

**Certification
Office**for Trade Unions
& Employers'
Associations

Mr G Thomson
General Secretary
National Federation of Sub-Postmasters
Evelyn House
22 Windlesham Gardens
Shoreham-by-Sea
BN43 5AZ

Your ref: GT/lw
Our ref: CO/353T/1
Date: 13 January 2014

By post and email

Dear Mr Thomson

Trade Union and Labour Relations (Consolidation) Act 1992
Removal of National Federation of Sub-Postmasters from the list of trade unions

Thank you for your letter of 17 December 2013 in which you make representations to the Certification Officer in response to my letter to you dated 21 August.

The Certification Office has now considered your representations together with all the information before him in respect of this matter. He has determined that the National Federation of Sub-Postmasters does not meet the definition of a trade union provided in section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992. Accordingly, I must inform you that, pursuant to section 4(1) of the 1992 Act the National Federation of Sub-Postmasters was removed from the list of trade unions today, 13 January 2014.

I enclose a copy of the written decision of the Certification Officer. A copy of the decision will appear on the Certification Officer's website in due course.

There is a right of appeal against a decision of the Certification Officer to the Employment Appeal Tribunal (EAT), on a question of law. Any such appeal must be lodged within 42 days of the date the written record of the Certification Officer's decision is sent to the parties. The EAT's address is: 2nd Floor, Fleetbank House, 2-6 Salisbury Square, London EC4 BJX (telephone: **GRO**). Further information about the EAT can be found on its website: www.justice.gov.uk/tribunals/employment-appeals.

Yours sincerely

GRO

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In the matter of:

CO/L/1/13-14

**The National Federation of Sub-Postmasters
Removal from the List of Trade Unions**

Date of Decision/Removal

13 January 2014

DECISION

Pursuant to section 4 of the Trade Union Labour Relations (Consolidation) Act 1992 ("the 1992 Act") I remove the National Federation of Sub-Postmasters from the list of trade unions on the grounds that it does not meet the definition of a trade union in Section 1.

REASONS

1. I take the background to this matter from the judgment of the Employment Appeal Tribunal (EAT) in *Commissioners of Inland Revenue v. Post Office Limited* (2003) IRLR 199, which I will refer to as "the Inland Revenue case". In that case the EAT explained that the network of post offices in this country comprises Crown Offices, sub-post offices and franchised post offices, which are each manned in different ways. Crown Offices are staffed by employees of Post Office Limited while franchised offices are operated under agreement with larger retailers, for example, supermarkets, which provide the facility within their larger stores. Sub-post offices, however, are operated by sub-postmasters and sub-postmistresses (hereafter 'sub-postmasters'), who perform their services under a contract with the Post Office. The circumstances under which such contracts are entered into may vary but typically a potential sub-postmaster would see an advertisement for, or learn from friends and family of the availability of, freehold or leasehold premises and a business – usually of a newsagent or general store – from which their predecessor would have been acting as sub-postmaster. Although there is no entitlement to assign or have assigned the office of sub-postmaster, during the negotiations for acquisition, there would be an appointment as sub-postmaster and the particulars of sale of the premises and business would be likely to be advertised on the basis of including reference to past revenue and/or estimated future revenue from the continuation of the sub-post office at the premises on the basis of which the acquisition would then be completed. In a letter to my office of 4 June 2013 the National Federation of Subpostmasters (the NFSP) set the scene as follows, "*Sub-postmasters contract with Post Office Limited to provide post office products and services from their own private business premises, mainly in conjunction with other retail business provision. Thus they derive income from their general business activities in addition to remuneration derived from Post Office Limited.*"

2. The NFSP has been in existence since 1897. It has been on the list of trade unions retained by my office since the creation of the position of Certification Officer in 1976. According to its most recent annual return filed

at my office, the NFSP had 7,168 members as at 31 December 2012 and net assets of £3,623,766.

3. The status of the NFSP came to my attention during the course of my investigations of an issue raised by a number of members who were concerned that the NFSP was no longer independent within the meaning of section 5 of the 1992 Act. I was given grounds to believe that the NFSP may no longer meet the definition of a trade union in section 1 of the 1992 Act (if it ever did so), notwithstanding the work it had done for its members over many years. I postponed my enquiries into the independence of the NFSP pending a resolution of this more fundamental matter.

4. Section 1 of the 1992 Act defines a trade union as follows:

"1 Meaning of "trade union"

In this Act a "trade union" means an organisation (whether temporary or permanent) –

- (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations"*

5. The status of the NFSP is called into question by the requirement that the members of a trade union are required to be 'workers'. This word is defined in section 296 of the 1992 Act as follows:

"296 Meaning of "worker " and related expressions

(1) In this Act "worker" means an individual who works, or normally works or seeks to work –

- (a) under a contract of employment, or*
- (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or*
- (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above."*

6. Where it appears to me that an organisation whose name is entered in the list of Trade Unions is not a trade union, I may remove its name from the list in accordance with section 4 of the 1992 Act. Section 4 provides as follows:

"4 Removal of name from the list

(1) If it appears to the Certification Officer, on application made to him or otherwise, that an organisation whose name is entered in the list of trade unions is not a trade union, he may remove its name from the list.

