

**DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS UNDER
ARTICLE 90A OF THE TRADE UNION AND LABOUR RELATIONS**

(NORTHERN IRELAND) ORDER 1995

Mr. J McKay

v

UNITE THE UNION

Date of Decisions

28 July 2011

DECISIONS

Upon application by the applicant under Article 90A (1) of the Trade Union and Labour Relations (Northern Ireland) Order (as amended) (“the 1995 Order”):

(1 & 2) Pursuant to Article 70ZA of The Industrial Relations (Northern Ireland) Order 1992 I have struck out, on the grounds that they had no reasonable prospect of success, the applicant’s complaints that on 15 October 2009 Unite the Union breached Rule 6.2 of its Rules, in that Mrs Geraldine Kelly was allowed to be elected to (1) the First Irish Executive Committee and (2) the Regional Committee for Disabled Members, although she was ineligible due to the fact that she was unemployed and therefore not an accountable representative of workers.

(3) I declare that Unite the Union breached Rule 17.8 of its rules in that Branch 3/24 failed to hold meetings once each month. I declare that Unite the Union breached rule 17.7 of its rules in that Branch 3/24 failed to hold Branch elections by 31 December in each alternate year.

REASONS

1. By an application dated 1 February 2010, the applicant, Mr John McKay, made four complaints against Unite the Union (“Unite” or “the Union”).

2. Following correspondence with my Office, the applicant withdrew one complaint. The three complaints he wished to pursue were confirmed by him in the following terms:-

Complaint 1

That on 15 October 2009 Unite the Union breached Rule 6.2 of the Rules of the Union at a meeting for the election of members to the First Irish Executive Committee, in that Mrs Geraldine Kelly was allowed to be elected, even though she was ineligible due to the fact that she was unemployed, and therefore not an accountable representative of workers, as required by Rule 6.2 of the Unite Rule book.

Complaint 2

That on 15 October 2009 Unite the Union breached Rule 6.2 of the Rules of the Union at a meeting for the election of members to the Regional Committee for disabled members (*a committee provided for under Rule 11.4*) in that Mrs Geraldine Kelly was allowed to be elected onto the disabled members committee, even though she was ineligible under Rule 6.2 as she was not an accountable representative of workers due to the fact that she was unemployed.

Complaint 3

That on numerous occasions prior to 3 October 2009 Unite the Union breached Rule 17.8 of the Rules of the Union by the failure of the Branch Secretary, Mr Maurice Cunningham, to call a meeting of Branch 3/24 to enable eligible members to be elected onto various committees, (Regional Disability, Ethnic Minorities, the Irish Executive Committee etc). In turn, Rule 17.7 of the Rules of the Union was breached in that there was a failure to hold branch elections by 31 December every alternate year.

3. The complaints are matters potentially within my jurisdiction under Article 90A (2) (a) and (d) of the 1995 Order. They were investigated in correspondence by my Office and, as required by Article 90B (2) (b) of the 1995 Order, the parties were offered the opportunity of a hearing, which took place on Wednesday 29 June 2011.

4. There were 17 months between the making of this application and the hearing of the complaints. There were a number of reasons for this. The applicant experienced significant difficulties in providing information necessary to clarify the wording his complaints, which was finally confirmed and put to the Union only on 20 December 2010. The applicant then issued consecutive Freedom of Information Act (FOIA) requests, in February and March 2011, to separate Education and Library Boards, seeking information concerning the employment status of Mrs Geraldine Kelly. This promised to be relevant information and I judged it appropriate to wait for the answers to his requests, which were all received by 13 April 2011. Finally, from 7 February 2011 onwards the applicant engaged in correspondence with the Union requesting it to provide him with legal representation at the hearing. The Union refused, but Mr McKay was unwilling to accept this and continued to press the Union to change its decision. The Union did not do so and in due course I directed my Office to inform the applicant that the hearing must now go ahead and that if he wished to be legally represented he must make his own arrangements. By letter of 31 May 2011 my office advised the parties that the hearing would take place on 29 June 2011. I refused a request from the applicant in a letter dated 7 June 2011 for a postponement while he awaited a reply to a further FOIA request to an Education and Library Board.

