

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTION 55(1) AND 108(A)(1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

**MR R LYONS**

**V**

**UNITE THE UNION (AMICUS SECTION)**

**Date of Decisions**

**23 October 2009**

**DECISIONS**

Upon application by Mr Lyons (“the Claimant”) under sections 55(1) and 108(A)(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

1. I refuse to make the declaration sought by the Claimant that on or about 6 March 2009 Unite the Union (“Unite” or “the Union”) breached section 52(2)(a) of the 1992 Act by its independent scrutineer, Electoral Reform Services Ltd, stating that it was satisfied that there were no reasonable grounds for believing that there had been any contravention of a requirement imposed by or under any enactment in relation to the election of the Joint General Secretary (Amicus Section).
2. I declare that rule 28(6) of the rules of the Union was breached on 29 January 2009 by Mr Simpson having played a part in the deliberations and decision of the Executive Council on an item of business which related specifically to the conduct of the election in which he was a candidate. I do not consider it appropriate that I make any enforcement order with regard to that breach.
3. I refuse to make the declaration sought by the Claimant that on or about 11 February 2009 the Union breached section 48(6) of the 1992 Act by the sending of a letter from Mr Simpson to all members of the Amicus section of the Union, which allegedly constituted a second election address.

**REASONS**

1. Mr Lyons is a member of Unite (Amicus Section). By an application received at the Certification Office on 10 March 2009, the Claimant made complaints of breaches of the 1992 Act and of a breach of rule, in relation to the election for the Joint General Secretary of Unite (Amicus Section), the result of which was declared in March 2009. Following correspondence with the Claimant, three complaints were confirmed by him in the following terms:-

### **Complaint 1**

*On or about 6 March 2009 the union acted in breach of section 52(2)(a) of the 1992 Act by the Scrutineer's report stating wrongly that there was no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election. The scrutineer's report should have stated that the second election address issued by Mr Simpson was in breach of section 48(6) of the 1992 Act.*

### **Complaint 2**

*In breach of Unite the Union (Amicus Section) rule 28(6) Derek Simpson took part in discussions about the Joint General Secretary election at the National Executive Committee meeting on or around 29 January 2009 despite being a candidate in that election.*

### **Complaint 3**

*"that on or about 11 February 2009 the Union breached section 48(6) of the 1992 Act by the sending to all members a letter from Derek Simpson Joint General Secretary Of Unite the Union (Amicus section). This letter dealing with job losses in the economy and including the writers view 'that it is vital that I, together with senior colleagues, am able to provide the continuity.' constituted a second election address not available to other candidates in the election."*

2. I investigated the alleged breaches in correspondence. A hearing took place on 8 October 2009. At the hearing, the Claimant represented himself and called no witnesses. The Claimant did not produce a written witness statement but I permitted him to give evidence during the course of his submissions. The Union was represented by Mr Peter Edwards of counsel. Mr Doug Collins, an Assistant General Secretary of the Union, produced a written witness statement and gave oral evidence. There was in evidence a 185 page bundle of documents consisting of letters, other correspondence and documentation and a 243 page bundle consisting of rule books and authorities. The rule book of Unite the Union (Amicus Section) was also in evidence. Mr Edwards provided a written skeleton argument. References in this decision to the rules of the Union are to the rules of the Amicus Section unless otherwise stated.

### **Findings of Fact**

3. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows:
4. Mr Lyons is a prominent and respected former trade union general secretary. He was the General Secretary of the Manufacturing Science & Finance Union (MSF) and subsequently the Joint General Secretary of Amicus (MSF Section) for a total period of 12 years ending in 2004.
5. Unite the Union is the product of the amalgamation of Amicus and the Transport & General Workers Union ("TGWU"). That amalgamation was effective on 27 April 2007, being the date that I registered the Instrument of Amalgamation. The Union was then called "The Amalgamated Union". It changed its name to Unite the Union on 23 May 2007.
6. The terms of the Instrument of Amalgamation and the proposed new General Rules provided for there to be a gradual assimilation of the structures of the two former unions into a single structure. This process was considered necessary not only to ensure continuity but also, to preserve a balance of power between the two former unions. The carefully negotiated constitutional arrangements, accepted by the members, to achieve these objectives were, in general terms, as follows:-