(2) *He shall not do so without giving the organisation notice of his intention and considering any representations made to him by the organisation within such period (of not less than 28 days beginning with the date of the notice) as may be specified in the notice.*

(3) *The Certification Officer shall remove the name of an organisation from the list of trade unions if -*

- (a) *he is requested by the organisation to do so, or*
- (b) *he is satisfied that the organisation has ceased to exist."*

7. In the Inland Revenue case, the EAT asked itself whether the sub-postmasters in question were employees and, if not, whether they were workers within the relevant statutory definition. The EAT concluded that those sub-postmasters were neither employees nor workers. As to worker status, the EAT noted that it was common ground that the test was whether the undertaking of the relevant personal services was the 'dominant purpose' of the contract (as expounded by the Court of Appeal in *Mirror Group Newspapers v. Gunning* (1986) IRLR 27 and by the House of Lords in *Kelly & Loughran v. Northern Ireland Housing Executive* (1998) IRLR 593). It further noted that even if the claimants were able to establish 'personal services' they had still to succeed on a second issue; namely whether the status of the Post Office is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried out by the sub-postmasters. The claimants failed at both these hurdles.

8. The status of sub-postmasters has been the subject of many judicial decisions over the years, culminating in the Inland Revenue case of 2003. As noted above the EAT, in that case, decided that sub-postmasters were neither employees nor workers. Whilst this decision may not be binding upon me, as it was not determined under the definition of a worker in the 1992 Act, I regard it as being highly persuasive for the following reasons. The Appeal Tribunal determined four separate appeals that had been consolidated and therefore dealt with the contractual and factual position of four different subpostmasters. The division of the EAT which decided these four consolidated appeals was chaired by the then President, Mr Justice Burton. The EAT had the benefit of argument from two QCs and three Junior Counsel. The EAT carefully reviewed the relevant case law back to 1980. It noted that other divisions of the EAT had reached the conclusion that subpostmasters were neither employees nor workers in appeals chaired by Slynn P, Wood P, Morison P, Lord Johnston and His Honour Judge Pugsley. The EAT noted that these different divisions of the EAT had considered the meaning of 'worker', as defined in what is now section 230(3) of the Employment Rights Act 1996, section 54(3) of the National Minimum Wage Act 1998, Regulation 2(1) of the Working Time Regulations 1998, the Race Relations Act 1976 and the Disability Discrimination Act 1976. It also had regard to, and dealt with, two decisions which came to a contrary conclusion, that of a VAT Tribunal in 1997 and an Employment Tribunal in Inverness in 1999.

9. On 9 July 2013 I caused a letter to be written to the NFSP which set out my powers under section 4 of the 1992 Act and requested its views on whether sub-postmasters are 'workers' as defined by section 256. The NFSP

responded initially by a letter dated 12 August 2013. My office wrote to the NFSP again on 29 August 2013. This letter was sent in compliance with my duty under section 4 of the 1992 Act to give the Union notice of my intention to remove the NFSP from the list of Trade Unions, subject to any representations it might make by 4 October 2013. The NFSP sought an extension of time to respond until the end of December 2013, having regard to the importance of this matter to it. I granted an extension until 18 December. The NFSP submitted its response dated 17 December.

10. The view of the Post Office on the status of the NFSP has been submitted to me in various forms. In an email of 4 January 2013 the Post Office responded to a Freedom of Information Act request from a Mr Baker. It stated, *"Sub-postmasters are not 'workers' for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 and as such the Post Office Ltd cannot recognise the NFSP for collective bargaining purposes"*. In an email to a Mr Heslop of 10 June 2013, the Post Office stated,

"...Subpostmasters are in business on their own account and are not obliged to provide Post Office services personally. For these reasons, amongst others, subpostmasters are not employees of Post Office Limited ... Post Office Limited does not recognise the NFSP under section 178 of the 1992 Act....Post Office Limited regards the NFSP as an independent membership organisation supporting operators of Post Office branches across the UK and which is solely acknowledged by Post Office Limited to represent operators. For that reason, the NFSP is the only body with which Post Office Limited will seek to discuss and consult on matters affecting operators, subject to any other legal or regulatory obligations ... The majority of Subpostmasters are engaged under the Standard Subpostmasters Contract. ... Under the terms of the Subpostmasters Contract, Post Office Limited are required to negotiate with the NFSP prior to revising other aspects of the Remuneration Booklet...These obligations arise out of the contract between Post Office Limited and the individual subpostmaster, not out of any separate agreement with the NFSP".