5. The Union was represented by Mr J. O'Neill of Thompsons McClure Solicitors. Mr J. Kelly, the Union's Regional Secretary, and Mr E. McGlone, a Regional Co-ordinating Officer, attended for the Union and gave evidence; as did Mrs Geraldine Kelly, whose election to two committees was the subject of two of the applicant's complaints. Mr M. Cunningham, a Regional Industrial Organiser

(and the former Secretary of the applicant's branch), attended but did not give evidence. Mr S. Andress of Agnew Andress Higgins Solicitors represented the applicant, Mr J. McKay, who gave evidence on his own behalf. The applicant was accompanied by a former member of the Union, Mr P. Torley, who did not participate in proceedings. A 126 page bundle of documents containing relevant correspondence and papers was prepared by my Office for the proceedings. After the bundle was despatched to the parties my Office sought some further information from the Union by letter of 24 June 2011. The response was received by my Office on 28 June, comprising 30 pages of documents and 26 pages of Harvey. It omitted some of the information sought by my Office, and provided some information not sought, for which the Union apologised. I admitted the latter upon the Union's application, after receiving satisfactory explanations of the delay in submission and the relevance of the documents. At the start of the hearing I also admitted three more pages of documents at Mr O'Neill's request, and I later admitted four pages of documents at Mr Andress's request.

Findings of Fact

6. Having considered the oral and documentary evidence provided and the submissions of the parties I find the facts to be as follows.
7. Mr McKay has been a member of Unite the Union and its predecessor the Transport and General Workers Union (TGWU) for some 35 years and has held a number of offices in the Ireland region of both. He is currently, following a Branch election held on 7 May 2011, the Chairman of Unite Branch 3/24, which is composed of Unite members resident in Northern Ireland. Mr McKay is disabled and has been unemployed for some years.
8. Unite was formed on 27 April 2007 by the amalgamation of the TGWU and Amicus, both of which thereupon ceased to exist.. The two former unions continued to operate under their own separate rulebooks until 1 May 2009, when these ceased to have effect and a new rulebook for the amalgamated Union as a whole came into force. Mr McKay's complaints were received in the Certification Office on 2 February 2010 and, under Article 90A(6)(a) of the 1995 Order, can refer only to rule breaches which are alleged to have taken place in the six months prior to that date, i.e. on or after 2 August 2009. The new rulebook introduced on 1 May 2009 is therefore the relevant one.
9. For a transitional period of two years after the amalgamation, the TGWU and Amicus also retained their separate committee structures within Unite. Then after the introduction of the new rulebook, Unite set in train the process of electing committees in its regions which would, for the first time, be made up of members from both the predecessor unions. The elections included those for membership of Regional Industrial Sector Committees and Area Activists Committees. These Committees in turn elect, from among their own members, the members of other regional committees: they are a stepping stone to those other committees.
10. On 15 October 2009 an Area Activists meeting was held in Belfast for the purpose of electing the members of the Belfast Area Activists Committee (AAC). Among others Mrs Geraldine Kelly was elected to the Belfast AAC. Immediately after its election, the Belfast AAC held its first meeting, at which it elected some of its own members to serve on the Irish Executive Committee (as the Ireland Regional Committee is called) and the Regional Disabled Members Committee. Mrs Kelly was elected to both these committees. Under Rule

6.2 of the Unite rulebook it is a requirement for anyone wishing to stand for or hold office on any committee of the Union that he or she be an “accountable representative of workers”. The Union’s acceptance of Mrs Kelly as a candidate and her subsequent election to these committees, despite her being, in Mr McKay’s contention, unemployed and therefore not an accountable representative of workers, are the grounds of his Complaints 1 and 2.

11. Mr McKay’s Branch, 3/24, which has about 800 members, held no meeting to elect Branch officers between the autumn of 2009 and May 2011. Its last meeting for that purpose before May 2011 was held on 13 October 2007, under the rules of the then “TGWU Section” of Unite. Under Rule 17.7 in the new rulebook of May 2009, Branch 3/24 was required to hold elections for branch officers before 31 December 2009: those elected would then hold office for the two calendar years 2010 and 2011. The Union accepted in correspondence with the Certification Office and at the hearing that these elections did not take place. Mr McKay’s Complaint 3 concerns this failure, which he claims prevented him from being elected to Branch office, from which he might then have gone on to be elected to a RISC or AAC and thence to other offices in the Ireland Region. It also concerns more generally the Branch’s failure to hold any meetings at all in the period to which his complaints relate.

