

D/3 -6/2007

DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION
UNDER ARTICLE 22(1) AND ARTICLE 90A(1) OF THE TRADE UNION AND
LABOUR RELATIONS (NORTHERN IRELAND) ORDER 1995

Mr P Archer

V

**Union of Construction, Allied Trades and Technicians
("UCATT")**

Date of decisions:

20 September 2007

DECISIONS

Upon application by the applicant under Article 22(1) and Article 90A(1) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) ("the 1995 Order"):

(i) I refuse to make the declaration sought by the applicant that the Union breached general rule 15 clause 10 of its rules as the nomination papers in the Executive Council (Irish Region) election of 2006 were not date stamped on arrival at the General Office, and their envelopes were not available, thereby permitting the election process to include nominations which were not received within 7 days of the last star night meeting.

(ii) I refuse to make the declaration sought by the applicant that in the above-mentioned election the Union breached its established custom and practice concerning election addresses, and its "Guidance on Publication of Election Addresses" of 6 July 1998, by accepting the inclusion of Mr J McDonald's photograph with his election address.

(iii) Upon withdrawal by the applicant, I dismiss the applicant's claim that in or about the middle of June 2006 the Union breached Article 14(3) of the 1995 Order by allowing the inclusion of a photograph in a candidate's election address in the above-mentioned election.

(iv) Upon withdrawal by the applicant, I dismiss the applicant's claim that in or about the middle of June 2006 the Union breached Article 15 of the 1995 Order by failing to appoint an independent scrutineer to oversee the Branch nominations for the above-mentioned election.

REASONS

1. By an application dated 10 August 2006, the applicant, Mr P Archer, complained of two alleged breaches of rule and two alleged breaches of statute by his union, the Union of Construction, Allied Trades and Technicians ("UCATT" or "the Union") in respect of an election of the Irish Region member of the Union's Executive Council Election (Irish Region). The complaints were subsequently refined and formulated as follows:-

That in or about the middle of June 2006 the Union failed to conduct the nomination process for the election of the Irish Region member of its Executive Council in accordance with its rules, in that

(1) In breach of general rule 15 clause 10 of its rules, nomination papers were not date stamped on arrival at the General Office and their envelopes were not available, thereby permitting the election process to include nominations which were not received within 7 days of the last star night meeting.

(2) In breach of its "Guidance on Publication of Election Addresses" dated 6 July 1998, it accepted Mr J McDonald's inclusion of his photograph with his election address.

And further that

(3) The Union breached Article 14(3) of the 1995 Order by allowing the inclusion of a photograph in a candidate's election address.

(4) The Union breached Article 15 of the 1995 Order by a failure to appoint an independent scrutineer to oversee Branch nominations for the Executive Council election (Irish Region).

2. By an e-mail of 21 February 2007, the applicant withdrew complaints (3) and (4), having accepted after discussion with my office that the matters complained of did not constitute breaches of statute. Regarding complaint (3), the applicant accepted that Article 14(3) does not forbid the inclusion of photographs in election addresses. Regarding complaint (4), the applicant accepted that Article 15 does not require an independent scrutineer to oversee nominations or the nomination process.
3. The remaining complaints, (1) and (2), are matters potentially within my jurisdiction under Article 90A(1) (a) and (c) of the 1995 Order. They were investigated in correspondence 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 9 August 2007. The Union was represented by Mr M O'Brien of Counsel instructed by Mr S Cottingham of OHP Parsons & Partners. Mr A Ritchie, General Secretary of UCATT, was in attendance and gave

evidence. The applicant acted in person and gave evidence on his own behalf. A bundle of documents containing relevant correspondence and papers, including a 1996 decision of the GB Certification Officer (D/1-3/96) submitted by the Union, was prepared by my office for the hearing. The rules of the Union (edition of 2000) were also in evidence. Written witness statements from Mr Ritchie (submitted by OHP Parsons and Partners) and Mr Archer were received by my office on 2 August 2007 and exchanged that day. Additional documents were introduced by the Union at the hearing.

