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

Mr P Torley and Mr J McKay

v

UNITE (TGWU Section)

Date of Decisions: 27 July 2010

DECISIONS

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

(1) I refuse to make the declaration sought by the applicants that the Union on or around 2/3 April, 25/26 June, 15/16 October and 22 November 2007 breached Rule 8.4 of the rules of the Union in that it bypassed the role of the Regional Committee (Ireland) in the selection, appointment and reappointment of the Union's solicitors.

(2) I refuse to make the declaration sought by the applicants that the Union on or around the dates mentioned above breached Schedule 1.3 of its rules in that it failed to conduct its actions through the appropriate Committee, in this case the Regional Committee

REASONS

1. By a joint application dated 21 December 2007, the applicants Mr Torley and Mr McKay made two complaints against their Union UNITE – T & G Section. Following correspondence with the applicants, the Complaints they wished to pursue were confirmed by them in the following terms:

Complaint 1

The Union breached rule 8.4 of the rules of the Union (Unite – T & G section) in that it bypassed the Regional Committee's role in the selection, appointment and reappointment of the union's solicitors.

The Union did so by removing the established solicitors (Agnew, Andress & Higgins), and appointing another firm of solicitors, without consulting or seeking the approval of the Regional Committee. Further, the Union also ignored the decision of the Regional Committee to reinstate Agnew, Andress & Higgins, at least on a temporary basis, and it continues to ignore the decision of the Regional Committee.

Complaint 2

The Union breached, continues to breach, schedule 1.3 of the rules of the Union in that any member in office or elected to any office in the Union shall conduct all matters relating to the union or the functions and purpose thereof through the branch or the appropriate committee or body connected with the Union and only through the Union. In failing to conduct its actions through the appropriate committee, in this case the Regional Committee, the Union acted and continues to act in breach of schedule 1.3.

An Annex to the complaints contained clarification provided by the applicants, in respect of the dates cited within the complaints.

Annex

We, Mr Torley and Mr McKay, feel that for complete clarification we should point out that the dates given (2-3 April 2007, 25-26 June 2007, 15-16 October 2007) were full Regional Committee meetings and 22 November 2007 was when an affidavit was issued on behalf of the present Regional Secretary, Mr James Kelly by Donnelly & Kinder against Agnew, Andress & Higgins, therefore confirming that Agnew, Andress & Higgins had been removed as union solicitors.

It should also be noted that although Mr O'Reilly made the initial decision as Regional Secretary, he retired soon after the Regional Committee meeting of 2-3 April 2007 and was replaced by Mr James Kelly who continues to implement the decision of his predecessor Mr O'Reilly.

2. The complaints are matters potentially within my jurisdiction under Article 90A(2)(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 Friday 11 June 2010.

3. The delay in arranging the hearing arose as a consequence of the Union's involvement in defending a concurrent action against it in the High Court, brought by one of its former solicitors (Agnew Andress Higgins). Although Agnew Andress Higgins was not party to the proceedings before me, the Union argued that the complaints before me "clearly covered the same issues which are before the court". The Union requested me to put my proceedings on hold pending the outcome of the High Court proceedings.

4. After extensive correspondence between my office and the parties to the complaints before me, I came to the view that despite the different focus of the two proceedings, I could not

comprehensively rule out the possibility that evidence might be given at my hearing which could have a prejudicial effect on the High Court action. I therefore reluctantly concluded that I should defer my proceedings. The High Court action was settled on Wednesday 3 March 2010.

5. At the hearing on 11 June 2010 the Union was represented by Mr M Lavery of counsel, instructed by Ms Kinder and Mr Beckett of Donnelly and Kinder solicitors. The Union's Regional Secretary, Mr J. Kelly; his predecessor, Mr M. O'Reilly; and the Regional Coordinating Officer, Mr E. McGlone, attended and gave evidence for the Union. Mr Torley acted on behalf of himself and Mr McKay; each gave evidence. A 359 page bundle of documents containing relevant correspondence and papers, including written witness statements from each of the Union's witnesses, was prepared by my office for the hearing. The relevant national rules of the Union and relevant statutory extracts were included. A separate 204 page bundle of documents compiled by the Union and comprising of pleadings relevant to the High Court action was included alongside. I permitted this, as the Union contended that ultimately it supported its case. (It was not referred to at hearing, however). Copies of the full rule book of the Union (TGWU Rules 2005) were in evidence at the hearing. At the outset of the hearing Mr Lavery QC made an application to introduce a skeleton argument on behalf of the Union. (This had been provided to my office early on the day of the hearing.) I accepted the application. The applicants were each provided with a copy. It was a lengthy paper with substantial legal content, but most of the ground in it had been covered by earlier correspondence from the Union, including a detailed response to the complaints, which the applicants had seen. That being so, the applicants agreed to proceed with the hearing on the understanding that the Union's representative would set out orally the matters raised in the skeleton argument in the course of the day.

Findings of Fact

6. Having considered the written and oral evidence and the submissions of the parties, I find the facts to be as follows:

7. Unite the Union was created on 27 April 2007 by the amalgamation of the Transport and General Workers Union ("TGWU") and Amicus, both of which ceased to exist on that date. For a transitional period that was intended to last until November 2008 but in fact lasted until May 2009, the two former unions became "Sections" of the new union and retained their separate structures and their existing rule books. In the present decision, "the Union" means "the TGWU" or "Unite the Union (TGWU Section)", as the context requires. The Union rules in question are the TGWU Rules printed in May 2005.

8. When the events that gave rise to these complaints occurred, the applicants were members of the Union. Both were also members of the Union's Regional Committee for Region 3 (Ireland). Mr McKay had been a member of the Union for some 30 years and remains a member: Mr Torley is no longer a member.