12. Mr McKay made verbal complaints about these matters to Mr Kelly, the Regional Secretary and Mr Cunningham, the then Secretary of Branch 3/24, though he could not provide the exact dates on which he did so. He received no answers satisfactory to him. He said in correspondence with the Certification Office that he was not aware of any formal complaints procedure within the Union that he might have followed. His complaints to the Certification Office were made on a Notification of Complaint form dated 1 February 2010 and received the following day.

The Relevant Statutory Provisions

13. The provisions of the Trade Union and Labour Relations (NI) Order 1995 which are relevant to this application are:

Right to apply to Certification Officer

90A. —

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in paragraph (2) may apply to the Certification Officer for a declaration to that effect, subject to paragraphs (3) to (7).

(2) The matters are—

(a) The appointment or election of a person to, or the removal of a person from, any office;

- (d) The constitution or proceedings of any executive committee or of any decision-making meeting;*
- (3) The applicant must be a member of the union, or have been one at the time of the alleged breach or threatened breach.*
- (8) The reference in paragraph (1) to the rules of a union includes references to the rules of any branch or section of the union.*
- (10) For the purposes of paragraph (2)(d) a committee is an executive committee if—*
- (a) it is a committee of the union concerned and has power to make executive decisions on behalf of the union or on behalf of a constituent body,*
 - (b) it is a committee of a major constituent body and has power to make executive decisions on behalf of that body, or*
 - (c) it is a sub-committee of a committee falling within sub-paragraph (a) or (b).*
- (11) For the purposes of paragraph (2) (d) a decision-making meeting is—*
- (a) a meeting of members of the union concerned (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union, is final as regards the union or which, under the rules of the union or a constituent body, is final as regards that body, or*
 - (b) a meeting of members of a major constituent body (or the representatives of such members) which has power to make a decision on any matter which, under the rules of the union or the body, is final as regards that body.*
- (12) For the purposes of paragraphs (10) and (11), in relation to the trade union concerned—*
- (a) a constituent body is anybody which forms part of the union, including a branch, group, section or region;*
 - (b) a major constituent body is such a body which has more than 1,000 members.*

Declarations and orders

90B. —

- (1) The Certification Officer may refuse to accept an application under Article 90A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.*
- (2) If he accepts an application under Article 90A the Certification Officer -*
- (a) shall make such enquiries as he thinks fit,*

(b) shall give the applicant and the union an opportunity to be heard,

(c) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made,

(d) may make or refuse the declaration asked for, and

(e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.

The provision of the Industrial Relations (NI) Order 1992 relevant to this application is:

Striking Out

70ZA. - *(1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may -*

(a) order the application or complaint, or any response, to be struck out on the grounds that is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived,

(b) order anything in the application or complaint, or any response, to be amended or struck out on those grounds, or

(c) order the application or complaint, or any response, to be struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant or on behalf of the applicant or complainant or (as the case may be) respondent has been scandalous, vexatious, or unreasonable.

(2) The Certification Officer may order an application or complaint made to him to be struck out for excessive delay in proceeding with it.

(3) An order under this Article may be made on the Certification Officer's own initiative and may also be made –

(a) if the order sought is to strike out an application or complaint, or to amend or strike out anything in an application or complaint, on an application by the respondent, or

(b) if the order sought is to strike out any response, or to amend or strike out anything in any response, on an application by the person who made the application or complaint mentioned in paragraph (1).

(4) Before making an order under this Article, the Certification Officer shall send notice to the party against whom it is proposed that the order should be made giving him an opportunity to show cause why the order should not be made.

(5) Paragraph (4) shall not be taken to require the Certification Officer to send a notice under that paragraph if the party against whom it is proposed that the order under this Article should be made has been given an opportunity to show cause orally

why the order should not be made.

(6) Nothing in this Article prevents the Certification Officer from making further provision under Article 70(1) about the striking out of the proceedings on any application or complaint made to him.