Findings of Fact

4 In early 2006, after some years of internal debate, UCATT decided, on financial viability considerations, to merge its Northern Ireland Region and its Republic of Ireland Region to form a new single Irish Region. UCATT's rules provide that each region shall elect one member of the Union's Executive Council ("EC"). The decision to merge these two regions therefore meant that in future there would be one EC member where there had been two before, and that an election would be required to choose that member. At the time of the merger decision, Mr Archer was the EC member for Northern Ireland, having been first elected in 1995, and Mr J McDonald was the EC member for the Republic of Ireland. The new single Region was to come into being in September 2006. The member elected to represent it would hold office from then until the next regular 5-year EC election in March 2008.

5 The General Secretary, Mr Ritchie, wrote to all UCATT Branch Secretaries in the two regions on 23 May 2006, advising them of the merger decision and enclosing nomination papers for the election of the EC member for the new single Region. Branches were to choose their nominee at their June "star night" meeting. Star night meetings are held in March, June, September and December. Their dates are marked with a star in the contribution cards that Branches issue to their members. They must take place on or before the 14th of the month. The General Secretary's letter said:

"The attached nomination paper must be properly filled in, as required by General Rule, and arrive at General Office within seven days from the date of the the last Star Night Meeting or such returns will be invalid."

All those involved understood this to mean that the last day for receipt of nominations was 21 June, i.e. seven days after the last possible date for any Branch star night meeting.

6 The only nominations received were for the two existing Irish members of the EC. Two Northern Ireland Branches nominated Mr Archer and 19 Republic of Ireland Branches nominated Mr McDonald. Mr Ritchie ruled out the nominations of two of the Republic of Ireland Branches on the grounds that the papers had not been properly completed. He wrote to the

Secretaries of the Branches concerned on 6 July 2006 to explain the reasons.

- 7 There was a monthly meeting of the EC at UCATT's General Office on 6 July, at which both Mr Archer and Mr McDonald were present. In an e-mail of 4 July, Mr Archer had told Mr Ritchie that he would like to take the opportunity to review the nomination papers while he was at the General Office for the meeting. This request was put to the EC, which after some discussion agreed that both the nominees should be given access to the papers. They duly inspected the papers during the lunch break of the EC meeting. Mr Archer expressed concern that the nominations were not date-stamped and asked to see the envelopes in which they had arrived, in order to verify that they had been received in time. He was told that the envelopes were not available. There was some difference in the evidence about the length of the inspection. Mr Ritchie said it lasted about 15 minutes, but no time limit was imposed. Mr Archer recalled it as being three or four minutes and implied that it had then been brought to an end.
- 8 Either during the inspection or later in the afternoon, Mr Archer asked Mr Ritchie for copies of the nomination papers, but he was not given them. On 24 July he made a formal written request, "as a candidate in the election", for the copies, indicating that he was prepared to pay for them. Mr Ritchie did not reply to this request.
- 9 On 25 July Mr Archer wrote to Mr Ritchie by e-mail as follows:

"I wish to make a formal complaint following my inspection of the Branch nominations for the Irish UCATT Executive Council position. After my inspection of the nomination papers at the EC meeting in July I brought to your attention that none of the nomination papers were date stamped.

I therefore requested the envelopes which I would have expected to have been date stamped on arrival at the General Office. I was informed by you that they were not available. I have waited until this moment because I believed that you as General Secretary would have dealt with this issue once I first brought it to your attention. I would request that this matter is brought to the attention of the election scrutineer without delay.

The reason for my request was to ensure that the nominating Branches had complied with UCATT General Rule 15 clause 10 which clearly stipulates the procedure.

As a candidate in the coming election I am unable to check whether all the Branches had submitted the nomination papers in the timescale set out in general rule 15 clause 10 and therefore believe the rule has been breached.

In the light of these deficiencies I am seeking a postponement of the election in order that a thorough investigation is carried out by the Union.

I believe that as a candidate in this election I have been placed at a significant disadvantage.”

10 Mr Ritchie replied the next day in these terms:

“I have read your e-mail of 25 July, 2006 and would advise you that your request is not accepted. I have ruled out two nominations, neither of them for you, as being in breach of Rule. I am satisfied that the remaining nominations comply with Rule. In your correspondence you have produced no evidence to suggest otherwise.