9. Over many years the Union has provided legal advice and services to members in Northern Ireland through a panel of local firms of solicitors. There were agreements,

modified from time to time, governing the terms on which the firms were to provide the services: these included, for example, that certain fees would be charged for handling personal injury claims, but work on Industrial Tribunal cases would often, or perhaps mostly, be done without charge to the Union. The number of firms on the panel varied over time, some leaving either of their own accord or because removed by the Union, others joining. In 2006/07 there were two firms on it: Agnew Andress Higgins ("AAH"), which had been there for over 20 years, and Donnelly and Kinder ("D&K"), which had had been there for some 18 months.

10. Towards the end of 2006, AAH appears to have become concerned that the amount of personal injury work referred to it by the Union had fallen to unsustainable levels, while a disproportionate amount was being referred to D&K. The firm raised this with the Mr Fergus Whitty, the Union's Legal Director at Headquarters in London. As a consequence, on 23 November 2006 the Union's General Secretary, Mr Tony Woodley, wrote to Mr Mick O'Reilly, the Regional Secretary (Ireland) for an explanation of the alleged disproportion and for information as to who was to provide legal services in the region into the future. In his reply of 5 December 2006 Mr O'Reilly, after asserting that it had always been the role of the Regional Secretary to distribute the legal work and indicating the proportion of work going to the two firms, said:

> "*You appear to be making the case that there is only sufficient work for one firm of solicitors in the North of Ireland. I do not disagree with the view.....*
>
> *....it is the view of the Region that all of our work within the North of Ireland should be given to D&K"*

Mr O'Reilly was asked to reconsider, and confirmed his view in a letter of 10 January 2007 to Mr Woodley, in which he said:

> *"Further to our telephone conversation I have considered these matters further and discussed it with other colleagues in the Region. My views have not changed."*

11. Mr Whitty wrote to Mr O'Reilly on 15 January 2007. He referred to "*the request to you to reconsider your decision only to engage the services of Donnelly & Kinder ... in Northern Ireland"* and, after positive remarks about the services provided by AAH, concluded:

> *"Therefore before the General Secretary makes a final decision in this matter: Could I suggest that the following steps are taken to bring this matter to a conclusion?*
>
> *1. Given the long term importance of this decision to the Region, I respectfully suggest that the Regional Committee confirms it agrees with this step.*
>
> *2. If that is indeed the case I will write to Agnew Andress to inform them that they are no longer to deal with legal claims for the union."*

12. On 28 February 2007 there was a meeting of the Finance and General Purposes ("F&GP") sub-committee of the Regional Committee. The Chairman expressed unhappiness that the Region appeared to have cancelled all legal work to AAH. Mr O'Reilly informed the committee that a decision appeared to have been taken in London that there was only sufficient work for one firm of solicitors in Northern Ireland and that he was recommending that that firm should be D&K.

13. The issue arose again at the next meeting of the Regional Committee (2/3 April 2007). The minutes record that there was "protracted discussion", during which some members questioned whether it was the function of the Committee or of the Regional Secretary to determine who provided legal services. The Regional Secretary then *"made it clear that the determination of who provides our legal services is a matter for the General Secretary and that before implementing any changes he* [the Regional Secretary] *will reconsider the matter in the light of the discussion."* There was no substantive discussion of the issue at the following Regional Committee meeting, on 25 June 2007, though an entry in the minutes referring to the "status quo" seems to indicate that the reconsideration promised at the April meeting was still ongoing.

14. At the F&GP Committee meeting held on 26 July 2007 Mr O'Reilly made a report "*which established that the appointment and changes in relation to solicitors were ultimately made by the General Secretary and that recommendations regarding solicitors were made by the Regional Secretary."* He went on to say that it was his intention to direct all future work to D&K and that he was reporting this matter to the F&GP Committee for information and would report it also to the Regional Committee. The minutes show that the F&GP Committee accepted this explanation.

15. On the same date Mr O'Reilly wrote to Mr Woodley

> *"... to advise that the usage of solicitors has been under consideration and having carefully reviewed the situation my view is that all of our legal work should be dealt with by Donnelly and Kinder.*
>
> *...I have explained this position to F&GPC and intend to implement this decision with immediate effect. This decision has the full support of Jimmy Kelly."*

Mr Kelly succeeded Mr O'Reilly as Regional Secretary at the end of July 2007. Mr Woodley asked for some further clarification, on grounds that are not clear from the papers or the evidence given at hearing. On 10 August Mr Kelly replied, rehearsing the argument that there was only enough work for one firm of solicitors, confirming that he agreed with Mr O'Reilly's view that it should all be awarded to D&K, and seeking Mr Woodley's authority to move ahead with this arrangement. There was no evidence of a response from Mr Woodley; however, the decision appears to have been put into effect.

16. When the Regional Committee met again on 15 October 2007, a member referred to the minutes of the F&GP Committee of 26 July and asked what involvement the Regional

Committee had in legal matters. Lengthy discussion followed, presumably mainly around a three-page "Report on the usage and determination of union solicitors" presented by Mr O'Reilly. This report reviewed previous occasions when solicitors had been appointed to or removed from the Union's panel and sought to show that the decision in each case had been taken ultimately by the General Secretary, on the recommendation of the Regional Secretary and with advice from the Union's legal department; it had never been a matter for the Regional Committee. The Regional Committee finally agreed *"to accept the minutes* [of the F&GPC] *but not to endorse the content."*

17. At the end of the Regional Committee meeting on 16 October, Mr Kelly agreed that in light of the "extended debate" about solicitors of the previous day, he would write to the General Secretary outlining the serious concerns discussed. He did so on 19 October, as follows

