

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTION 31(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR J MORTIMER

v

AMICUS

Date of Decision:

14 February 2003

DECISION

Upon application by the Applicant under section 31(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):-

1. The Applicant’s complaint that Amicus (“the Union”) failed to comply with his request for access to accounting records of the Union is well founded.
2. (a) Amicus is ordered to give the Applicant access to inspect those accounting records of the Union which relate to a termination payment made to Mr Chowcat by the Union in or about 1999. The Applicant is to be given access to those records no later than Friday 28 March 2003.
- (b) Amicus will allow the Applicant to be accompanied at the inspection by an accountant (being a person eligible for appointment as a company auditor under section 25 of the Companies Act 1989). Amicus need not allow the Applicant to be accompanied by an accountant if the accountant fails to enter into such agreement as the Union may reasonably require for protecting the confidentiality of the records.

- (c) Amicus will allow the Applicant to take or will supply to the Applicant such copies or extracts from those accounting records as he may request.
- (d) Amicus may charge the Applicant for allowing him to inspect the records to which he has had access, for allowing him to take copies of, or extracts from, those records or for supplying any such copies. If such charges are required, Amicus shall notify the Applicant, before any arrangements are made for the inspection, of the principles in accordance with which its charges will be determined. Such charges are not to exceed the reasonable administrative expenses incurred by Amicus in complying with this order. The Applicant shall be liable to pay such sum upon demand by the Union, after having inspected and, if appropriate, after having been provided with copies of the records to which he has had access pursuant to this order.

REASONS

1. By an application dated 27 March 2002 the Applicant made a complaint against his Union, Amicus (“the Union”). Following correspondence with my Office the complaint was identified in the following terms:-

“ In breach of section 30 of the 1992 Act the Union has failed to comply with Mr Mortimer’s requests of 20 January 2002 and 18 February 2002 for access to the accounting records of the Union. The accounting records to which Mr Mortimer has sought access are those which relate to payments made from (and including) 1999 to former employees who left the employment of the Union before their normal retirement date with a confidential compromise agreement, including payments made to Mr Chowcat, Mr John, Ms Solomon and Mr Keagan, such payments being reflected in the Union’s annual accounts for 1999, 2000 and 2001 under the heading of “Rationalisation costs.”

2. These matters were investigated in correspondence. As required by section 31(2A)(b) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on Thursday 23 January 2003.
3. The Union was represented by Mr C Ettinger, a solicitor of Messrs Irwin Mitchell. Mr A McKenna, an Assistant General Secretary of Amicus, gave evidence. Mr S Mehta of Messrs H W Fisher, Chartered Accountants, was also in attendance. The Applicant acted in person and called no witnesses. A bundle of documents was prepared for the hearing by my Office. This consisted of the exchanges of correspondence with the parties,

together with their enclosures. Both Mr Mortimer and the Union helpfully provided skeleton arguments. This decision has been reached on the basis of the representations made by the Applicant and the Union, together with such documents as were provided by them.

Findings of Fact

4. Having considered the representations made to me and the documents to which I was referred I make the following findings of fact.
5. Amicus was formed on 1 January 2002 upon the amalgamation of the Manufacturing Science and Finance Union (“MSF”) and the Amalgamated Engineering and Electrical Union (AEEU). In this decision I use the expression “the Union” to refer to MSF or Amicus, as the context requires.
6. John Chowcat was an Assistant General Secretary of MSF whose employment with MSF terminated in 1999. The terms upon which that employment terminated were recorded in a compromise agreement which imposed an obligation of confidence on both parties.
7. At the Annual Conference of MSF in May 2000 a motion was carried, motion 47, which instructed the National Executive Committee (NEC), amongst other things, not to make *“any more secret payments to employees of the union upon termination of their employment”*.
8. Following its Annual Conference in 2000, MSF reconsidered its policy on the making of severance payments and, in all subsequent negotiations leading to a termination payment, it made clear to the employees concerned that the settlement arrangements would be disclosed to the NEC and published in the NEC minutes. In accordance with this new policy, MSF made known to its members the amount of the termination payments that were subsequently made to Ms Solomon, Mr John and Mr Keegan. At the hearing, Mr McKenna gave evidence that the termination agreements with these three individuals did

not contain a confidentiality undertaking. Mr Mortimer stated that he had not seen the termination agreements in question and was therefore unaware whether or not they contained a confidentiality undertaking. However, having no evidence to the contrary, Mr Mortimer accepted Mr McKenna's word that this was the case.