- (i) Immediately following the effective date of the amalgamation there was to be a set of General Rules which would be binding on all members.
  - (ii) Notwithstanding the General Rules, the structures of the two former unions would continue for the time being. The two former unions were to become sections of the new union and their former rule books would become the Section Rules under which they would operate.
  - (iii) Under the General Rules, there would be a Joint Executive Committee (“JEC”) consisting of 30 members (15 members from each section) which, amongst other things, was to prepare a new set of rules to govern the affairs of the whole Union. The JEC was to hold office for one year only, after which it was to be replaced by the First Executive Committee (“FEC”), which was to consist of 80 members (40 members from each section). It would hold office for 3 years, until April 2011, after which an Executive Council would be elected in a common ballot of the whole membership.
  - (iv) The New Rules were to become effective by 1 November 2008, at which time the Amicus and TGWU sections would cease to exist.
  - (v) The two General Secretaries of the former unions were to become the Joint General Secretaries of the new Union.
  - (vi) In the negotiations leading up to the amalgamation, an issue arose about the retirement date of the proposed Joint General Secretaries. It was agreed that Mr Simpson would postpone his retirement by a year to December 2010 and that Mr Woodley would retire roughly 12 months after Mr Simpson left office, effectively bringing forward his retirement by one year.
  - (vii) It was agreed that by a month before Mr Simpson retired, a General Secretary Designate would have been elected by the whole Union. This person would work alongside Mr Woodley in 2011 and become the sole General Secretary in January 2012, after Mr Woodley’s retirement.
  - (viii) Thus, in summary, in November 2008 there would be a single set of rules binding on the whole membership, in May 2011 there would be an Executive Council (“EC”) elected by the whole membership and in January 2012 there would be a General Secretary elected by the whole membership.
7. In August 2008 I received a complaint that it would be unlawful for Mr Simpson to remain in office until December 2010 without subjecting himself to a further election. This complaint was withdrawn after the Executive Council of the Union decided, on 9 October 2008, to postpone the introduction of the new rules until 1 May 2009 and to conduct an election for the position of Joint General Secretary (Amicus Section), to be concluded by 1 May 2009. This case concerns the conduct of that election.
8. For the administration of this election, the Union appointed one of its full-time employees, John Gibbins, as the Returning Officer under Rule 28 (5). It also appointed Electoral Reform Services Limited (“ERS”) as the independent scrutineer under rule 28(2) and pursuant to section 49(1) of the 1992 Act. It also appointed Professor William Brown CBE as the Election Commissioner under rule 28(3). The role of the Election Commissioner is to consider complaints relating to the conduct of a relevant election made by a candidate in that election or by the Executive Council (“the EC”). He may make recommendations that the EC should declare an election void, order a fresh ballot, disqualify a candidate or such other remedial measures as he considers appropriate. The EC shall give effect to any such recommendations, if lawful.

Professor Brown is an experienced and well respected expert in industrial relations. He is the Master of Darwin College Cambridge and has held many distinguished positions, including that of Professor of Industrial Relations since 1985.

9. There were four candidates for the election in question; Mr Simpson (the incumbent), Mr Hicks, Mr Coyne and Mr Reuter. They each submitted an election address.
10. On 17 January 2009 The Times published articles in its newspaper and online which were considered by the Union to be hostile to it and, in many respects, inaccurate.
11. On 27 and 28 January 2009 there was an exchange of emails between Mr Gibbins and Mr Hicks in relation to Mr Hicks election address. Mr Gibbins considered that his election address contained defamatory material which he wished Mr Hicks to remove. Mr Hicks proposed some amendments, under protest, but reserved his legal rights. In these circumstances Mr Gibbins decided that the safest course was to publish the original election address, having regard to Mr Hicks' right to insist upon its publication pursuant to section 48(4) of the 1992 Act.
12. The EC of Unite met at County Hall London between 28 and 30 January 2009. On 29 January there was a discussion of the articles that had appeared in The Times about which the members of the EC expressed considerable anger. It was agreed that steps should be taken to correct and counter this attack and support should be given to Mr Simpson to seek retractions and corrections.
13. The next item of business before the EC concerned the election address of Mr Hicks. This was the last item to be discussed that day and was called shortly before 5pm. The discussion is recorded as minute 231, item 4.15, and is in the following terms:-