(7) In this Article –

“response” means any response made by a trade union or other body in the exercise of a right to be heard, or to make representations, in response to the applicant or complaint;

“respondent” means any trade union, or other body, that has such a right”.

The Relevant Union Rules: Unite the Union Rules (2009)

14. The Union rules that are relevant to this application are as follows:

Rule 6. Lay Office

6.2 In order to be eligible to be a candidate for election to, or hold office on, the Executive Council and/or any committee, council, or other body of the Union provided for by these rules, the member in question must be an accountable representative of workers.

6.3 The definition of the term “accountable representative of workers” shall be in the exclusive power of the Executive Council, which is empowered to take into account changing industrial realities and the unique nature of some industries (eg: construction, contracting, leisure, rural etc) in formulating such a definition. It must nevertheless include Branch office-holders who are in employment, shop stewards, health & safety and equalities representatives.

Rule 8. Regions

8.2 Each Region shall have a Regional Committee of lay members elected from the Regional Industrial Sector Committees, Area Activists Committees where established, and as otherwise provided for by these rules in such proportions, as may be determined by the Executive Council.

Rule 11. Equalities

11.2 All constitutional conferences and committees of the Union shall have a gender and ethnic balance of elected representatives at least reflecting the proportion of the black, Asian and ethnic minority and female membership which they represent. The Executive Council shall ensure the implementation of this rule and shall report on its implementation to the Policy Conference of the Union.

11.4 *There shall be Regional Committees for women members; black, Asian and ethnic minority members; disabled members; and lesbian, gay, bisexual and transgender members, elected from the Regional Industrial Sector Committees and Area Activists Committees where established in such proportion, as may be determined by the Executive Council. These committees shall each elect a delegate to their respective Regional Committee of the Union as a whole.*

Rule 17. Branches

17.7 *Each Branch shall have for its management a Chair, a Treasurer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by show of hands, or by ballot, if so decided by the meeting. The election shall take place and be completed not later than December 31 in each alternate year, and the elected candidates shall take office the following January for two years. Casual vacancies may be filled at an ordinary Branch meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.*

17.8 *Each Branch shall meet once each month at a designated meeting time and place. New members shall be notified of that time and place. A Branch which immediately prior to these rules coming in to force met at a frequency other than once each month may continue to do so. A Branch may decide to change its meeting time or place or the frequency of its meetings provided it obtains the Regional Committee's consent before implementing that change and takes such steps to inform Branch members of the change as shall be required by the Regional Committee. If the Regional Committee rejects the change, the Branch may appeal in writing to the Executive Council whose decision shall be final.*

17.10 *The Executive Council shall issue standing orders to regulate the conduct of Branch meetings and business and may amend the standing orders from time to time. Those standing orders may only be varied in respect of a Branch with the prior approval of the Executive Council. The quorum for a Branch meeting to make a decision on any matter shall be 5 members and all matters should be decided by a simple majority of those voting. If the votes are equal the proposition before the meeting shall fail.*

Rule 18. Workplace Representation

18.1 *At each workplace, the members employed at that workplace, shall elect from amongst themselves, at least every two years, 1 or more of the following representatives:*

18.1.1 *Shop stewards/workplace representatives*

18.1.2 *Safety representatives*

18.1.3 *Learning representatives*

18.1.4 Equality representatives

Rule 24. Ireland

24.4 *The procedure for qualifications, election and nomination of representatives to the Irish Executive Committee shall be determined by the Executive Council. The Executive Council may organise constituencies both by reference to Industrial Sectors and geographic area following consultation with appropriate constitutional committees in Ireland.*

24.5 *The Irish Executive Committee shall take the place and have the powers, duties and responsibilities of the Regional Committee for Ireland. The Regional Secretary shall act as secretary to the Irish Executive Committee and shall be responsible for implementing its decisions.*

Submissions and Conclusions

Complaints 1 and 2

15. Complaints 1 and 2 concern the eligibility of Mrs Geraldine Kelly to stand for and be elected to seats on committees in the Ireland region of the Union. In a letter to my Office on 21 January 2011, Mr O'Neill made a formal request on behalf of the Union that I strike out these complaints using my powers under Article 70ZA of the 1992 Order, on the grounds that they had no reasonable prospect of success and/or were misconceived. He argued that they were based on the claim that Mrs Kelly was not an accountable representative of workers, a claim which I had already rejected in the case of *Rice v Unite the Union (D/10-13/2010)*. I did not accede to the Union's request at that time, as Mr McKay was holding out that he would be bringing fresh evidence: he was in the process of finding out Mrs Kelly's employment status through Freedom of Information Act requests to two Education and Library Boards (ELBs) and believed the replies would show that she was not employed and so could not be an accountable representative of workers.