There is no basis for ordering an investigation. The election will go ahead.”

The election began as planned on 28 July. It was run by Electoral Reform Services (ERS), a business of the Electoral Reform Society.

11 In an e-mailed letter of 1 August, Mr Archer replied to Mr Ritchie's point about evidence by saying that the evidence was in the hands of the Union. He added that he had pointed out to Mr Ritchie on 6 July, in the presence of the other candidate, that the nomination papers had not been date stamped and that the envelopes were not available. The letter ended:

“Please also advise why I was not informed of specified changes on the publication of election addresses. I do not recall the matter being discussed or agreed at Executive Council meetings.”

Later the same day Mr Archer sent a further e-mail which read as follows:

“I have recently been informed that Mr McDonald's photograph in his election address is not within the permissible content and layout of candidate's addresses in accordance with long established UCATT practice and written instructions with regard to election statements.”

12. Mr Ritchie replied to the letter the next day. He repeated that Mr Archer had provided no evidence of invalid nominations and that the election would go ahead. However, he had apparently not yet seen Mr Archer's later e-mail, since he ended:

“The final paragraph of your letter makes reference to changes on the publication of election addresses. If you would

like to let me know what you mean by this, I will endeavour to respond.”

13. There appears to have been no further correspondence between Mr Archer and Mr Ritchie on the matter. On 10 August Mr Archer lodged his application with the Certification Office.

14. A meeting of the EC took place on 24 August, the day before the close of the election. Mr Archer attended and presented his views about the date stamping of nominations and the Union's practice of not allowing photographs in election addresses. The EC noted Mr Archer's points and agreed that in future clear guidance should be issued on the contents of election addresses. However, it did not endorse (according to Mr Archer, it did not in fact discuss) his views on date stamping or photographs, nor did it give any indication of concern that these matters might have put a question mark over the validity of the election.

15. ERS sent its report on the election to the Union on 25 August and on 29 August Mr Ritchie wrote to all Branches in the Irish Region announcing the result. Mr McDonald had received 419 votes to Mr Archer's 172 and was declared elected.

The Relevant Statutory Provisions

16. The provisions of the 1995 Order that 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;

(c) the balloting of members on any issue other than industrial action;

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.*

(3) *Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union or both of the following requirements –*

- (a) *to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;*
- (b) *to abstain from such acts as may be so specified with a view to securing that a breach or threat of a breach of the same or a similar kind does not occur in future.*

(4) *The Certification Officer shall in an order imposing any such requirement as is mention in paragraph (3)(a) specify the period within which the union is to comply with the requirement.*

Election addresses

14.-

(3) *The trade union may provide that the 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.

(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 matter not in words, are provided or applied equally to each of the candidates.*

Appointment of independent scrutineer

15.-

(1) *The trade union shall, before the election is held, appoint a qualified independent person (“the scrutineer”).....*

- (3) *The scrutineer's appointment shall require him –*
- (a) *to be the person who supervises the production of the voting papers and their distribution and to whom the voting papers are returned by those voting;*

 - (e) *to retain custody of all voting papers returned for the purposes of the election*
- (8) *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.*

The Relevant Union Rules (Rules 2000)

17. Rule 3 - Branch Meetings

1. *The business of the Union shall be conducted through branches which shall elect a President, Secretary, Treasurer and three Committee members, who shall act as trustees for the branch.*

Rule 15 – Duties of Branch Secretary

10. *At the conclusion of voting on all questions submitted to the member, the BS shall record on the voting papers the number of votes cast for each candidate as the votes are recorded and shall write these in block letters (for example TEN VOTES) and where any candidate receives no votes, then after his/her name the BS shall record in block letters NO VOTES on the voting paper. The voting papers must be signed by the Branch Secretary and the B[ranch] P[resident], and forwarded at once to the G[eneral] O[ffice] or Regional Office as appropriate. All voting papers (whether any votes are recorded or not) and nomination papers must arrive at the GO or Regional Office as appropriate within seven days from the date of the last Star Night*

meeting or such returns will be invalid, except under the circumstances referred to in Rule 21 Clause 8. All members in attendance at the time of voting shall sign the official attendance list and the BS shall be responsible for maintaining correct attendance lists.