9. The accounts which form part of the Union's Financial Report for the calendar year 1999 show that there were "*Rationalisation costs*" of £653,000. The notes to these accounts state "*The rationalisation costs relate to 18 employees ... who left employment of the Union in the year*". Similarly, the Financial Report for 2000 shows rationalisation costs of £569,000 in respect of 22 employees who left MSF that year and the Financial Report for 2001 shows rationalisation costs of £415,000 in respect of 15 employees who left MSF that year.
10. Whilst most of those who left the employment of MSF with a termination payment did so as a result of a re-organisation or redundancy, some members were concerned about the termination payments made to certain individuals which were thought to be related to allegations by them about financial irregularities within MSF. Complaints were received by the then Certification Officer about alleged financial irregularities within MSF but, following detailed enquiries, he decided on 31 July 2001 not to use his powers under section 37(B) of the 1992 Act to appoint an inspector to formally investigate the financial affairs of MSF. Nevertheless, some members, including Mr Mortimer, continued to seek greater transparency about the circumstances of the termination of employment of Mr Chowcat, Ms Solomon, Mr John and Mr Keegan. They pursued this objective through the internal mechanisms of the Union but failed to receive any response satisfactory to them.
11. On 20 January 2002 Mr Mortimer wrote to the Union seeking to examine its financial records. He stated, "*I am particularly interested though not exclusively so - in the rationalisation costs and the legal and professional fees referred to in the accounts*". Upon being asked by the Union to clarify precisely what he was seeking, Mr Mortimer wrote again to the Union on 18 February 2002. In this letter he stated the following:-

“I am seeking to ascertain how much has been paid to officials and staff since but also including the departure of John Chowcat, who have left the employment of MSF other than at the normal retirement age and have signed an accompanying confidentiality undertaking. Perhaps these costs are included in the item described as ‘rationalisation costs’ on page 11 of the accounts presented at last year’s conference?”

12. The Union responded to this letter on 20 March 2002, stating that any inspection was unnecessary as, in effect, the relevant accounting records prior to 2000 were covered by a confidentiality undertaking and those after 2000 were already in the public domain. Nevertheless Mr Mortimer and a colleague attended at the Union offices on 26 March, having previously given notice of his intention to do so. Mr Mortimer was told courteously but firmly that he would not be given access to the accounting records.
13. Mr Mortimer brought this application for a breach of section 30 of the 1992 Act by a letter dated 27 March 2002. Mr Mortimer has been a member of Amicus-MSF Section and its predecessor unions since 1942. He has held most of the offices of his Union open to lay members, including that of Regional Council Auditor and member of the NEC. He is the present Branch Chair of the Thames-Side and London South East Branch of the Union. He is a former Chairman of ACAS. Mr Mortimer stated that he and others had exhausted all the means they knew to obtain the information he now seeks using the internal mechanisms of the Union and that he only brought this application when all other attempts had been unsuccessful.

The Relevant Statutory Provisions

14. This claim is brought under section 31(1) of the 1992 Act which provides as follows:-

S31(1) “A person who claims that a trade union has failed in any respect to comply with a request made by him under section 30 may apply to the court or to the Certification Officer.”
15. Section 30 of the 1992 Act provides members of a union with the right of access to accounting records and is in the following terms:-

S30 “A member of a trade union has a right to request access to any accounting records of the union which are available for inspection and relate to periods including a time when he was a member of the union ...”

16. Section 29(2) of the 1992 Act assists in the interpretation of section 30. It states:-

S29(2) "In section 30 (right of members to access to accounting records) -

- (a) references to a union's accounting records are to any such records as are mentioned in subsection (1) above, and
- (b) references to records available for inspection are to records which the union is required by that subsection to keep available for inspection."

17. It is therefore necessary to consider section 29(1) of the 1992 Act. It states:-

S29(1) "A trade union shall keep available for inspection from their creation until the end of the period of six years beginning with 1 January following the end of the period to which they relate such of the records of the union, or of any branch or section of the union, as are, or purport to be, records required to be kept by the union under section 28 ..."

18. The final cross-reference is to section 28 of the 1992 Act. It states:-

S28(1) "A trade union shall -

- (a) cause to be kept proper accounting records with respect to its transactions and its assets and liabilities, and
 - (b) establish and maintain a satisfactory system of control of its accounting records, its cash holdings and all its receipts and remittances.
- (2) Proper accounting records shall not be taken to be kept with respect to the matters mentioned in subsection (1)(a) unless there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions."