> *"Following the Irish Regional Committee meeting held on 15 &16 October 2007, the Regional Committee discussed the decision taken to move the legal work from Agnew Andress Higgins to Donnelly and Kinder.*
>
> *The Regional Committee has asked me, as Regional Secretary, to write to you outlining the following serious concerns raised at this meeting;*

- *That moving our legal work should be the authority of the Regional Committee in agreement with the Regional Secretary and the General Secretary, not at the sole discretion of the Regional Secretary*
- *That the process involved in moving the legal work carried out by Michael O'Reilly was not the correct procedure".....*

18. On the evidence available to me, Mr Woodley did not reply. On 28 November 2007, AAH issued a writ of summons against the Union in the High Court of Northern Ireland. From then on the Union regarded the matter of solicitors as sub judice and not to be discussed at any of its meetings. On 21 December 2007 Mr Torley and Mr McKay lodged their complaints with the Certification Office. As mentioned above, I decided, on the application of the Union, to defer hearing the complaints until the proceedings in the High Court were concluded, in order to avoid any possibility that matters disclosed at my hearing might prejudice those proceedings. AAH's claim against the Union was settled, on undisclosed terms, on 3 March 2010.

The Relevant Statutory Provisions

19. The provisions of the Industrial Relations (Northern Ireland) Order 1992 and of the 1995 Order that are relevant to this application are:

1992 Order

Striking Out

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

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

(b)-(c)

1995 Order

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)-(c)

(d) the constitution or proceedings of any executive committee or of any decision-making meeting;

(6) An application must be made—

(a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or

(b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in paragraph (7).

(7) Those days are—

(a) the day on which the procedure is concluded, and

(b) the last day of the period of one year beginning with the day on which the procedure is invoked.

(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 any body 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.

20. The Relevant Union Rules (TGWU Rules 2005)

The Union rules that are relevant to this application are:

Rule 6

GENERAL EXECUTIVE COUNCIL

***12(c).** It [the GEC] shall overlook the business of the National Industrial Sector or section and regional committees and district committees set up under the following clause (d) and branches, and see that they administer the business of the of the Union properly and*

according to the rules. It shall require reports to be submitted to it of the work of the National industrial Sector and section officers and regional officers. It shall adjust and decide all differences in questions of administration that arise between branches and regional and all other committees.

Rule 8

REGIONAL COMMITTEES

1. *For the purpose of locally administering the general business of the Union there shall be a Regional Committee for each region which shall hold office for the same period as the General Executive Council as provided in Rules 6, Clauses 3 to 6.*

4. *The powers and duties of the Regional Committee shall include the organisation of groups within the region, the coordination of the work of the various Regional Trade Groups and Sections, the conduct of necessary propaganda, the administration of such business of the Union as affects all sections of the membership in the region, such as general industrial movements, educational work, political administration, etc, the consideration of any dispute arising in the region and reporting thereon to the General Executive Council, with suggestions as to arrangements for the mutual support of respective sections when necessary, and on disputes arising out of the non-payment of benefits.*

Schedule I

ELIGIBILITY AND REQUIREMENTS OF DELEGATES, OFFICERS, ETC

3*. Any member now in office, or any member accepting nomination or being elected to any office in the Union shall conduct all matters relating to the Union or the functions and purpose thereof through the Branch or the appropriate committee or body connected with the Union and only through the Union. Members' violating this rule shall be removed from office and their position declared vacant.*

Summary of submissions.

21. Mr Torley said that Rule 8.4 of the rulebook laid down the powers and duties of the Regional Committee. These included *"the administration of such business of the Union as affects all sections of the membership in the region, such as general industrial movements, educational work, political administration, etc"*. Legal services and advice affected every member in the region, since anyone might need them at any time. He pointed also to Rule 6.12(c), which states that the General Executive Council ("GEC") shall "*overlook the business of the ..... regional committees.....and see that they administer the business of the Union properly and according to the rules"*, and which showed, he said, that it was the Regional Committee, not the Regional Secretary, who had the authority to make decisions on Union business. In his submission, the Regional Committee was a "mini-version" of the General Executive Committee. Just as the latter delegated powers to the General Secretary, but retained the power to overrule his decisions, so it was with the Regional Committee and

the Regional Secretary. The GEC gave the Regional Committee authority in the region and the latter delegated the day-to-day administration to the Regional Secretary, but important decisions were for it to take if it chose.

22. Mr Torley argued that the Union's Legal Director, Mr Whitty, clearly agreed with this view. He cited in evidence the letter of 15 January 2007, in which Mr Whitty described the provision of legal services as of long-term importance for the region, advised Mr O'Reilly to seek the Regional Committee's agreement to stop using the services of AAH, and indicated that if that agreement was obtained he would write so informing AAH. Mr Torley also cited a letter of 12 July 2007 from Mr Woodley and Mr Derek Simpson, the Joint General Secretaries of the Union, headed "Towards New Regions – The Process for an Orderly Transition." In discussing the responsibilities of the new Regional Secretaries, this letter states *"Regional Secretaries have no authority to change or allocate legal work."*

23. Mr Torley said that in this matter the Regional Committee had been ignored time and time again by the Regional Secretary. The rule book had been ignored, the democratic principles of the Union had been ignored, and it had not been possible to get anything done about it internally. This was the sole reason that he and Mr McKay had come, reluctantly, to the Certification Office.