Rule 27 - Appeals of Members, Branches and Regional Councils

1. Any member or members excepting regional full-time officials or national organisers aggrieved at a decision of the Branch, Regional Council, or Executive Council shall have a right of appeal against any such decision as set out hereafter. Such right of appeal shall similarly apply to the Branch or Regional Council. In the case of appeals concerning the working rules the appeal in the first instance shall be dealt with by the Regional Council. Any other appeals shall be dealt with by the Executive Council. Any appeal against the decision of the EC shall be to the GC whose decision shall be final and binding, subject to any power vested in any court or tribunal.

Rule 28 – Miscellaneous Obligations

8. Members seeking office may solicit nomination by Branches. Members wishing to address a Branch meeting in support of his/her own nomination should submit such a request in writing to the appropriate Branch Secretary. A member seeking office shall be allowed, after nomination, to issue an address in accordance with the provisions of Clause 7 of this Rule, setting forth his/her qualifications and reasons relevant to the office concerned to be read in branches on the meeting prior to or on the night of election. A member may issue an address, not exceeding 300 words, to Branches for election as a delegate to the Rules revision Committee, General Council, Executive Council, Regional Councils, Labour Party Conference, Trades Union Congress and National Delegate Conference.

All postal ballots shall be conducted by the Electoral Reform Society.

(GUIDANCE NOTE: Members who wish to solicit nominations from Branches should confine their request to expressing an interest in being nominated. The request should not exceed one hundred words and should in no way constitute an election address or pre-empt any issues that might ensue in the election campaign.)

18. Union Guidance on Publication of Election Addresses

Extract from letter dated 6th July 1998 headed "Guidance on Publication of Election Addresses" and addressed to all nominees for the 1998 UCATT South-East Lay Executive Council Election, from the then General Secretary, Mr George Brumwell.

“Nominees who intend to accept nomination and have an election address published should note the following points:

2. In accordance with long established UCATT practice, election addresses should not contain graphics, columns or tables, or photographs.

I trust this guidance proves helpful”.

Preliminary issue raised by the Union

19. Mr O’Brien, for the Union, submitted that the hearing should not proceed. He referred to Article 90B(1) of the 1995 Order, which provides that the Certification Officer may refuse to accept an application if he is not satisfied that the applicant has taken all reasonable steps to resolve the claim through the union’s internal complaints procedure. He said that Mr Archer had not exhausted the appeal procedures of UCATT before applying to the Certification Office. He cited rule 3.1 of the rulebook, which states that the business of the union shall be conducted through branches, and rule 27, which lays down mechanisms for appealing against decisions of Union bodies at Branch, regional or national level. According to Mr O’Brien, these rules mean to begin with that Mr Archer ought to have raised his complaints through his Branch, and that in any case when his views were not accepted by the EC on 24 August 2006 (paragraph 14 above), he should then have appealed to the General Council. He did not do these things and therefore had not taken all reasonable steps, and his application ought not to have been accepted.

20. I ruled that the hearing should go ahead, on the grounds that the Union had had time to make these points before the hearing was arranged but had not done so. I did not consider it reasonable in the circumstances to stop the hearing at the outset. I said that I would address the Union’s points in my decision, and I do so in the following paragraphs.

21. Article 90B(1) gives me discretion whether or not to accept an application in the circumstances it describes. In the present case, I am satisfied that the applicant did take reasonable steps to resolve his complaint internally.