16. Mr McKay did receive replies from the two ELBs, and these were available at the hearing, but they did not show that Mrs Kelly was not an employee. Mr McKay's only other evidence was hearsay evidence, given to him, he said, by a teacher in a school in which Mrs Kelly claimed to be a classroom assistant, to the effect that she was not employed there. He was not prepared to name the teacher concerned.

17. For her part, after registering a protest that she should have to demonstrate that she was employed when it was for Mr McKay to prove his case that she was not, Mrs Kelly gave evidence in which she detailed her employment history over the past 11 years. She explained that she was employed by the school, which was funded by one of the ELBs: she was paid her salary by the South Eastern ELB, which then claimed a proportion of it back from the Belfast ELB. She had been on full-time secondment from the school to Unite since the academic year 2005/06, and looked after the interests of Unite members in the two ELBs. She was based at the Union offices in Belfast and went out from there to deal with problems

that arose with members in the ELBs. Mrs Kelly provided documentary evidence – payslips and a P60 - which confirmed her employed status and the source of her ELB income.

18. In light of the evidence given at the hearing Mr O’Neill again applied to me to strike out Complaints 1 and 2. Mr Andress, for Mr McKay, was given the opportunity to say why I should not do so. He offered no argument, but instead asked me to allow him to amend Complaint 2 by deleting from it the phrase “due to the fact that she was unemployed”, so that the Complaint would become that she was ineligible for election on the single ground that she was not an accountable representative of workers. I rejected this request. I accepted evidence at the *Rice v Unite* hearing in November 2010 that Mrs Kelly was a senior shop steward and Secretary of Unite Branch 3/119, and Mrs Kelly gave evidence in the present hearing that she had held these offices at the relevant time and still did so. Since under rule 6.3 the definition of accountable representative of workers “*must include Branch office-holders who are in employment, shop stewards.....*” and since Mr Andress gave no indication that he had any evidence to counter Mrs Kelly’s, I saw no purpose in allowing the amendment he sought.

19. I therefore formally advised the parties that under the powers provided by Article 70ZA (1)(a) of the Industrial Relations (Northern Ireland) Order 1992 Complaints 1 and 2 were struck out on the grounds that they had no reasonable prospect of success.

Complaint 3

20. This complaint has two parts. Taking the second part first, it is claimed that Branch 3/24 failed to hold elections for Branch officers by 31 December in each alternate year, in breach of the requirement to do so that is laid down in rule 17.7 of its rulebook. Specifically, the claim is that elections that should have been held before 31 December 2009 did not take place. Complaint 3 also alleges that rule 17.8 was breached in that on numerous occasions prior to 3 October 2009, the Secretary of Branch 3/24 failed to call a meeting of the Branch to enable eligible members to be elected on to various regional committees, such as the Regional Disabled Members Committee, the Regional Ethnic Minorities Committee and the Irish Executive Committee.

Rule 17.7.

21. This is a rule which comes within my jurisdiction under Article 90A(2)(a) of the 1995 Order since it concerns “*the appointment or election of a person to.....any office*”.

22. In correspondence and at the hearing, the Union conceded that Rule 17.7 had been breached. There had been no elections in Branch 3/24 in the two year period up to 31 December 2009. Mr O’Neill, for the Union, said that the Secretary had made attempts to call Branch meetings, but only a very small number of members had turned up and the meetings had not reached the quorum necessary to conduct Branch business (which under Rule 17.10 is, I note, just five members,). Mr McGlone confirmed this in his evidence. In any event, it is agreed by both parties that elections which were required under Rule 17.7 to be held in late 2009 were not held.

23. In light of its concession, I declare that the Union breached Rule 17.7 of its rules in that there was a failure by Branch 3/24 to hold Branch elections by 31 December in each alternate year.