***4.15 Amicus Section Election for General Secretary***

*Joint General Secretary, Derek Simpson referred to the election that is currently taking place for General Secretary of the Amicus Section. The Union, by law, is not allowed to interfere or alter a candidates election address so a candidate can say anything they want in an election address which the Union is obliged to print. However, it is also open to the Union to make clear in a statement and correct anything it believes to be misleading, defamatory or similar. Comments contained in the election address of Jerry Hicks were defamatory and misleading and legal advice had been sought by the Returning Officer. Although the closing date for election addresses has now passed, Jerry Hicks was given the opportunity to remove the defamatory statements. He offered an amended address but it remained defamatory and thus did not justify substitution for the original address. At this point a vote to move Standing Orders was called for and Standing Orders were suspended.*

*The Legal Director advised the Council that the Union is allowed under a previous authority to send out a separate circular with contradictory statements with a candidates election address. The following motion was proposed and carried:*

*“The Executive Council is concerned that a candidate in the current election for Joint General Secretary of the Amicus Section has included defamatory smears against Derek Simpson in his election address, and the union is legally obliged to circulate that statement, unaltered, with the ballot papers. The Executive Council hereby instructs the union to circulate the statement below with the election address.”*

The minute then sets out in full the terms of what is called the “Statement of Unite Executive Council 29 January 2009”. The EC approved the resolution by 58 votes in favour, 1 against and 12 abstentions.

14. The only other evidence before me of what took place at this meeting was the evidence of Mr Collins. He stated that the minute reflected the tone and substance of Mr Simpson's comments; that Mr Simpson had given a short factual report of a few minutes only and had made no recommendations as to what the EC should decide. Mr Collins also stated that although Mr Simpson remained present throughout the whole item he did not take part in the short debate that followed and that, as Joint General Secretary, he did not have a vote. Mr Collins gave evidence that there was a considerable overlap between the articles in The Times and those parts of Mr Hicks' election address that were considered to be defamatory and that the anger that had been expressed over the articles in The Times carried over to this matter. In his opinion, there was never any chance that the EC was going to do anything other than approve the additional statement for circulation and Mr Simpson's limited and factual introduction to the debate did not make any difference to the outcome.
15. In early February 2009, Mr Simpson in his capacity as the Amicus Section Joint General Secretary, wrote to all members of the Amicus Section. The letters are undated but it would appear that about half were sent out in the days immediately before 6 February and the other half shortly afterwards. The letters were substantially in the same terms but were tailored to refer to the industrial sector to which the member belonged, e.g. the Manufacturing Sector, the Finance Sector etc. They contained the membership number of the recipient. The ostensible purpose of the circular letter was to inform members what the Union was doing for them "as we entered 2009 with a background of further job losses". Mr Lyons received his letter on the 11 February. It is in the following terms:-

*"Dear Colleague,*  
*As we enter 2009 with a background of further job losses across all sectors it is more important now than ever before that members of Unite understand what it is to have the UK's largest Union battling for you. This was never more so than in the situation facing workers in the beleaguered manufacturing sector.*  
*My commitment to manufacturing and its essential contribution to this nation's wealth has never been in doubt. Since becoming General Secretary of Amicus and currently as Joint General Secretary of Unite, I have led the Union's campaigns to defend manufacturing and to promote it as central to the wealth creation of the UK. Since 2007 when the first signs of the collapse of the global financial structures and the subsequent developments, I have continually argued that government must do everything possible to avoid the mistakes of the past and protect manufacturing.*  
*My pleas have not gone entirely unheeded and we have seen a sea change of attitude in the government departments responsible for addressing the needs of manufacturing. Even now we hear of the government recognising the need for an industrial policy, a demand I first made in my first contributions to TUC and Labour Party conferences in 2004. They have been repeated every year since.*  
*In response to the latest downturn of the economy in recent months, Unite has put together a 10 point plan for economic recovery. I was able to present this plan to the Prime Minister and Chancellor prior to the pre budget report last year. It is pleasing to see that steps have already been taken to secure a number of these proposals, including protection for homeowners, investments in public infrastructure and increased spending, a cut in VAT and a new 45% higher income tax rate.*  
*More recently I have pressed cabinet ministers and Gordon Brown to address the fundamental problem of lack of credit, so vital in the manufacturing sector. In the last few weeks those demands have started to be acknowledged with the government guaranteeing loans to businesses releasing up to £20billion. I have been pressing equally hard on behalf of our members in the motor industry where the global recession is hitting particularly hard. That battle has not yet been won but I will continue to press for support from*