22. Mr Archer had dealt directly with Mr Ritchie, in the margins of the 6 July EC meeting and later, about his concern over the verification of the nomination papers, and in seeking copies of these. In my judgement it was reasonable for him, when he did not get what he considered a satisfactory response, to follow up by making his complaint in the first instance to Mr Ritchie. It seems that Mr Ritchie did not at the time perceive Mr Archer’s approach to be anomalous, since he dealt with it straightaway and without raising any issue about the procedures governing appeals set out in rule 27. In particular, he did not assert that the complaint must come through Mr Archer’s Branch (on the grounds that rule 3.1 applied). In support of its position, the Union appeared to argue that rule 3.1 should be read as meaning

that *all* the Union's business must be conducted through the Branches, a view which, if I have understood it correctly, I do not believe to be sustainable (see, for example, rule 21.14: "The EC shall transact the ordinary business of the Union".).

23. I consider therefore that the steps Mr Archer took were reasonable in the circumstances, and I reject the Union's argument that his application should not have been accepted under Article 90B(1).

Summary of submissions

24. Mr Archer said he had been a UCATT member for 25 years. He had never previously made a complaint against his Union and regretted having had to apply to the Certification Officer in the present case, which he had done because he could not get a fair hearing from the Union. His application was not about who won or lost the Irish Region EC election, but about members' trust in the Union, the integrity of its election processes and a level playing field for all candidates.

25. Mr Archer submitted that the election had failed the Union's members in two ways, which were the substance of his two complaints. First, the nominations had not been date stamped, and the envelopes they were posted in had not been kept. It was therefore impossible to verify that they were valid, i.e. had been received within seven days of the last star night as required by rule 15.10. In important matters like elections it was necessary to have a method of verifying that any time-limits laid down were respected, and date-stamping was an obvious method. Rule 15.10 could not be complied with if there was no method of verification. He added that Branch nominations play an important role in UCATT elections, since credibility is measured by the number of nominations a candidate receives. Several election addresses in the bundle of evidence included long lists of nominating Branches.

26. Secondly, Mr Archer said, the Union had allowed inclusion of a photograph in an election address, in contravention of its own long-established practice. As evidence for this practice he referred to the guidance on election addresses issued in 1998 by the then General Secretary, Mr Brumwell (paragraph 18 above), and a number of election addresses he had submitted in evidence, which did not include photographs. Throughout his union career he had never seen photographs in any UCATT election address. In the Irish Region EC election he had abided by the Union's practice and had been disadvantaged as a result.

27. He concluded by saying that he had made a formal complaint, which was of a serious nature and warranted investigation. It was dismissed out of hand without investigation. He had not sought rejection of any nominations, merely a pause to get the perceived irregularities attended to. He was asked to provide evidence when the Union knew that the evidence was in its own possession, and he was twice refused copies of the nomination returns despite a previous ruling of the Union (following a 1992/93 report made to it by

Mr J Hand QC) that election candidates should have access to election documentation.

28. Mr O'Brien developed the Union's response through his questioning of Mr Archer and Mr Ritchie. On the first complaint, he argued that the Union's rules did not require that nominations be date stamped; they did not mention date stamping at all. To prove that the time limit set down in rule 15.10 had been breached, it would be necessary for Mr Archer to show that some or all of the nominations in this election had been received after 21 June 2006 and accepted as valid. But at the time when he made his complaint Mr Archer had no evidence that this was the case, and he had not been able to provide any since. However, the General Secretary had testified in his witness statement and would say in evidence that all the applications had been received before the 21 June and all had been opened on 22 June by himself in the presence of his assistant. It was not the UCATT practice to date stamp nominations (which anyway was not necessarily a secure procedure, since date stamps could easily be set to the wrong date); instead the tradition was that they were put aside in a safe on receipt and opened on the day after the deadline, and that was what was done in this case. It was a practical way of handling election materials and it did not breach rule 15.10.