19. The remedy for a breach of section 30 of the 1992 Act in any application before me is provided for in section 31(2B). This is in the following terms:-

S31(2B) "Where the Certification Officer is satisfied that the claim is well-founded he shall make such order as he considers appropriate for ensuring that the applicant -

- (a) is allowed to inspect the records requested,
- (b) is allowed to be accompanied by an accountant when making the inspection of those records, and
- (c) is allowed to take, or is supplied with, such copies of, or of extracts from, the records as he may require."

The Submissions

20. Mr Mortimer sought those accounting records which relate to the termination of employment of Mr Chowcat, Ms Solomon, Mr John and Mr Keegan and anyone else who left the Union's employment from 1999 with a confidentiality undertaking. In his proposed enforcement order Mr Mortimer stated that *"The accounting record should include the individual terms of settlement in each of the four cases, sometimes described as confidential compromise agreements, indicating the amount of money to be paid, undertakings given by either party, and whether or not the allegations of financial*

irregularity were withdrawn". At the hearing Mr Mortimer said that he wished to leave aside whether the compromise agreements themselves were accounting records. He nevertheless still sought to inspect those terms of any compromise agreement which related to the termination payments. Mr Mortimer also sought any other accounting records which related to the termination payments. He did not accept the Union's assertion in correspondence that his statutory right to inspect the accounting records of the Union could be defeated by the Union having entered into a confidentiality agreement with its former employees. He further argued that a receipt is part of the accounting records of the Union, relying on section 28(1)(b) of the 1992 Act, and that the Union had not discharged its obligation to give access to accounting records by publishing the amount of the termination payments in the minutes of the NEC or in a letter from the General Secretary. Mr Mortimer argued that the Union was under an obligation to keep accounting records which must not only give a true and fair view of the state of affairs of the trade union but must also explain its transactions.

21. For the Union, Mr Ettinger submitted that Mr Mortimer's application could only refer to those accounting records which relate to Mr Chowcat as no other employee in the relevant period had received a termination payment which was subject to a confidentiality undertaking. He further argued that the Union had complied with Mr Mortimer's request by having provided access to the Annual Financial Report for 1999. In Mr Ettinger's submission, the mere publication in that Report of the amount paid by way of rationalisation costs in 1999 may not have been sufficient to explain the transactions of the Union but that I should also have regard to the notes to that Report. These explain that the sum of £653,000 related to eighteen employees who left the Union's employment that year. He argued that the Financial Report, read together with this note, was sufficient to explain the transaction and discharge the Union's obligations with regard to the keeping of accounting records and their disclosure. Mr Ettinger argued that neither the books of prime entry, such as the cash book day book or purchase ledger, nor the nominal ledger were accounting records if there existed an Annual Financial Report which gave a true and fair view of the state of affairs of the Union and explained its transactions. As he put it, the definition of an accounting record, interpreted in this way, accommodated the

confidentiality of the termination agreement. Quite properly, Mr Ettinger did not seek to argue that the Union's contractual obligation of confidence prevailed over the Union's statutory obligations. In a further submission, Mr Ettinger directed my attention to the expression "*records of the union which are available for inspection*" in section 30 of the 1992 Act. He argued that information which is confidential or relates to the financial position of a specific employee is not "*available*" and therefore may not be inspected. Finally, Mr Ettinger submitted that if I found the complaint to be well founded I should exercise my discretion to order that any accounting records that are made available for inspection should have deleted from them any reference to the amount of any termination payment.

Conclusion

22. The first issue to be determined is the scope of Mr Mortimer's complaint. By section 31 of the 1992 Act any such complaint must be that a Union has failed to comply with a request made by the Applicant. The request made by Mr Mortimer is contained in his letters of 20 January and 18 February 2002, the relevant extracts of which appear above. These extracts show that the request which was considered by the Union related to those accounting records of individuals who "*.... left the employment of MSF other than at the normal retirement age and have signed an accompanying confidentiality undertaking....*" (my emphasis). Mr Mortimer accepted the evidence of Mr McKenna that during the relevant period only Mr Chowcat fell within this category. Accordingly I find that Mr Mortimer's request related exclusively to the accounting records relating to the termination payment which was made to Mr Chowcat.

23. What then are accounting records for the purposes of the 1992 Act? This is the first case brought under section 31 in which consideration has had to be given to the meaning of the term "*accounting records*" in this legislation. The precise meaning of this term has been a vexed issue to trade unions and practitioners since the introduction of the obligation to keep Proper Accounting Records in 1974.