*government to ensure the survival of this key and strategically important part of the manufacturing sector.*

*The current crisis is likely to continue over the coming months and it is vital that I, together with senior colleagues, am able to provide the continuity so necessary in these difficult times. Rest assured that as Joint General Secretary it is my intention to focus the union's efforts in ensuring that Unite members across all sectors of the economy are provided with maximum support and influence in defending jobs and working conditions both in the workplace and through our considerable political influence.*

*Yours sincerely*

*Derek Simpson*

*Joint General Secretary*

*Unite the Union”*

16. Mr Lyons considered this letter to be outright electioneering by Mr Simpson and, on the same day, wrote letters of complaint to the Certification Officer and the Election Commissioner asking for Mr Simpson to be disqualified as a candidate.
17. A similar letter of complaint had already been sent to the Returning Officer by Mr Coyne on 6 February. Mr Coyne also wrote directly to the Election Commissioner on 11 February (by post and email) stating that he believed Mr Simpson's circular to be a breach of a rule of the union. Professor Brown responded on 11 February. In that response he stated:-

*“Dear Mr Coyne*

*Thank you for your letter by email on 11 February 2009. I understand that you had received my response of 9 February, via the Returning Officer, which was:*

*I am responding to Mr Kevin Coyne's email of 6 February 2009, querying the rectitude of a number of letters to members sent out by Mr Derek Simpson, and the legal advice you have forwarded from Ms Georgina Hirsch. Mr Coyne asks whether Union resources have been used appropriately, whether the letters replicate Mr Simpson's election address, and whether the bulletins amount to election publicity. The bulletins relate to issues specific to particular sectors at a time of economic crisis unprecedented in our lifetime. It would be unreasonable, especially at such a time, for the union leadership to be restrained from contacting its members over the 5 or so months of an election campaign. It would be unusual if some aspects of election bulletins were not replicated in terms of issue and policy. Any such action by a leadership standing for re-election could be construed as serving an election purpose in part, but it is not evident that that is the main purpose of these communications. The legal advice from Harvey makes clear that union leaderships in such circumstances are not constrained from expressing support for particular candidates. I consequently do not consider it necessary that distribution of the material should be halted.”*

18. In the meantime, Mr Hicks had written to the Election Commissioner on 9 February 2009 raising various matters, including Mr Simpson's participation at the EC on 29 January in an item of business concerning the election in which he was a candidate, allegedly in breach of Rule 28(6). Mr Hicks specifically asked that the statement approved by the EC which commented upon his election address should not be circulated with the ballot papers. Professor Brown responded to Mr Hicks on 11 February as follows:-

*“Dear Mr Hicks*

*I am replying to your letter of 9 February 2009, received by email 10 February, in my capacity as Election Commissioner for Unite (Amicus). I have considered your complaints in the light of the facts I have ascertained. It is not evident, in my considered opinion, that there have been breaches of rule or of law on the part of the union. Accordingly I see no reason to advise the Returning Officer not to circulate the Executive's statement with the ballot papers.”*

19. Professor Brown responded to Mr Lyons' letter by stating, in effect, that the Election Commissioner only had jurisdiction to consider complaints from candidates or from the EC. By a letter dated 20 February 2009, Mr Gibbins informed Mr Lyons that the appropriate procedure was for his complaint to be considered by the EC and that he would write to him again after the meeting of the EC in March.
20. Voting in the election for Joint General Secretary (Amicus Section) took place between 16 February and 6 March 2009. The statement that had been approved by the EC on 29 January was included with the ballot papers and election addresses.
21. The result of the election is contained in an undated letter from ERS to the Union, which the Union received on 7 March 2009. Mr Simpson received 60,048 votes, Mr Hicks 39,307 votes, Mr Coyne 30,603 votes and Mr Reuter 28,283 votes. In this letter ERS stated: "*We are satisfied as to each of the matters specified in sub-section 52(2) with regard to the election*".
22. On 10 March 2009 my office received the Registration of Complaint Form from Mr Lyons in this matter.
23. The EC of the Union met between 18 and 20 March 2009 at Congress House, London. It discussed the complaints that had been received about the election and declared Mr Simpson elected by 64 votes in favour with 3 against.
24. On 9 April 2009 Mr Gibbins wrote to Mr Lyons concerning his complaint about the circulation of the letter by Mr Simpson in early February. Mr Lyons was informed that the EC had decided to treat his complaint in the same way as the Election Commissioner had considered the previous similar complaint from Mr Coyne. They rejected it.