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29. On the second complaint, Mr O'Brien said that the GB Certification Officer's ruling in Decision D/1-3/96 made clear that the legislation (in Northern Ireland, Article 14(3) and (6) of the 1995 Order) allows photographs in election addresses provided there is no internal union prohibition against them and all candidates are treated equally with regard to them. But there was no UCATT rule, and no established UCATT practice, that prohibited photographs. On the contrary, the Union had a long history of allowing them, as was clear from a number of election addresses containing them that the Union introduced in evidence on the day of the hearing. Mr Ritchie, the Union's highest ranking official, was not aware of any prohibition on photographs and had not known of Mr Brumwell's 1998 letter until it was drawn to his attention in 2006. That letter had been addressed to the nominees in the South East Region EC election, but there was no sign that Mr Brumwell had written in similar terms to any other UCATT region or to the Union at large. Mr Ritchie had checked the Irish Region election addresses against the rulebook, and then with the Union's lawyers and with experienced General Office staff, and no-one had detected any problem with them. Moreover, at its meeting on 24 August the EC had not reacted to Mr Archer's claim about a prohibition on photographs, which showed that it was not aware that one existed. If it had agreed with him, it could have stopped the election even at that late stage.

30. Mr O'Brien said that there had been no unfairness towards Mr Archer in any part of the election process. Scrupulous equality of treatment had been applied to both candidates, as required by Article 14(6) of the 1995 Order. Both had been given access to the nomination papers and if Mr Archer had included a photograph in his election address, it would have been printed, just as Mr McDonald's had been. Mr Archer had been able to put his concerns to the EC, but the EC had not agreed that there had been any breach of rule or of established practice.

Conclusions

Complaint 1

31. It is common ground that there is no rule in the Union's rulebook that explicitly requires Branch nominations for EC elections to be date stamped on arrival at General Office. Mr Archer's argument is that in the absence of date stamping, the rule (15.10) which lays down a deadline for arrival of such nominations cannot be enforced, that nominations arriving outside the deadline may therefore be accepted, and that rule 15.10 is therefore breached.

32. This might be a convincing argument if the Union had no means at all of ensuring that nominations comply with rule 15.10. However, the evidence given by Mr Ritchie is that the Union has an established method for doing so that does not involve date stamping. This is that nominations, which are clearly recognisable as such from their envelopes, are put in a safe on arrival at General Office and are opened on the day after the deadline. In this case, the deadline for receipt was 21 June 2006 and, as Mr Ritchie affirmed in his witness statement and again in his oral evidence, the envelopes were opened on 22 June by him in the presence of his assistant.

33. Rule 17.6 of the rulebook provides support for the conclusion that this is indeed the, or at least a, traditional UCATT way of handling nominations. This rule, which deals with the election of Regional Councils, contains the following:

"The voting returns shall be kept in a safe place unopened until the day after the closing date for such returns. They shall then be opened in the presence of the appropriate secretary....."

Admittedly this relates to elections to Regional Councils, not the EC, and to votes, not nominations, but it does demonstrate the general point that this is a method acceptable to UCATT and sanctioned by its rules. Conscientiously implemented it should be a reliable way of ensuring that out-of-time nominations are not admitted, since there should be no means of introducing nominations between the end of the closing date and the opening of the safe the following day. Mr Archer said in the hearing that date-stamping was a very important method of verification in situations where there were formal time limits, and one can agree with that way of putting it. But for his argument to have a prospect of success, date stamping would have to be the *only* reliable method, and clearly it is not.

34. Mr Archer did not offer any evidence that any of the nominations in the Irish Region EC election had, in fact, been received late and admitted. Mr Ritchie affirmed that all had been received in time and opened on the day after the closing date (22 June) in the presence of his assistant. It was observed that Mr Ritchie had written on 6 July to the two Branches whose nominations had been ruled out, a fact which might suggest that the nominations had only been opened on that day or shortly before. Mr Ritchie

said, however, that he had first circulated a list of the nominations and that the two Branches in question had asked why they were not on it. He had replied on 6 July and this was the explanation of the timing of those letters.

35. I am persuaded on the evidence before me (including the nomination papers themselves, which were all signed off at dates between 2 and 13 June) that all the papers were received on or before 21 June and all, except the two that were ruled out on grounds other than time, were valid.

36. For the above reasons I refuse to make a declaration that the Union breached rule 15.10 of its rulebook by not date stamping nominations in the 2006 Irish Region Executive Council elections on arrival at General Office, thereby permitting the election process to include nominations which were out-of-time.

