unlawfully when it failed to appoint a scrutineer in the election that returned Mr Lyttle. At

hearing, Mr Gilliland asserted that an independent scrutineer is required to be appointed by a trade union even in an election which is uncontested. Mr Gilliland's submission is straightforward. He said Article 15 is unambiguous and requires the trade union "before the election is held, to appoint a qualified independent person ("the scrutineer")... (my emphasis). He said that "election" includes an uncontested election and in support of this he pointed to five matters. First he said that the normal meaning of election includes an uncontested election. Second he said Article 20 makes it expressly clear that where the word "election" is used in Part III it is meant to include an uncontested election (Article 20 states "nothing in this Part shall be taken to require a ballot to be held at an uncontested election"). Third he said Article 12 uses "election" without qualification (like Article 15) and this must include an "uncontested election" within its meaning. Otherwise a person returned at an uncontested election would not satisfy the primary requirement of Part III contained in Article 12 namely that "every person who holds a position in the union to which this Part applies does so by virtue of having been elected to it at an election satisfying the requirements of this Part..."(my emphasis). Fourth he pointed to the fact that the union recently (April 2000) held another election for the post of President and a scrutineer was appointed in accordance with Article 15. In his view this action clearly proves that the union accepts it had acted wrongly in not appointing a scrutineer in the election of its President in 1999.

2.2 Finally Mr Gilliland cited the G. B. Certification Officer's decision in the Offshore Industry Liaison committee case (D/7/94) in which he decided that the law did require the appointment of an independent scrutineer in an uncontested election.

2.3 That is the applicants' case.

#### The Union's Response

2.4 Mr Shevlin, on behalf of the union, cited the "Offshore Industry Liaison Committee" decision and accepted that a scrutineer should be appointed even in an uncontested election. He said that the union had acted in a bona fide manner when it did not do this and suggested that the law is unclear, so unclear in fact that "Harvey on Industrial Relations and Employment Law" devotes three pages to it. Mr Shevlin accepted that the law is as determined in the "Off-Shore" decision. He said that much as NIMA would like to appeal it, he pointed to the fact that it is a small trade union without the resources to challenge the decision in a higher court. He asked me, in reaching my decision, to take the views expressed in "Harvey on Industrial Relations and Employment Law" in part 2, paragraphs M1028.01 to 1031.04 into account. He added that much of the argument was now academic as the remedy had already taken place. Mr Lyttle had stood down shortly after being elected on grounds of ill - health. Subsequently, NIMA appointed Unity Security Balloting as the independent scrutineer in the election for President in 2000.

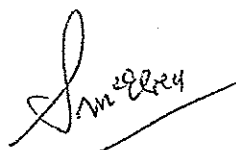
#### Reasons for my Decision

- 2.5 I agree with the applicants' view that an independent scrutineer must be appointed, even in circumstances where an election is uncontested.
- 2.6 I was not persuaded by Mr Shevlin's arguments, and I see no reason to come to a different decision to that of the G.B. Certification Officer in the case cited at hearing.

2.7 I accept that as a consequence of Mr Lyttle's resignation another election for the post of President has taken place and the remedy has, effectively, taken effect.

2.8 For these reasons I upheld this complaint. I made the declaration sought. I have considered it inappropriate to make an order in this case.

S Mc Elrea

A handwritten signature in black ink, appearing to read 'S Mc Elrea', with a horizontal line underneath it.

Northern Ireland Certification Officer



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