24. For the Union, Mr Lavery said that this case was about the way the Union ran its business in providing legal services to members, which had never been challenged up to now; it concerned the Union's custom and practice, not just its rules. He drew my attention to the remarks on the interpretation of union rules, and the role of custom and practice, made by Lord Wilberforce in *Heatons Transport v TGWU* [All England Law Reports 1972 3 p110]. The applicants' claims were unfounded, because the long-standing practice of the Union gave no role to Regional Committees in appointing or removing solicitors; those were decisions for the General Secretary, with advice and recommendations from the Regional Secretary. Regional Committees might be consulted or informed, but as a matter of courtesy only. The Union's normal procedures had been followed in this case.

25. In the Union's submission, the rules had to be interpreted in the light of the way the Union had actually been run, and the rules themselves had actually been applied, to date. That is, they had to be interpreted purposefully, taking account of how they affected the efficient management of Union business. They were clearly not intended to give the Regional Committee power to take all decisions in the region; it would bring the business to a halt in a short time if all administrative decisions, including the appointment or removal of solicitors, had to be taken by a committee which met at three-month intervals. Moreover, if the applicants' claims were right, Regional Committees would be able to take decisions that went against the views of Regional Secretaries, the General Secretary and the GEC, which would make the Union unmanageable as a unit. But the whole power structure of the Union deliberately placed ultimate authority at the centre, in the hands of the GEC and the General Secretary. The applicants' view of the powers of the Regional Committee was untenable.

26. Mr Lavery made a number of submissions which tended in the Union's view to show that the complaints should be dismissed because of formal defects within them or because they were outside my jurisdiction. These submissions were that:

(i) the complaints had not been brought to clarify the Union's rules in the interest of members, but to further the interests of the solicitors AAH in their commercial dispute with the Union. They were not bona fide complaints and not within the spirit of the legislation. They were vexatious under Article 70ZA of the Industrial Relations (Northern Ireland) Order 1992, and I should decline jurisdiction;

(ii) the complaints were out of time. The Notification of Complaint Form showed that the alleged breach must have taken place before 2/3 April 2007, but the application was not made until 21 December 2007, which was outside the six-month limitation period for complaints laid down in Article 90A(6) of the 1995 Order. Further, as the applicants had not invoked any internal Union procedure to resolve their claim, they could not benefit from an extension, under Article 90A(7), of the six-month limit;

(iii) the complaints lacked certainty, in that it was not clear what exactly the alleged breach of rule was supposed to be. The Union had not removed AAH from the panel, as the applicants claimed. There was no act done by the Union that could be identified as a breach of rule;

(iv) the applicants did not take all reasonable steps to resolve their claim by use of an internal Union complaints procedure. Applying Article 90B(1) of the 1995 Order, I should have refused to accept their application;

(v) the Regional Committee was not an executive committee, but a forum for discussion and debate. However, the Certification Officer's jurisdiction under Article 90A(2)(d) of the 1995 Order is restricted to rules relating to the constitution or proceedings of any executive committee or decision-making meeting. Since the Regional Committee was not such a body, rules relating to it were not within my jurisdiction.

(vi) even if the Regional Committee were held to be an executive committee, the rules alleged to have been breached were not rules relating to the constitution or proceedings of the committee, and were therefore not within my jurisdiction under Article 90A(2)(d).

Conclusions

27. I will deal first with the issues of jurisdiction and alleged defectiveness of the complaints, as outlined in the preceding paragraph.

28. The Union's claim that the application is vexatious. Under Article 70ZA(a) of the 1992 Order, the Certification Officer has discretionary power to *"order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived"*. The Union says that this application is vexatious, and so ought to be struck out, because it was not made in the interests of members of the Union but for the benefit of non-members, the solicitors AAH,

since if successful it would assist the latter in their commercial claim against with the Union in the High Court. The evidence that the Union offers is that the applicants made no complaints on other occasions when solicitors were removed from the panel, and that AAH supplied them with certain documents which they used to support their application. It concludes that there was a relationship between the applicants and AAH and this was the motive behind the application, which was, consequently, not made in good faith.

29. I find this argument unconvincing. The conclusion which the Union draws from its evidence is by no means necessary or unavoidable. The fact that the applicants did not complain previously when other solicitors left the panel may mean no more than that those other cases, for whatever reason, did not generate the same degree of heat within the Regional Committee as the AAH case did. That they sought documents from AAH does not of itself show that they had a relationship with AAH such as would lead them to act on the latter's behalf and against the interests of their Union. As Mr Torley pointed out in evidence, he and Mr McKay were continuing with their application despite the fact that the dispute between AAH and the Union was "done and dusted", i.e. despite the fact that there would be no point in continuing, if their intention was to benefit AAH. I note also that other members of the Regional Committee and of its sub-committee, the F&GPC, were exercised about the issue of solicitors and felt, rightly or wrongly, that they were having less say about it than they should. The applicants' shared that feeling and it is what underlies their complaints. In my judgment there is no credible evidence of any ulterior motive. I reject the claim that the application is vexatious.

30. The Union's claim that the application is out of time. Article 90A(6) states that an application to the Certification Officer about a breach of trade union rules must be made *"within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place..."* The Union says that since the applicants claim that they first complained of the breach on 2/3 April 2007, the breach itself must have occurred before then, and that therefore they should have made their application before 2/3 October 2007. Since they made it on 21 December 2007, it was beyond the six month limit and out of time.

31. To decide this matter, it is necessary to answer the question, in what, in the view of the applicants, did the breach consist? It is clear from their Notification of Complaint form that the applicants considered that rule 8.4 gave the Regional Committee a role, or even the right, to appoint or remove solicitors and that the breach consisted in the Union (represented by the Regional Secretary, Mr O'Reilly) taking a decision to remove AAH without allowing the Committee to exercise that role or right. The form lists the dates of three quarterly Regional Committee meetings in 2007 (2/3 April, 25/26 June and 15/16 October), as dates on which both the decision was taken and complaint was made about it. It also cites 22 November 2007, as the date when it was confirmed (in an affidavit made by Mr Kelly, who by then had become Regional Secretary) that AAH had been removed from the panel.