24. Mr O'Neill submitted that I should not make any enforcement order under Article 90B(3) of the 1995 Order in relation to this breach. Mr Andress, for the complainant, disagreed and suggested specific terms for such an order. I deal with this matter below, after considering the remaining part of Complaint 3.

Rule 17.8.

25. The remaining part of Complaint 3 alleges breaches of Rule 17.8 of the Union's rules, in particular the requirement that "*Each Branch shall meet once each month at a designated meeting time and place*". It is further alleged that, there being no meetings, eligible members of Branch 3/24 were not able to be elected to various regional committees. It was clear from his Notification of Complaint form and his evidence that Mr McKay would have seen himself as a candidate for election to one or more of those committees. Mr Andress claimed that the failure to hold meetings was deliberate. Branch 3/24 was the only Branch in the region where elections had not been held. The intention was, he said, to deny Mr MacKay and his supporters the opportunity to sit on influential decision-making bodies in the region. It was part of a power struggle then taking place within the Region, which had led to a breakdown in the democratic processes of the Union.

26. The Union accepted that meetings of Branch 3/24 had not taken place in 2008 and 2009 as required by Rule 17.8, and that the rule had therefore been breached. Mr O'Neill submitted, however, that this was not a rule that fell within my jurisdiction under Article 90A(2)(d) of the 1995 Order. First, he said, my jurisdiction under that Article was over "*rules relating to ... the constitution or proceedings of any executive committee or of any decision-making meeting*" of a union, but Rule 17.8 dealt with the frequency of branch meetings, not the constitution or proceedings of branches. Secondly, even if that point was disputed, Branch 3/24 did not satisfy the definitions of an executive committee or a decision-making meeting set out in paragraphs (10), (11) and (12) of Article 90A. Referring me to those paragraphs and to Harvey (Division M, paragraphs 3963 ff.), Mr O'Neill pointed out that an executive committee must be a committee of the whole union, or a committee of a major constituent body of the union, or a sub-committee of either of these. He submitted that Branch 3/24 was self-evidently not a committee of the whole Union: nor, since it had only some 800 members, was it a committee of a major constituent body, which under Article 90A(12)(b) must have more than 1000 members; and it was not a sub-committee of either of these kinds of body. Similar considerations, he said, disqualified Branch 3/24 from being a decision-making meeting: to be such it would have to be either a meeting of members of the whole union (whether plenary, delegate or representative), typically the annual conference; or a meeting of the members of a major constituent body with more than 1000 members. Therefore meetings of Branch 3/24 were outside the jurisdiction given to me by Article 90A(2)(d).

27. Despite Mr O'Neill's assertion to the contrary, I am inclined to the view that Rule 17.8, which regulates the frequency of branch meetings, is a rule relating to the constitution or proceedings of a committee. But however that may be, the definitions in paragraphs (10), (11) and (12) of Article 90A mean that Branch 3/24 is not an executive committee or a decision-making meeting for the purposes of paragraph (2)(d) of that Article. Consequently, I find that I do not have jurisdiction to determine complaints about its constitution or proceedings.

28. The Union had doubts about whether Rule 17.8 came within my jurisdiction under Article 90A (2)(a) of the 1995 Order. Its position on this question shifted over the course of the hearing. Mr O'Neill conceded that the rule was within my jurisdiction, but later withdrew the concession. In summing up, however, he agreed that ultimately the burden of Mr MacKay's complaint was that the failure of his Branch to hold meetings had led to him being denied the opportunity to be elected to certain regional committees, and he accepted that it came under Article 90A(2)(a), which covers "*rules relating to.... the appointment or election of a person to.... any office*".

29. On the substance of the complaint, Mr O'Neill said that it was entirely misconceived; it assumed that Branch meetings could elect persons on to the Regional Committee and the regional "equalities" committees (for disabled members, women, ethnic minorities etc), but this was not so. The members of the equalities committees were elected from among the members of the RISCs and the AACs, in accordance with Rule 11.4. The Regional Committee (in Ireland, the Irish Executive Committee) was elected from the RISCs, the AACs and the equalities committees.