Complaint 2

37. It is again common ground that there is no rule in the Union's rulebook that forbids the inclusion of candidates' photographs in their election addresses. Rule 28.8 is the rule that deals with election addresses, but it is silent on this point. Mr Archer's argument, however, is that there is a long-established UCATT practice that photographs are not included; that this is explicitly stated in the "Guidance on Publication of Election Addresses" issued in 1998 by the then General Secretary; and that breach of this long-established practice is equivalent to a breach of rule. As the Great Britain Certification Officer's decision mentioned earlier makes clear, if the Union were shown to have such a practice, it would be held to have "made provision" about photographs under Article 14 (3) of the 1995 Order .

38. It is an accepted principle that custom and practice can have effect in matters where the rules of a union are silent. If it is to do so, however, it must satisfy three conditions; it must be fair, precise, and well-known. The practice alleged by Mr Archer is precise and, if applied impartially to all candidates, it is also fair. It remains to determine whether it can be considered to be well-known.

39. On this point, Mr Archer's evidence and that of the Union are in conflict. Mr Archer pointed to the 1998 guidance from the General Secretary; to many copies of election addresses which he introduced in evidence which had no photographs (including some post-1998, and Mr Ritchie's address in the 2004 General Secretary election); to his own experience, over 25 years, of never having seen a UCATT election address which contained a photograph; to advice he recalled receiving on the subject when he first stood for election to the EC in 1995; and to supporting statements allegedly made to him by other EC members. The Union on the other hand supplied several copies of election addresses (including one by Mr Ritchie) which did have photographs; Mr Ritchie stated that he had never known of a prohibition on photographs; that he had not seen the 1998 guidance, or anything similar, until Mr Archer produced it in 2006: that by not acting on Mr Archer's claims at the meeting of 24 August 2006, the EC had shown that it was not aware of any prohibition;

and that the Union's lawyers and experienced staff had shown that they too were not aware.

40. The most compelling piece of evidence brought forward by Mr Archer is the 1998 guidance from the General Secretary. This says unequivocally, "*In accordance with long-established UCATT practice, election addresses should not contain...photographs.*" Although the guidance was addressed to the nominees in the 1998 South East Region EC elections, the practice is described as being that of UCATT generally, and in my view a UCATT member would not interpret it as being meant to apply only to one Region, as the Union sought to argue. This therefore seems to be definite evidence for a long-established (and so presumably well-known) practice of UCATT as a whole.

41. However, if we look at the background of the General Secretary's guidance, matters are less clear-cut. The guidance was issued after Mr Tony O'Brien, a nominee in the South East Region election asked UCATT General Office for clarification on the use of photographs in election addresses. I note that Mr O'Brien who claimed in his election address to have had 30 years' experience in UCATT from Branch to national level, was not clear what the position was on photographs. The Office itself was unsure, and sought the advice of Electoral Reform Services. In their reply the latter referred to the Certification Officer's 1996 decision, which they said meant that "if the Union wishes to exclude photographs...and has not expressly stated so in writing, it should have a long-established practice of not including them to comply with [the Great Britain equivalent of Article 14 (3) of the 1995 Order]" . They went on to say that it would be reasonable on this basis to inform the candidates that addresses "should not include graphics, columns or tables and photographs, as this is the long-established practice of the union and it is alluded to in the union rule book." The General Secretary's guidance was issued three days after the date of this reply. (The reference to an allusion in the rule book appears to have been an error on the part of ERS and was not reproduced in the guidance).

42. The guidance therefore claimed that there was, already in 1998, a long-established practice prohibiting photographs. Yet a very experienced election candidate did not know it and apparently neither did the General Office. If there was such a practice, these facts are hard to explain. The possibility suggests itself that, with the nominees for the South-East Region EC post already selected and the timetable for submission of election addresses running, the ERS advice may have been incorporated in the guidance hurriedly, and perhaps without mature reflection.