32. It is, in fact, difficult to pin down when the decision to remove AAH was definitively taken. The issue kept coming up throughout 2007 at meetings of the Regional Committee and

at meetings of the F&GP Committee. At the April meeting of the Regional Committee Mr O'Reilly said he would reconsider the matter in the light of the discussion at the meeting. From the minutes of the June meeting, this reconsideration seems to have still been ongoing at that time. At the meeting of the F&GP Committee on 26 July, Mr O'Reilly reported on the issue and said it was "*his intention to cancel future work*" to AAH and that he would report this decision to the Regional Committee (presumably at the next scheduled meeting on 15/16 October). In a letter of the same date to Mr Woodley, Mr O'Reilly said "*... I intend to implement this decision with immediate effect"*. Mr Woodley apparently queried this and received in reply a letter of 10 August from the new Regional Secretary, Mr Kelly, who indicated his agreement with Mr O'Reilly's view and sought Mr Woodley's authority to proceed with the arrangement. Mr Kelly's further letter to Mr Woodley following the October Regional Committee meeting speaks of *"the decision taken to move the legal work"* from AAH to D&K. From their statement of claim to the High Court, AAH seem to have concluded in early September that (as they put it) the Union had "repudiated its agreement" with them by failing to send them work. The Union never conveyed its decision formally in writing to AAH.

33. Although the applicants listed three dates on which the breach of rule occurred, (i.e. the decision was taken), it appears to me that, with events unfolding in the way outlined above, they could not have been certain on the first two of these (April and June 2007) that the decision had actually been taken. A decision seemed to have been taken, but then was challenged and was under review. It was indicated in evidence at the hearing that some work continued to be sent to AAH in the meantime. Mr O'Reilly informed the F&GP Committee on 26 July of what appeared to be the definitive decision, though even that was queried by the Union's General Secretary. Neither of the applicants was present at the F&GP Committee meeting, and though they may have heard of the decision on the grapevine, it is probable that their formal notification of it will have come at the October meeting of the Regional Committee. In my judgment, it was then that they were for the first time in a position to conclude that there had definitely been, on their interpretation, a breach of rule. Their application on 21 December was therefore within the six month limitation period laid down by Article 90A(6) of the 1995 Order. The question of an extension of the period under Article 90A(7) does not arise.

34. <u>The Union's claim that the complaints lack certainty</u>. The Union says that the complaints are unclear and that it cannot know with certainty what breach of rule it is supposed to have committed. It says that it did not remove AAH from the panel, as the applicants allege; AAH effectively removed themselves by issuing a writ against the Union in November 2007. Since the Union took no action, it cannot have breached a rule. It cannot determine what it is supposed to have done wrong.

35. The applicants are complaining, in essence, that the Regional Secretary took a decision which was for the Regional Committee to take. It is clear to me that a decision was indeed taken that the Union would have D&K as its only firm of solicitors in Northern Ireland, and that AAH would therefore be removed from the panel. As mentioned above, Mr Kelly wrote to the General Secretary on 10 August 2007 seeking authorisation to implement that decision;

and in his further letter of 16 October he referred to the decision as "taken". It is true that the Union never wrote formally to AAH to convey the decision, but it seems clear that it was implemented on the ground; certainly AAH recognised in early September that cases had ceased to be referred to them. In my view the important question here is not "Did the Union formally remove AAH from the panel?", but "Did the Union take a decision to remove AAH from the panel (and was that decision acted on)?" The answer seems to be clearly "yes" to both parts of the latter. I also consider that, despite the argument it now makes, the Union believed at the time that it had taken a decision (Mr Kelly's letter of 16 October refers). That AAH may have pre-empted the formal conveying of that decision by issuing a writ does not affect the position. I therefore conclude that Union's argument that the complaints are defective in point of certainty must fail.

36. The Union's claim that the application should have been rejected under Article 90B(1) of the 1995 Order. Article 90B(1) gives the Certification Officer discretion *"to refuse to accept an application ... 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."* The Union says that the applicants had internal routes open to them - initiating the Union's complaints procedure against the Regional Secretary, or writing to the General Secretary. They did not use these, but went instead to the Certification Office. They did not take all reasonable steps and I should have refused to accept their application.

37. I draw attention to the fact that the power provided by Article 90B(1) is a discretionary one. The Certification Officer is not required to refuse an application on the grounds stated. If he considers, for example, that it would be in the interests of a union and its members, to have the meaning of a disputed rule clarified, and that this is not likely to be done internally, he may accept an application even though he may not think that an applicant has made all reasonable use of established internal procedures to resolve the claim.

38. The present application seems to me to be just such a case. The circumstances are that members of the Regional Committee, including members other than the two applicants, were in dispute with the Regional Secretary (Mr O'Reilly) about the Committee's powers. The Regional Committee is the major body of the Union in Ireland. The dispute went on over the greater part of the year 2007. It was conducted both in the Regional Committee itself and in its F&GP sub-committee, of which the applicants were not members. The discussions about the issue were described in minutes as "lengthy", "protracted", and "extended". Finally, after the meeting of 15/16 October 2007, the new Regional Secretary Mr Kelly agreed, at the request of the Regional Committee, to write to the General Secretary expressing the Committee's concern that its authority in the matter of appointment or removal of solicitors had been infringed. The General Secretary did not reply. Significant efforts were therefore being made to reach a solution within the region and through headquarters, but without success.