30. Mr O'Neill said further that under Rule 6.2, any person wishing to stand for or be elected to lay office in the Union had to be an accountable representative of workers. Rule 6.3 gave the Executive Council exclusive power to define this term, but added that the definition must include "*Branch office-holders who are in employment, shop stewards, health and safety representatives and equalities representatives*". Executive Council Guidance on Rule 6 issued in September 2008 extended this list to include convenors and learning representatives. Convenor, shop steward and all the representative posts listed were workplace posts, i.e. a person had to be employed in a workplace to hold them (see Rule 18.1, reproduced in para 14 above); and Rule 6.3 explicitly required Branch officers to be employed. It followed that only an employed person could be an accountable representative of workers and eligible for election to lay office. This was understood throughout the Union and, indeed, Mr McKay himself understood it, since it was the whole basis of his Complaints 1 and 2 about Mrs Kelly's eligibility. But at the time of the elections he claimed to have been excluded from, Mr McKay was not employed (nor, Mr O'Neill added, did he hold any Branch office). He was not an accountable representative of workers and was not eligible to stand. Branch 3/24's failure to meet did not deny him the opportunity to do so.

31. On the question whether Rule 17.8 is a rule that is within my jurisdiction under Article 90A(2)(a), I consider that the Union rightly conceded that it was. That Article gives me jurisdiction over "*rules relating to...the appointment or election of a person ...to any office.*"

On the face of it, Rule 17.8 is a rule laying down that Branch meetings will be held once a month at designated time and place, and allowing changes in the frequency, time or place of meetings under certain conditions. It does not mention appointments or elections to office. However, it has been established in a number of decisions of the Great Britain Certification Officer that his jurisdiction is not confined to rules that explicitly mention the matters set out in S.108A(2)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992, which is the Great Britain equivalent of Article 90A(2)(a): more general rules, which clearly “relate to” those matters in the context of a given complaint, may also come within jurisdiction. Relevant decisions were reviewed by the Great Britain Certification Officer in *Dawes v Royal College of Nursing (D/42-43/10-11)*, paras 47ff.

32. In one of the decisions there reviewed (*Lynch v UNIFI, CO/1964/18*, 7 October 2004), the Certification Officer pointed out, however, that the potential extension of jurisdiction deriving from the words “relating to” must be viewed restrictively. He said:

“In my judgment, however, the use of the word “relate” does not have the effect of extending my jurisdiction to all those rules which touch upon, no matter how obliquely, the matters set out in section 108A(2). I find that the connection between the rule allegedly breached and the matters set out in section 108A(2) must be clear and direct. Whether a rule is one relating to a matter listed in section 108A(2) is a matter of fact and degree to be determined in the circumstances of the particular case.”

I respectfully agree with this reasoning. If therefore I am to regard myself as having jurisdiction in the present instance, I have to be satisfied that there is a clear and direct connection between Rule 17.8 and the matters set out in Article 90A(2)(a), i.e. “*the appointment or election of a person....to any office*”, in the circumstances of this case.

33. In my judgment there is such a connection in this case. Branches, as Mr O’Neill correctly said, cannot elect members directly to the RISCs or the AACs. But they are one of the routes by which members can be nominated for election to those committees, which as mentioned above, are stepping stones to the equality committees and to the Irish Executive Committee. The “*Guidance for Officers and Staff for the Convening and Conduct of Regional Industrial Sector Conferences and Area Activists Meetings*” issued by Unite in July 2009 says (Section 6):

“Candidates for the RISC must be proposed by an accountable representative of workers, or be nominated by the appropriate branch or workplace. There can be no self nomination by reps.” (my emphasis)

The same document applies the same “general principles and procedures” to the AACs; and a pro-forma note from Regional Secretaries, addressed to “all reps in the Region”, advises them that if they wish to stand for an AAC they must be nominated by a branch or workplace.

34. If Branch meetings are not held, therefore, one of the routes to nomination for election to a RISC and/or an AAC, and thence to other regional committees, is blocked. The Union acknowledged that there could be circumstances (though it maintained that they would be rare) in which the Branch route would be the only one available to a prospective candidate. Consequently I find that Rule 17.8, which requires Branch meetings to be held, has a clear and direct connection with the matters set out in Article 90A(2)(a) and comes within my jurisdiction in the circumstances of this case .