### **The Relevant Statutory Provisions**

25. The provisions of the 1992 Act which are relevant for the purposes of this application are as follows:-

***Requirements to be satisfied with respect to elections***

***s.46 Duty to hold elections for certain positions***

- (2) *The positions to which this Chapter applies (subject as mentioned below) are –*
  - (a) *member of the executive,*
  - (b) *any position by virtue of which a person is a member of the executive,*
  - (c) *president, and*
  - (d) *general secretary;*

***s. 48 Election addresses***

***(1) The trade union shall –***

- (a) *provide every candidate with an opportunity of preparing an election address in his own words and of submitting it to the union to be distributed to the persons accorded entitlement to vote in the election; and*
- (b) *secure that, so far as reasonably practicable, copies of every election address submitted to it in time are distributed to each of those persons by post along with the voting papers for the election.*
- (4) *The trade union shall secure that no modification of an election address submitted to it is made by any person in any copy of the address to be distributed except -*
  - (a) *at the request or with the consent of the candidate, or*

- (b) where the modification is necessarily incidental to the method adopted for producing that copy.
- (5) The trade union shall secure that the same method of producing copies is applied in the same way to every election address submitted and, so far as reasonably practicable, that no such facility or information as would enable a candidate to gain any benefit from -
  - (a) the method by which copies of the election addresses are produced, or
  - (b) the modifications which are necessarily incidental to that method, is provided to any candidate without being provided equally to all the others.
- (6) The trade union shall, so far as reasonably practicable, secure that the same facilities and restrictions with respect to the preparation, submission, length or modification of an election address, and with respect to the incorporation of photographs or other matters not in words, are provided or applied equally to each of the candidates.

**s.49 Appointment of independent scrutineer**

- (1) The trade union shall, before the election is held, appoint a qualified independent person ("the scrutineer") to carry out -
  - (a) the functions in relation to the election which are required under this section to be contained in his appointment; and
  - (b) such additional functions in relation to the election as may be specified in his appointment.
- (3) The scrutineer's appointment shall require him -
  - (b) to take such steps as appear to him to be appropriate for the purpose of enabling him to make his report (see section 52);
  - (c) to make his report to the trade union as soon as reasonably practicable after the last date for the return of voting papers; and

**s.52 Scrutineer's report**

- (2) The report shall also state whether the scrutineer is satisfied -
  - (a) that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election,

**s.54 Remedy for failure to comply with requirements: general**

- (1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).

**s.55 Application to Certification Officer**

- (1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.
- (2) On an application being made to him, the Certification Officer shall -
  - (a) make such enquiries as he thinks fit, and
  - (b) give the applicant and the trade union an opportunity to be heard, and may make or refuse the declaration asked for.
- (5A) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or more of the following requirements -
  - (a) to secure the holding of an election in accordance with the order;
  - (b) to take such other steps to remedy the declared failure as may be specified in the order;
  - (c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.

The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.

### **Breach of Rules**

#### **s.108A Right to apply to Certification Officer**

(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 subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

#### **s.108B Declarations and orders**

(2) If he accepts an application under section 108A the Certification Officer

(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.

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

(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

### **The Relevant Rules of the Union**

26. The rules of the Union which are relevant to this application are:-

**Rule 28(6)** - A candidate in an election shall play no part in any deliberations of or decision by the National Executive Council which relates specifically to the conduct of an election in the constituency in which an individual is a candidate.

**Rule 28(14)** - Members shall be entitled to vote for as many candidates as there are vacancies to be filled from the constituency and the candidates(s) who receive(s) the most votes in that constituency shall be declared elected until all vacancies are filled. The National Executive Council may decide that a different method of election shall be used.

### **Submissions and Conclusions**

#### **Complaint One**

27. Mr Lyons' first complaint is in the following terms:

*"On or about 6 March 2009 the union acted in breach of section 52(2)(a) of the 1992 Act by the Scrutineer's report stating wrongly that there was no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election. The scrutineer's report should have stated that the second election address issued by Mr Simpson was in breach of section 48(6) of the 1992 Act."*

28. Section 52(2) of the 1992 Act provides as follows:

(2) The report shall also state whether the scrutineer is satisfied -

(a) that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election,

### **Summary of Submissions**

29. Mr Lyons submitted that the letters circulated by Mr Simpson to all members of the Amicus Section in early February 2009 constituted a clear breach of section 48(6) of the 1992 Act and that accordingly ERS should not have stated in its report to the Union that it was satisfied there were no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the

election. Mr Lyons argued that he was entitled to bring this complaint against the Union on the basis that the EC had accepted a defective report from ERS.