39. The applicants agreed that they did not initiate a complaints procedure against the Regional Secretary in relation to this issue. (I point out, however, that the Union, did not show that a complaints procedure existed; it did not introduce a copy in evidence, or describe

the procedure). It might conceivably be argued that Mr Kelly's letter of 16 October should count as the applicants writing to the General Secretary, since it was sent at the behest of the Regional Committee, of which they were clearly among the members most exercised on the issue. However that may be, it is my judgment that this is a situation where it is proper to exercise the discretion given by Article 90B(1) and accept an application even if the applicants did not take all reasonable steps by use of an internal complaints procedure. When there has been a long-running and unresolved dispute over the respective powers of the Union's major institution and its chief officer in the region, it seems to me to be in the interest of both the Union and its members that the rules underlying the dispute should be clarified. The fact that the Union's headquarters had an opportunity to do so but did not take it (the General Secretary did not reply to Mr Kelly's letter) supports this view.

40. The Union's claim that the Regional Committee is not an executive committee. Article 90A(2)(d) of the 1995 Order gives the Certification Officer jurisdiction over complaints about breaches of rules of a trade union relating to *"the constitution or proceedings of any executive committee or of any decision-making meeting"*. An executive committee is defined as a committee which *"has power to make executive decisions on behalf of the union or on behalf of a constituent body"* [Article 90A(10)] and a constituent body is "*any body which forms part of the union, including a branch, group, section or region"* [Article 90A (12)]. The Union says that power in the Union resides in the central governing body, the GEC. The Regional Committee does not make executive decisions; its function is simply to implement decisions taken by a superior authority, namely the GEC (or by the General Secretary acting on powers delegated to him by the GEC), not to take such decisions itself. It is therefore not an executive committee and so it is outside my jurisdiction.

41. This argument would, as the applicants contended, deny the Regional Committee any meaningful role. It seems to place all power to take decisions about regional issues in the hands of the Union's central headquarters, and it makes it difficult to see why the Committee should exist at all: headquarters could simply pass on its instructions to the regional office and have them implemented without need for an extra layer of administration in the form of the Committee. Yet it is clear from the rules and from the evidence at hearing that the Regional Committee is able to take decisions. Rule 8.1 says that it exists "*for the purpose of locally administering the general business of the Union",* which must require it to take decisions of various kinds. Under Rule 8.4 it can organise groups within the region, coordinate the work of other regional bodies and administer such business of the Union as *"general industrial movements, educational work, political administration etc"* all of which must again require it to make decisions. Mr O'Reilly said in evidence that the Committee could give him, as Regional Secretary, instructions which he would carry out, and that he was the servant of the Committee, not vice versa. That is not a description of a body which cannot take executive decisions.

42. Further, Rule 3 of the Union's rules, which is headed "Constitution and Government", says (3.9) that while the general policy of the Union shall be determined by the GEC, *"the policy of every region or trade, shall, within the powers delegated to a Regional Trade Group or District Committee, Regional Committee....by these rules or the General Executive*

Council, be determined by such committees". Again, Rule 10, headed "Branches", gives a Regional Committee the power to suspend (10.2) or merge (10.3) branches, and although branches have a right of appeal to the GEC, in the absence of such an appeal the decision is the Regional Committee's. This is clearly within the Order's definition of an executive committee as one which "*has power to make executive decisions....on behalf of a constituent body...including a branch."* In light of the above, I reject the Union's argument.

43. The Union's claim that Rule 8.4 and Schedule 1.3 do not fall within the Certification Officer's jurisdiction. Under Article 90A(2)(d) the Certification Officer's jurisdiction covers breaches of rules that relate to "*the constitution or proceedings"* of an executive committee. The Union says that neither of the rules cited by the applicants is such a rule. Rule 8.4 relates to the powers and duties of a Regional Committee, not its constitution or proceedings, while Schedule 1.3 is designed to prevent officers from taking unauthorised action which could undermine the Union.

44. As regards Schedule 1.3, I agree with the Union. Schedule 1 is entitled "Eligibility and requirements of delegates, officers etc". It deals mainly with the criteria that officers and candidates for office must satisfy – have two years' standing as a financial member, be employed in the trade they wish to represent, not be a member of any organisation detrimental to or inconsistent with the purposes of the Union, etc. Penalties are prescribed for those who fail to meet these requirements, usually that they will cease to hold office or be declared ineligible for office.

45. Schedule 1.3 says that an officer

> "*shall conduct all matters relating to the Union or the functions and purpose thereof through the Branch or the appropriate committee or body connected with the Union and only through the Union. Members violating this rule shall be removed from office and their positions declared vacant."*

The applicants argued that Mr O'Reilly had not conducted the matter of the choice of Union solicitors through the appropriate committee, the Regional Committee, in that he took the decision on it himself and presented this to the Committee as a "done deal". Since the matter was in fact discussed on several occasions within the Regional Committee and its F&GP sub-committee, the applicants appear to construe the words *"conduct all matters"* in a strong sense, as meaning that an officer must get the agreement of the appropriate committee before taking some action, rather than, say, merely informing it of what he intends to do. It is by no means obvious that in the context the words can bear so prescriptive a meaning. If I had to decide this point, I would take the view that by his discussions in the Committees Mr O'Reilly did "conduct the matter" through the appropriate committee in a manner sufficient to satisfy Schedule 1.3. However, I do not in fact have to decide the point. The prior question for me is whether Schedule 1.3 is a rule that relates to the constitution or proceedings of any committee, and in my judgment it clearly is not. The fact that it mentions committees does not make it a rule about their constitution or proceedings, any more than the mention of Branches and other bodies makes it a rule about theirs. Its focus is regulation of

the conduct of officers of the Union, as the inclusion of a penalty for *mis*conduct shows. The natural reading is that it is a rule intended to prevent officers from doing things in the Union's name without informing or consulting the appropriate part of the Union about them. The phrase *"and only through the Union"* perhaps suggests that the aim is also, in part at least, to ensure that matters related to the Union are not discussed or pursued outside the Union – through the press for example. I conclude that Schedule 1.3 is not a rule relating to the constitution or proceedings of a committee and is outside the jurisdiction conferred by Article 90A(2)(d).