11. The general view of the NFSP as to its status is evidenced by a circular letter to colleagues issued by its General Secretary on 12 April 2013. This states that, *"According to the narrow definitions of the Trade Union and Labour Relations (Consolidation) Act 1992, subpostmasters are not 'workers' and so Post Office Limited believes it is unable to recognise a trade union to 'collectively bargain' on their behalf ..."* In a similar circular of 13 May 2013 the General Secretary stated that *"The NFSP is and always has been a moderate, reasonable organisation representing self employed business people"*. As noted above, in a letter to my office of 4 June 2013 the General Secretary stated, *"subpostmasters contract with Post Office Limited to provide post office products and services from their own private business premises, mainly in conjunction with other retail business provision. Thus they derive income from their general business activities in addition to remuneration derived from Post Office Limited"*.

12. By a letter dated 17 December 2013 the General Secretary of the NFSP responded to my 'show cause' letter, which requested written representations as to why the NFSP should not be removed from the list of trade unions. He argued that the EAT's decision in the Inland Revenue case

turned on the circumstances of those specific individual appellants who were not required to render personal services. He went on to argue that whilst the contract between the Post Office and individual sub-postmasters states that sub-postmasters are not employees and are not required to render personal service the position in reality is quite different. He noted that the earnings of many of his members are so low that they cannot afford to hire assistance and are therefore effectively compelled to provide personal service. The General Secretary also argued that the Post Office has now impliedly recognised the worker status of sub-postmasters by making a top up payment to 800 post offices so that the remuneration of those subpostmasters is brought up to that of the National Minimum Wage. In addition, the General Secretary relied upon the statutory requirement of the Post Office to deduct primary class one National Insurance contributions from sub-postmasters, the fact that the Post Office has a criminal injuries compensation scheme which applies equally to Post Office employees and sub-postmasters and to the fact that the Post Office retains the right to discipline sub-postmasters for misconduct.

13. Further representations on this matter were made to me by some of the members who had originally raised the issue of the independence of the NFSP. In an email dated 1 November 2013, a particular member argued that new evidence is now available which cast doubt on whether the Inland Revenue case would be similarly decided in the present circumstances. This member asserted that when someone now applies to be a sub-postmaster he or she must provide a very detailed business plan outlining his/her proposal in the form of a spreadsheet, including the amount of time he/she intends to spend working in the Post Office. He also referred to a Post office Guide to potential new subpostmasters. In the section headed "*Frequently Asked Questions*", there is a question, "*Will I have to work in the business full time or can I have a manager look after my Post Office?*" The rather vague response refers to the importance of fully participating in the day to day running of the business and devoting an appropriate amount of time to ensure its success. It states that each proposition will be judged on its merits. This member also argued that personal services are now required by sub-postmasters by virtue of them having to take compliance tests via the computers in their post offices on the Post Office's own Horizon computer system. Further, he relied upon *Redrow Homes (Yorkshire) Limited v. Buckborough* (2009) IRLR 34.

14. The definition of a worker in section 296 of the 1992 Act requires the identification of a contract between an individual and another party and a subsequent determination of the nature of that contract. There can be no doubt that sub-postmasters overcome the first hurdle by having a contract with Post Office Limited. It is the nature of those contracts which falls for consideration. In this regard, I note that the Subpostmasters Contract supplied to me by the NFSP in August 2013 is in virtually identical terms to that set out extensively by the EAT in the Inland Revenue case.

15. I accept the careful analysis of the EAT in the Inland Revenue case in its decision that none of the four subpostmasters in question were employees of the Post Office nor workers in that none of them worked under a contract

whereby they undertook to do or perform personally any work or service for the Post Office but, even if they did, they did so by way of providing services to a client.

16. I have therefore considered whether there has been any material change of circumstance since the Inland Revenue decision of 2003 and whether the NFSP satisfies the definition of a trade union in section 1 of the 1992 Act, specifically whether the NFSP 'consists wholly or mainly of workers'.

17. In my judgment none of the representations I have received establish any sufficiently changed circumstances to persuade me that sub-postmasters should now be considered workers within the relevant statutory definition. The amount and type of payments made to sub-postmasters or statutory deductions made from their payments are not determinative or even weighty considerations on the present facts. Even less persuasive is the inclusion of sub-postmasters in the criminal injury compensation scheme of the Post Office or the reservation of certain disciplinary powers by the Post Office in its contracts with sub-postmasters. I am similarly not persuaded that sub-postmasters now work under a different contractual regime by virtue of the business plan that new applicants must present to the Post Office, having had the opportunity of considering the response to a "*Frequently Asked Question*" nor by the requirement that compliance tests must be taken via the Post Office's computer system. The issue as to whether the contracts between subpostmasters and the Post Office are a sham was canvassed in the Inland Revenue case but not pursued. On the information before me, I am unable to reach any such conclusion.

18. Accordingly, I conclude that the NFSP does not consist wholly or mainly of workers, within the definition of a worker in section 296 of the 1992 Act and that therefore the NFSP does not meet the definition of a trade union in section 1 of that Act.

19. For the above reasons and pursuant to section 4 of the 1992 Act, I remove the NFSP from the list of trade unions that I keep under section 2 of that Act.

GRO

David Cockburn
The Certification Officer