43. There is also the fact that there do exist actual instances of UCATT election addresses which include photographs. The Union supplied copies of such, ranging in date from 1983 to 1992. They are all for elections in the Scottish Region, and it will be noticed that all pre-date the 1998 guidance. However, a copy of Mr Ritchie's "solicitation for nomination" for the post of General Secretary in 2004, which contained his photograph, was also supplied. The rulebook (rule 28.8 Guidance note) distinguishes clearly between such solicitations and election addresses, but one would expect the

practice on photographs to extend to them also, since they are merely an earlier stage of the same process: it would seem odd to allow photographs in one while prohibiting them in the other (though, as mentioned above, Mr Ritchie's subsequent election address did not have a photograph). UCATT General Office seems to have made no objection to any of these election materials. If in 1998 there was already a long-established ban on photographs, this too is hard to explain.

44. I note that in his second e-mail of 1 August 2006 to Mr Ritchie (paragraph 11 above), Mr Archer said *"I have recently been informed that Mr McDonald's photograph is not.....in accordance with long-established UCATT practice..."*. I do not wish to lay too much stress on the first five words here, since they may just be a somewhat loose form of expression, but if taken at face value they would suggest that Mr Archer himself had not been aware the alleged practice for a long time. On the other hand, Mr Archer did affirm in evidence that he had been aware of it since his own first election in 1995.

45. Mr Archer pointed out that all the election addresses offered in evidence by the Union were for regional posts and the elections were not conducted by postal ballot like the EC election. But the rulebook does not make any relevant distinction between elections at different levels. Further, in my judgement, it is not significant that all these election addresses come from one region. Even if only one region was unaware of a prohibition on photographs (and it could not be established from the evidence before me that this was the case), that would be enough to show that there was not an established and well-known UCATT practice in place.

46. Finally, on the question of the fairness of continuing with the election when it became clear that one candidate had a photograph and the other did not, Mr Archer said that Mr Ritchie should have contacted him and asked if he wanted to submit his photograph. I agree with Mr Ritchie's reply that that was not a decision that he could take upon himself: election addresses as submitted were final. Mr Archer also argued that if photographs were allowed, there would have to be some rules about them, to prevent abuse: and since there were no such rules, it followed that they were not allowed. Mr Ritchie said that candidates generally used common sense in this matter and rules were not needed.

47. I have to decide this point on the balance of probabilities. My conclusion is that there was not in fact a long-established and well-known practice prohibiting photographs in UCATT election addresses. Despite the apparent definitiveness of the 1998 guidance by the General Secretary, I am led to doubt it by the considerations set out in paragraphs 41 and following above. I am also influenced by the fact that the EC did not support Mr Archer's view at its meeting 24 August 2006 and that Mr Ritchie, the Union's General Secretary, had himself used photographs in election addresses and was, in my judgement, unaware of any contrary custom and practice. Ideally, I should have liked to have from the Union copies of election addresses with photographs from other regions as well as Scotland, and dated after 1998. Nevertheless, on the balance of probabilities, and despite Mr Archer's able presentation of his arguments, I find that his second complaint fails.

48. I therefore refuse to make a declaration that the Union breached its rules in accepting the inclusion of Mr McDonald's photograph in his election address.

Observations

49. At its meeting on 24 August 2006, the EC agreed that in future clear guidance should be given about the contents of election addresses. The Union may already have formulated this advice, but if not, it will be in its interest to do so, and to make it available well before the EC elections of March 2008.

50. Mr Archer twice asked Mr Ritchie for photocopies of the nomination papers, once orally and once in writing. He was prepared to pay for them. However, he was not given the copies and only received them in the bundle prepared by my office for the hearing. The report by Mr J Hand QC (see paragraph 27 above) recommended that members should have reasonable access to Union records such as voting returns where they have a direct interest in the matter (eg where they are candidates in an election); and that candidates should be allowed without restriction to make notes or take photocopies (on payment of reasonable administrative charges). The Union adopted this recommendation and I was given no evidence that this has since changed. Therefore, on the basis of the Union's stated policy, Mr Archer's request should have been granted. It is regrettable that it was not, since, to quote the Hand Report "*refusal [to supply information] can only serve to exacerbate the suspicions of members*". In this case also the refusal is likely to have contributed significantly to Mr Archer's perception that he was being treated in a dismissive and off-hand way by his Union.

R Gamble
Certification Officer for Northern Ireland