35. Since the Union conceded that no meetings of Branch 3/24 had been held in 2008 or 2009, I declare that by that failure it breached Rule 17.8.

36. When I make a declaration, I am required by Article 90B(3) of the 1995 Order, if I consider it appropriate to do so, to make an enforcement order to remedy the breach and/or to ensure that it or a similar breach does not occur in future.

37. Mr Andress, for Mr McKay, argued that I should make an enforcement order in respect of the breaches of Rules 17.7 and 17.8. He said although the Union sought to make light of it, the failure to hold Branch meetings and elect Branch Officers was a serious matter. It was a deliberate strategy to keep Mr McKay and his supporters out of office in the region and an abuse of the Union's democracy. An enforcement order should be made to protect all members against such abuse. It should require that the elections held in the autumn of 2009 for RISCs and AACs be re-run, with Mr McKay permitted to be a candidate: or that a seat be "made available" for him on the Belfast AAC and the Irish Executive Committee (Mr Andress did not identify any mechanism in the Union's rules or custom and practice by which this might be done).

38. Mr O'Neill, for the Union, submitted that no order should be made. He said that Mr McKay personally had suffered no disadvantage in terms of election to office from Branch 3/24's not meeting in 2009. He would not have been eligible to be a candidate for a RISC or an AAC or another committee, because he was not an accountable representative of workers, being neither a workplace representative nor an employed Branch office-holder. Mr O'Neill acknowledged that Complaint 3 did not mention Mr McKay personally but referred generally to "eligible members" of the Branch, and he accepted that it was "theoretically possible", though in his view very unlikely, that some member of Branch 3/24 who was an accountable representative of workers and wished to stand had been unable to get nominated. However, he said that no-one else had made a complaint and despite its general wording, Complaint 3 was actually about Mr McKay's personal grievance – as Mr Andress's proposed remedies clearly confirmed. In any case nomination by a branch was rare in practice, most nominations came from workplaces.

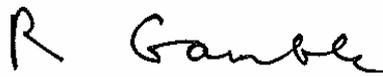
39. Mr O'Neill said further that Branch 3/24 was now running properly, following the election of Branch officers in May 2011. Any mischief had largely been remedied. He also pointed out that there would be elections in September/October 2011 for membership of the RISCs and AACs and the committees that were elected from them. In his submission it

would be wholly disproportionate in terms of cost and disruption in the Region to order re-runs when fresh elections were so close.

40. Mr Andress was able to offer no evidence in support of the assertion that the failure to hold Branch meetings had been a conspiracy to keep Mr McKay and/or his supporters out of office, nor was any account given as to why such a conspiracy should have been formed or what was the basis of the alleged power struggle within the Region. For the reasons given by Mr O'Neill, I do not believe that Mr McKay was denied the opportunity to stand for a RISC or an AAC because of the breaches of Rules 17.7 and 17.8. Even if I had reason to believe that he or another member of Branch 3/24 had been denied that opportunity, I would not regard a re-run of elections held in 2009 as a reasonable remedy in the circumstances of this case. I agree with Mr O'Neill that that would be disproportionate, given that there will be new elections for these committees, and the equalities committees and the Irish Executive Committee, in a few months time. I do not see that there would be any case for "finding a place" for Mr McKay on one or more of these Committees for the remainder of its current term, even if the Union had a mechanism for doing so, which the Union says it does not, and for which I find no sanction in the rulebook at any rate. As regards the future, the Union has confirmed that Branch 3/24 is now operating according to rule. With Mr McKay as Chairman, I am confident it will continue to do so and will not repeat these breaches. For these reasons I do not consider it appropriate to make an order in relation to the breach of Rule 17.7 or Rule 17.8.

Observation

41. Under 17.5 of the Union's rulebook, a branch which fails to hold an Annual General Meeting is to be suspended and its members allocated to another branch, subject to appeal. Branch 3/24 held no meetings at all in 2008, 2009 and 2010, but Rule 17.5 was not applied. This is not a matter I am required to pronounce upon in the present case, but I think it worth bringing to the Union's attention, since a similar situation occurring in future, in any branch, could give rise to a breach of rule complaint.



Roy Gamble
Certification Officer for Northern Ireland