46. As regards Rule 8.4, this is a rule which describes the powers and duties of the Regional Committee. It lists these as: organising and co-ordinating groups within the region, conducting propaganda, administering such business of the Union as affects all sections of the membership in the region, considering any dispute arising in the region and reporting on it to the GEC etc. That is, it defines what the Regional Committee is to do, what business it is to conduct. In my judgment, a union rule which defines what a body can do (and by implication what it cannot) is a rule relating to the constitution of that body, in the sense of "constitution" as "the set of principles according to which the body operates" – the sense which the word has in the Union's own Rule 3. Article 90A of the 1995 Act is silent about the meaning of "constitution", but there is no reason to take it as meaning, in a narrow sense, just the way the membership of a committee is made up. Rule 8.2 in fact deals with that aspect, laying down that the Committee shall be composed of representatives of each trade group or district committee, with proportionate representation of women and ethnic minority members. Rule 8 as a whole is in my view a rule relating to the constitution of the Regional Committee in the broad sense, covering membership, frequency of meetings, the business which is within its remit, and its power to appoint sub-committees and to delegate functions to them. I conclude that Rule 8.4 is a rule which comes within my jurisdiction under Article 90A(2)(d) of the 1995 Order.

47. The Union referred me to the cases of *Fradley v The Transport and Salaried Staffs' Association* (D/28-30/03) and *Finlay v Unite the Union* (D/18/-24/08), where, it said, the Great Britain Certification Officer had acknowledged that, under the Great Britain equivalent of Article 90A(2)(d), his powers were limited to the constitution and proceedings of executive committees and did not give him jurisdiction to adjudicate on the merits of any decision taken by such. I respectfully agree with the Certification Officer on this point. However, I do not see particular relevance to the present matter. First, there was no decision taken by the Regional Committee here: the applicants say the Regional Secretary took it, while the Union says that (if a decision was taken at all) it was taken by the General Secretary on the advice and recommendation of the Regional Secretary and the Legal Department. Secondly, the complaint is that the correct process was not followed in making the decision. It may possibly have arisen from the fact that the applicants would have preferred a different decision, but it is still a complaint about process. I can adjudicate on it without adjudicating on the merits of the decision itself, which I fully accept is not within my powers.

48. Having considered the arguments as to jurisdiction and alleged defects in the application, I turn now to the substance.

49. I have already concluded that the rule on which the applicants rely in regard to Complaint 2, Schedule 1.3, is not within my jurisdiction, and I therefore dismiss Complaint 2 on that ground. It remains to consider Complaint 1.

50. Complaint 1. The burden of the complaint is that the Regional Secretary took a decision regarding the Union's solicitors in Northern Ireland which was, under Rule 8.4, a decision for the Regional Committee to take, or at least approve in advance. The burden of the Union's response is that Rule 8.4 does not in fact give the Regional Committee power to take such decisions and that the Union's custom and practice has always been that decisions on the appointment of solicitors in the regions are taken by the General Secretary, on the advice and recommendation of the Regional Secretary and the head of the Union's Legal Department.

51. There is some force in the applicants' contention that the provision of legal services is a matter which affects all sections of the Union's membership (rather than, say, only the members of one branch or district or trade group) and so would be a matter appropriate to the Regional Committee under Rule 8.4. Even if it is, however, (and the Union argued that as a matter of history the Regional Committee had not concerned itself with legal services), it does not follow that the rule intends that the Committee should deal with every matter arising in the area of legal services. It is unlikely, for example, that the Committee would be meant to take decisions on more routine matters such as approval of individual members' applications for legal representation, not least because many applications might require more urgent handling than could be provided by a body meeting once a quarter. It seems more probable that, if legal services were within its remit, the Committee would be expected to deal with issues of policy or principle, such as how the services should be organised in the region (e.g. in-house or contracted out), or whether there might be more economical and efficient ways to provide them (e.g. jointly with another region). Decisions as to which particular solicitors should be on the Union's panel might seem to be a matter of the former, rather than the latter kind, i.e. a day-to-day matter rather than a matter of policy or principle.

52. Rule 8.4 is expressed in fairly broad terms. It does not purport to list all the powers and duties of the Regional Committee, only to state what they shall include. The part of the rule which covers *"the administration of such business ... as affects all sections of the membership, such as general industrial movements, educational work, political administration, etc."* is vague and general. A rule stated in these general terms clearly cannot itself provide an answer to a specific question, such as whether legal provision is covered ,or, if so, what particular aspects of it. It is well established that when a union's rules are not clear, its custom and practice can clarify them. The Union referred to the *Heatons Transport* judgment in which Lord Wilberforce, having said that union rule books are not to construed as if written by parliamentary draftsmen, went on to quote with approval a TUC handbook which said:

> *"Trade union government does not however rely solely on what is written down in the rule book. It also depends on custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either*

by modifying a union's rules as they operate in practice or by compensating for the absence of formal rules"

It is to the Union's custom and practice, then, that I must look to clarify rule 8.4 and determine the applicants claim that it gives the Regional Committee the power to appoint and remove solicitors.