24. I have not heard expert accountancy evidence on this point nor have I had addressed to me arguments based on the meaning of the same words in the Companies Acts nor any guidance that may have been issued by the relevant governing bodies of the accountancy profession. I have, however, been assisted by a letter from the Union's auditor dated 17 October 2002. In this letter the auditors state, "*the payments made to John Chowcat are recorded in the ledgers of the Union and could be ascertained from an examination of the accounting records ... I do not believe that access should be permitted to the accounting records of the Union to ascertain the information sought by Mr Mortimer for the pure and simple reason that this would cause the Union to be in breach of the confidentiality undertaking given to an individual and to permit such a breach to take place, I do not believe can be correct.*" The auditors were not purporting to give legal advice as to the meaning of the term "*accounting records*" in the context of this legislation but I take it that they were using the term "*accounting records*" in the sense that it is ordinarily understood by professional accountants.
25. In my judgement, Mr Ettinger's argument that the Union complied with its obligation to give access to the accounting records of the Union by giving access to the Union's Annual Financial Report cannot be sustained. The Union's Annual Financial Report may be an accounting record but it is not the only one. Were it the intention of Parliament to restrict access to this document, there would have been no need for section 30 of the 1992 Act. This is because unions are required in any event by section 32 to submit an Annual Return to the Certification Officer which must contain revenue (income and expenditure) accounts, a balance sheet and such other accounts as the Certification Officer may require. In practise the Annual Return contains broadly the same information as the Annual Financial Report and is publically available. Furthermore, section 36 deals with the duties of auditors of unions and makes plain that there is a distinction between the accounts of the union and accounting records. Section 36(3)(c) provides that the auditors shall carry out such investigations as will enable them to form an opinion as to:-

S36(3)(c) "whether the accounts to which the report relates agree with the accounting records."

Furthermore, section 36(4) provides:-

S36(4) “If in the opinion of the auditor or auditors the trade union has failed to comply with section 28, or if the accounts do not agree with the accounting records, the auditor or auditors shall state that fact in the report.”

In the Financial Reports for 1999, 2000 and 2001 the auditors do not report that the Union had not kept Proper Accounting Records.

26. Mr Ettinger’s argument also leads to the inelegant conclusion that the Annual Financial Report is the exclusive accounting record when it is published but that, before the Annual Financial Report is published, other records are to be temporarily treated as accounting records. A member may seek access to the various ledgers of the Union in the period up to the publication of the Annual Financial Report but not thereafter. I find it improbable that an analysis which has this effect can be correct. I am fortified in this conclusion by the Union’s auditors which state in their letter of 17 October 2002, *“I also note in your letter that you make reference to a clear distinction between the accounting records and the accounts themselves and I would agree with this”*.
27. Mr Ettinger further submitted that the accounting records sought by Mr Mortimer were not *“available”* within the correct meaning of this word in section 30 of the 1992 Act. The meaning of *“available”* in the Shorter Oxford Dictionary is *“able to be used ... at one’s disposal ... obtainable”*. Moreover, section 29(2)(b) provides that references to *“records available for inspection”* in section 30 *“are to records which the union is required by that subsection to keep available for inspection”*. This requires a consideration of subsection (1) of section 29 and, in turn, a consideration of section 28. Neither of these further provisions give any support to Mr Ettinger’s submission. Accordingly neither the ordinary meaning of the word *‘available’* nor the specific meaning given to it by section 29(2) support the Union’s contention. In my judgement the word *“available”*, as it is used in section 30, does not have the special meaning ascribed to it by the Union.
28. I now consider Mr Mortimer’s submissions with regard to the termination agreement entered into by Mr Chowcat and the Union. Is the termination agreement itself or are any

of its terms an accounting record? In order to determine these issues it is necessary to consider more closely the meaning of the expression “*accounting records*” as it is used in the 1992 Act.

29. I firstly observe that the 1992 Act makes a distinction between accounting records and other documents which may contain information of a financial nature. This distinction is illustrated by comparing the rights of access of union members in section 30 with the rights of union auditors or the Certification Officer. By section 37(1)(a) of the 1992 Act an auditor “*has a right of access at all times to its accounting records and to all other documents relating to its affairs*”. Similarly, by section 37(A)(1), under the heading “*Investigation of Financial Affairs*”, the Certification Officer may give directions to a union “*to produce such relevant documents as may be specified in the directions*”. A document containing financial information may therefore be described as a record of that financial information but it is not necessarily an accounting record.
30. A further distinction made by the legislation is that between accounting records for the purposes of section 30 of the 1992 Act and Proper Accounting Records in section 28(2). In order to be accounting records to which access must be given to union members, section 29(1) requires that they must be, or purport to be, records which are required to be kept under section 28, whether they do so or not. Such accounting records will not amount to Proper Accounting Records unless, taken together, they provide a true and fair view of the state of affairs of the union and explain its transactions. A union’s failure to keep Proper Accounting Records is an offence under section 45. It is not a matter about which a member can make a complaint to the Certification Officer.
31. Accordingly, the statutory scheme in the 1992 Act provides for four levels at which the financial affairs of a union can be called into question, beyond the requirement to file an annual return. The auditor has a wide-ranging power to require the production of accounting records and “*documents*” (section 37(1)). The Certification Officer has a similar wide-ranging power, in appropriate circumstances (section 37A(1)). Members have a right of access to accounting records (section 30) and a failure to keep Proper