30. Mr Edwards, for the Union observed that section 54(1) of the 1992 Act is the provision that enables a Union member to bring a complaint relating to an election before the Certification Officer but that this only provides a remedy for a failure on the part of the Union itself and not for an alleged failure by the scrutineer. Mr Edwards submitted that the duty of the Union in this regard was to appoint an independent scrutineer (section 49(1)) and to specify certain terms of appointment (section 49(3)). He maintained that the Union had complied with these requirements and that accordingly there was no action to be brought against the Union under section 54(1). As to the conduct of the scrutineer, Mr Edwards submitted that ERS had complied with section 52(2) as its report stated that it was satisfied that the matters upon which it was required to make such a statement. He further stated that the scrutineer's statement could not be fairly criticised as being unreasonable as it had been preceded by Professor Brown's rejection of the similar allegations which he had considered. Mr Edwards commented that any breach by the scrutineer of its statutory obligations may well be actionable as a breach of statutory duty but this could not be by way of an action brought before the Certification Officer.

## **Conclusion**

31. Mr Lyons alleged a breach of section 52(2) of the 1992 Act. That is to be found in Chapter IV of that Act. My jurisdiction in relation to alleged breaches of Chapter IV of the 1992 Act is to be found in section 54(1). This provides:-

*“54(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).”*

Further, section 55(1) provides as follows:-

*“55(1) A person having a sufficient interest (see section 54(2) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.”*

Accordingly, my jurisdiction is restricted to alleged breaches of those requirements of Chapter IV which have been committed by a trade union.

32. The complaint, as put by Mr Lyons, alleges a breach of section 52(2) of the 1992 Act by the scrutineer, not by the Union. As such, it is not a claim which Mr Lyons is entitled to bring to me under the 1992 Act. I do not have jurisdiction to determine such a complaint.
33. Mr Lyons attempted to finesse his complaint at the hearing by submitting that his complaint should be understood as a complaint against the EC for having accepted a defective scrutineer's report. I find that Mr Lyons' complaint is quite clearly expressed and cannot properly be finessed in this way. In any event, section 52(2) imposes no requirement on the EC to accept the scrutineer's report, let alone to only accept it only if certain conditions are satisfied. A failure by the scrutineer to carry out its functions may give rise to a potential action in the civil courts or to a potential breach of section

49(6) of the 1992 Act. However such an alleged breach is neither at issue on the facts of this case nor the way it was put.

34. Were I to have jurisdiction over this complaint, I note that section 52(2) of the 1992 Act requires the scrutineer to state whether it is satisfied by various matters. Mr Lyons did not argue that the scrutineer had not made such a statement. He rather argued that the scrutineer should not have stated that it was satisfied that there were no reasonable grounds for believing that there was any contravention of a statutory requirement in relation to the election. However, the matter that Mr Lyons considers the scrutineer should have raised (i.e. the alleged breach of section 48(6)) had already been the subject of a complaint to the Election Commissioner and rejected by him. In these circumstances it would have been difficult for Mr Lyons to establish that the scrutineer could not reasonably have formed the view that it was satisfied about the matters in question.
35. For the above reasons I refuse to make the declaration sought by the Claimant that on or about 6 March 2009 the Union breached section 52(2)(a) of the 1992 Act by ERS having stated that it was satisfied that there were no reasonable grounds for believing that there had been any contravention of a requirement imposed by or under any enactment in relation to the election of the Joint General Secretary (Amicus Section).