53. The Union claims that its established custom and practice on the appointment or removal of solicitors is that the Regional Secretary, in consultation with the Legal Department, makes a recommendation to the General Secretary who then takes the decision. Mr O'Reilly, Mr McGlone and Mr Kelly all confirmed in evidence that this was the established route. The Union provided evidence for this from previous appointments or removals, both in Ireland and in other regions. Minutes of the Ireland Regional Committee meeting in October 1984 were produced. Under an item raising issues about the services provided by a solicitor, the Regional Secretary of the time is recorded as telling the Committee that

"The appointment of solicitors was solely at the discretion of the Regional Secretary after appropriate consultation with the Secretary of the Legal department and was an administrative matter which was dealt with on an every day basis. It was not within the jurisdiction of the Regional Committee to either hire or fire solicitors, that responsibility was vested in the Regional Secretary on behalf of the General Executive Council."

Mr O'Reilly's report to the Regional Committee in October 2007 gave details of previous appointments or removals that had been decided by the Regional Secretary and General Secretary, not the Committee. It also related, and Mr O'Reilly confirmed in evidence, that when a new solicitor was needed for the Union's panel in the Republic of Ireland, he and the Head of the Legal Department, Mr Whitty, interviewed candidates and selected one, who was then appointed by the General Secretary, without the involvement of the Regional Committee, except for information after the event. In addition, letters were produced, one of which showed the General Secretary writing to a firm of solicitors in an English region to end their connection with the Union while in another Mr Whitty instructed an English Regional Secretary to write to a firm conveying the Union's decision to dispense with their services. Also, it seemed clear from answers given by Mr Torley at the hearing that, though a member of the Regional Committee at a time when other solicitors left or were removed from the Northern Ireland panel, he had not been especially aware that this was happening, which may suggest that these matters were not routinely brought to the Regional Committee. The Union's witnesses also confirmed that legal matters generally are reserved to the GEC, which is the body that takes decisions on legal aid and is the only body to receive reports on the Union's legal business. I am persuaded by this evidence, which the applicants did not controvert, that the Union's custom and practice on appointment or removal of solicitors has over a lengthy period been what the Union says it was, and that Rule 8.4, interpreted in the light of that custom and practice, does not require that the Regional Committee should make such decisions or approve them in advance. This conclusion means that the secondary part of

Complaint 1, that the Union ignored the decision of the Regional Committee to reinstate AAH at least on a temporary basis, necessarily also fails.

54. There are some inconsistencies in the Union's description of the decision route. Mr O'Reilly sometimes wrote of *"my decision"* and Mr Whitty also wrote sometimes (see his letter of 15 January 2007) as if the decision was Mr O'Reilly's to take. However, this seems to me to be simply a looseness of expression (as shown by Mr Whitty's immediately proceeding to say, *"Therefore before the General Secretary makes a final decision in this matter...*). I am satisfied that the Union's practice was clear to those involved in these matters, namely that a recommendation was from the Regional Secretary with the endorsement of the Legal Department to the General Secretary, who was ultimately responsible for the decision.

55. I look finally at some points made in the applicants' submission at the hearing. Mr Torley argued that just as the General Secretary could only act on powers delegated to him by the GEC, so the Regional Secretary only had powers because they were delegated to him by the Regional Committee. His conclusion appeared to be that it was for the Regional Committee to take decisions in the region, in this case on legal appointments, unless it chose to delegate them. I do not believe that this analogy holds up. The rules are clear (Rule 6.18) that the GEC *"may delegate such of their powers to the General Secretary as they deem necessary"*, but there is no corresponding rule about Regional Committees. There is nothing to indicate they can delegate powers in the same way as the GEC. I was offered no evidence that any Regional Committee had in fact ever formally delegated any powers to its Regional Secretary. Regional Secretaries are appointed by the GEC and may be ultimately responsible to it. Mr Torley's theory is an interesting one, but it is not supported by the rules and, as regards legal appointments at least, it does not correspond to the practice of the Union as explained above

56. Mr Torley drew attention to two pieces of evidence in the Union's own correspondence. He said that Mr Whitty's letter of 15 January 2007 showed that the decision on the solicitors must go through the Regional Committee because of its long term importance to the region, and that only if the Regional Committee agreed would he write to AAH to end their arrangement with the Union. But it is to be noted that Mr Whitty's words were *"I respectfully suggest that the Regional Committee confirms it agrees with this step."* This is a suggestion, not an instruction; he is recommending a desirable or prudential action, not imposing an obligatory one. No right of the Committee to approve is implied by his words. (I note also that in his letter of 19 October 2007, Mr Kelly did not endorse the Regional Committee's views of its powers over the appointment of solicitors, but merely conveyed them to the General Secretary).

57. The second piece of evidence was in the letter of 12 July 2007 from Mr Woodley and Mr Simpson to the Joint Executive Committee of Unite the Union and all officers, staff and organisers. It was headed "Towards New regions – The Process for an Orderly Transition". It contains the sentence *"Regional Secretaries have no authority to change or allocate legal work"* which Mr Torley took as a quite general statement about the powers of Regional

Secretaries. But in my view it is a statement specific to a particular context. Mr Kelly pointed out that that context was the recent merger of the TGWU and Amicus and the re-organisation of the regional structures that was taking place as a consequence. There were ten new Regional Secretaries, five from each of the two merged unions. This sentence was intended to ensure that difficulties and disputes were not caused by a Regional Secretary from Amicus favouring its solicitors in the region at the expense of the TGWU's, or vice versa. It does not show that Regional Secretaries normally had no role in the management of legal provision in their region.

58. For the above reasons I find that the Union did not breach Rule 8.4 of its rules by bypassing the role of the Regional Committee in the selection, appointment and reappointment of the Union's solicitors, and I refuse to make the declaration sought by the applicants.

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Roy Gamble

Certification Officer for Northern Ireland