Accounting Records constitutes an offence (section 28 and section 45). Furthermore, section 32A requires a union to provide its members each year with a statement which must set out certain specified financial information and which must also contain a statement in the following terms:-

“A member who is concerned that some irregularity may be occurring, or have occurred, in the conduct of the financial affairs of the union may take steps with a view to investigating further, obtaining clarification and, if necessary, securing regularisation of that conduct. The member may raise any such concern with such one or more of the following as it seems appropriate to raise it with: the officials of the union, the trustees of the property of the union, the auditor or auditors of the union, the Certification Officer (who is an independent officer appointed by the Secretary of State) and the police. Where a member believes that the financial affairs of the union have been or are being conducted in breach of the law or in breach of rules of the union and contemplates bringing civil proceedings against the union or responsible officials or trustees, he should consider obtaining independent legal advice.”

32. Against this background, an accounting record for the purposes of section 30 of the 1992 Act is, in my judgement, a record which is created or kept principally for the purposes of accounting. The modern meaning of “*accounting*” in the Shorter Oxford Dictionary is “*the process or art of keeping and verifying accounts*”. Accordingly, primary or source documents created for effecting or evidencing a transaction, such as a bill, an invoice or a receipt may be described as a record of financial information but they are not necessarily an accounting record. Union auditors or the Certification Officer have a statutory right to require access to such documents but not union members exercising their rights under section 30 of the 1992 Act. The right of access of union members is limited to the accounting records which will ordinarily have been created on the basis of information contained in such primary or source documents.
33. Applying this analysis to the facts of the present case, I find that Mr Chowcat’s termination agreement is not an accounting record to which Mr Mortimer has a right of access by section 30 of the 1992 Act as it is a document which was created for effecting a transaction between the Union and Mr Chowcat. Similarly any receipt given by Mr Chowcat for the money he allegedly received is not an accounting record for these purposes. The use of the word “*receipts*” in section 28(1)(b) is a reference to all monies received by the Union, not a reference to individual acknowledgements of receipt given by persons to whom the Union has made a payment.

34. I nevertheless find that the Union has failed to comply with Mr Mortimer's request for access to those accounting records which relate to Mr Chowcat's termination payment and record that transaction for the purpose of the Union's accounting procedures, both as an individual transaction and grouped with other transactions.
35. The Union was placed in a dilemma by Mr Mortimer's application. It had concluded its agreement with Mr Chowcat in good faith on the basis of mutual undertakings as to confidence. To comply with Mr Mortimer's request would reveal the amount of the termination payment and might lead to a breach of its confidentiality undertaking. This could not only have certain legal consequences but could also be regarded as a breach of good faith. These factors may help to explain the Union's refusal to comply with its statutory obligations but it does not excuse them. A party to a contract cannot excuse its failure to comply with a statutory obligation by reference to the contract. Although this principle would apply whenever the statute came into force, it is more readily understandable where, as in this case, the statutory obligation existed before the termination agreement.
36. I reject the Union's submission that, if I make an order, I should exercise my discretion to authorise the Union to delete from any accounting record to which Mr Mortimer is given access the amount of the termination payment made to Mr Chowcat. The purpose of the legislation is to give union members access to information contained in accounting records. To delete the financial information from an accounting record would ordinarily undermine the purpose of the legislation and would, in this case, defeat the purpose of Mr Mortimer's request to examine those accounting records.
37. In the order I make, I do not set out the precise accounting records to which Mr Mortimer must be given access. Mr Mortimer was understandably unable to identify them and the Union has chosen not to do so. However, as I have already observed, the Union's auditors state in their letter of 17 October 2002 that the payments made to Mr Chowcat are recorded in the ledgers of the Union which, as a matter of common sense, they must. It would, for example, be unusual if the payment to Mr Chowcat were not recorded in a cash book or if that entry had not been carried forward at some stage to a nominal ledger.

There could very well be different or other accounting records in which the termination payment is recorded. I am confident that the Union will comply with this order in good faith. Should an issue arise as to whether any specific document is an accounting record falling within my order I give leave to either party to re-apply.

D Cockburn
Certification Officer