### **Complaint Two**

36. Mr Lyons' second complaint is in the following terms:

#### **Complaint 2**

*"In breach of Unite the Union (Amicus Section) rule 28(6) Derek Simpson took part in discussions about the Joint General Secretary election at the National Executive Committee meeting on or around 29 January 2009 despite being a candidate in that election."*

37. Rule 28(6) of the rules of the Amicus Section of the Union was in the following terms:

*"28(6) A candidate in an election shall play no part in any deliberations of or decision by the National Executive Council which relates specifically to the conduct of an election in the constituency in which an individual is a candidate."*

### **Summary of Submissions**

38. Mr Lyons submitted that there was no dispute about Mr Simpson having been present at the meeting of the EC on 29 January 2009 and that he remained there throughout the discussion of the agenda item which concluded with a decision to include a statement with the voting papers commenting upon the election address of Mr Hicks. Mr Lyons noted that Mr Simpson had introduced this item and suspected that he had made further interventions during the debate. Mr Lyons argued that, in accordance with normal practice, Mr Simpson should have left the room for the entirety of this agenda item and should most certainly have left after making any opening remarks. He commented that in such an election Mr Simpson's constituency was the entire Amicus Section and that in his submission it could not be said that Mr Simpson had "played no part" in any deliberations of or decision by the EC.
39. Mr Edwards, for the Union, noted that it was not being suggested that Mr Simpson had voted on the resolution in question, it being common ground that the Joint General Secretary had no vote on the EC. He argued that it was therefore clear that Mr Simpson had not taken any part in the decision. Mr Edwards submitted that a central issue in this

complaint was the correct meaning to be given to the word “deliberations”. In his submission, rule 28(6) did not debar Mr Simpson from introducing the relevant topic or taking part in its discussion. He argued that the rule could easily have provided expressly for the exclusion of a candidate from the meeting room during such an item but it does not do so. He also argued that I should accept the evidence of Mr Collins that Mr Simpson did no more than introduce the debate, as recorded in the minutes. Mr Edwards further submitted that rule 28(6) has no application to candidates for the position of General Secretary as, properly interpreted, this rule applies exclusively to elections of EC members. He supported this submission by reference to rule 28(14) which he said could only apply to elections of EC members and by reference to the word “constituency” in rule 28(6), which he submitted was a clear indication that the rule was intended to apply only to the election of EC members. Finally, Mr Edwards noted that a complaint in similar terms had been considered by the Election Commissioner and rejected by him.

## **Conclusion**

40. Rule 28 of the Rules of the Amicus Section is headed “Elections of NEC members and the General Secretary”. These are positions which existed in Amicus before its amalgamation with the TGWU. Adopting this heading to meet the situation since the amalgamation, it is to be understood as being, “Elections of EC Members and the Joint General Secretary (Amicus Section)”. In my judgment, this heading creates a rebuttable presumption that each of the 25 sub-sections within rule 28 applies to both the elections of EC members and Joint General Secretary. Mr Edwards has sought to persuade me that, in context, rule 28(6) applies only to the election of EC members. In this regard, I note firstly, that the terms of Rule 28(6) do not expressly exclude its application to elections of the Joint General Secretary. Secondly, I note that the subject matter of Rule 28(6) is not inappropriate for its application to the election of the Joint General Secretary. Indeed, the purpose of rule 28(6) strongly suggests that candidates in such an election should be included within its remit. Thirdly, no conclusive inference can be drawn from the fact that at least one other sub-rule may apply to the elections of EC members only. Examining the terms of rule 28(6) in context, there is some force in Mr Edwards’ argument that the reference to the candidate’s constituency is not particularly apposite in the context of an election of the Joint General Secretary of the whole Amicus Section. However, those drafting this rule apparently sought to allow candidates in an EC election to remain in the EC meeting to discuss matters arising in that election but which did not relate specifically to his or her constituency. I find that in order to achieve this purpose, a reference to the constituency was necessary and the fact that it is otiose in connection with a Joint General Secretary election is not conclusive that it does not apply in that situation. In my judgment, rule 28(6) applies equally to the elections of EC members and the Joint General Secretary. I find that this is clear from the heading to rule 28, the apparent purpose of the rule and its terms.
41. The facts in relation to this complaint are not in dispute. Despite Mr Lyons’ suspicions, the only evidence of Mr Simpson’s participation in this agenda item are the minutes of the EC meeting and the evidence of Mr Collins, which I accept. I find that Mr Simpson was present from the beginning to the end of this agenda item but that his only opening contribution was by way of an opening statement, as noted in the minutes. In this opening statement Mr Simpson informed the EC, amongst other things, that it was open

to the Union “to make clear in a statement and correct anything it believed to be misleading, defamatory or otherwise”.

42. It was agreed that Mr Simpson played no part in the decision of the EC in the literal sense that he was not a voting member of that body. The question is therefore whether he played any part in any deliberations or in its decision in a broader sense.
43. The ordinary literal meaning of the word “deliberations” suggests some weighing of different considerations. The process of weighing the considerations is a process which was to be carried out by members of the EC and not by Mr Simpson. However, rule 28(6) prohibits the playing of any part in such deliberations and decisions and I find that the continued presence of a relevant candidate, whilst his or her election is being debated and voted upon by the EC, amounts to that candidate playing a part in that deliberative and decision-making process. In my judgment, this is the case even if the candidate does not participate in the debate as his or her presence could influence its outcome. Some members of the EC may wish to curry favour with the candidate. Others may be embarrassed or even intimidated by his or her presence. Whatever effect the candidate’s continued presence might have on the deliberations and decisions of the EC, it cannot be said that it will not play any part.
44. Accordingly, I find that there was a breach of rule 28(6) of the Amicus Section of the Union by Mr Simpson remaining in the EC meeting throughout its discussion and decision-making on the agenda item which related specifically to an election in which he was a candidate.
45. My decision on the meaning of rule 28(6) should not be misunderstood as excluding a candidate from making a statement to the EC on a matter relating to his or her election or being subjected to questioning by the EC. That would be part of the normal process of fact finding by and representation before a decision making body. What I find to be prohibited by rule 28(6) is that such a candidate remains present before the EC during its deliberations and voting.
46. Section 108B(3) provides that where I make a declaration, I shall also make an enforcement order unless I consider it inappropriate to do so. Mr Lyons invited me to make an order that the election in question be re-run. My discretion to make an enforcement order in the case of breach of rule is limited by sub-sections (a) and (b) of section 108B(3). Having regard to these powers and the facts of this case, I find that it would be inappropriate to make an enforcement order. On the balance of probabilities, I find that the EC would have come to the same decision on this particular agenda item whether or not Mr Simpson had stayed or left the meeting. Further, the rule in question has now been superseded by another set of rules and I am confident that the Union will have due regard to my interpretation of rule 28(6) in the way it applies any similar provision.

### **Complaint Three**

47. Mr Lyons’ third complaint is in the following terms:

*“that on or about 11 February 2009 the Union breached section 48(6) of the 1992 Act by the sending to all members a letter from Derek Simpson Joint General Secretary Of Unite the Union (Amicus section). This letter dealing with job losses in the economy and including the writers view ‘that it is vital that I, together with senior colleagues, am able to*

*provide the continuity.’ constituted a second election address not available to other candidates in the election.”*

48. Section 48(6) of the 1992 Act provides as follows:

*“(6) The trade union shall, so far as reasonably practicable, secure that the same facilities and restrictions with respect to the preparation, submission, length or modification of an election address, and with respect to the incorporation of photographs or other matters not in words, are provided or applied equally to each of the candidates.”*

### **Summary of Submissions**

49. Mr Lyons submitted that the letters circulated by Mr Simpson in early February 2009 to all members of the Amicus Section amounted to a second election address. He argued that this was a breach of section 48(6) of the 1992 Act as the other candidates had not been afforded a similar opportunity. Mr Lyons considered this letter to be a second election address, having regard to its circulation, its timing and its content. He noted that it was sent to all members of the Amicus Section, that it was sent within about 10 days of the commencement of voting and that it contained the words, “... *it is vital that I, together with senior colleagues, am able to provide the continuity so necessary in these difficult times.*” He further noted that the letter contained the word “my” in four places and the word “I” in eight places. He complained that this letter had been circulated at a cost of about £400,000 to the Union, that it used the Union’s database of names and addresses and that other candidates had not been given the same facility. In his submission, the circulation of such a letter, ostensibly about the Union’s reaction to the current economic crisis, so shortly before the election was not accidental. Mr Lyons noted that there was no minute of the EC agreeing to its circulation and considered that this letter could have had an important psychological effect on members, thereby influencing the outcome of the ballot. He argued that this case could be distinguished from the authorities cited by the Union on the grounds that in those cases the EC had agreed to support a particular candidate.

50. Mr Edwards, for the Union, noted that the Union of which Mr Lyons had been General Secretary, MSF, had a rule which would have prevented the circulation of such a letter but observed that there was no similar provision in the rules of Unite the Union (Amicus Section) nor any such prohibition in section 48 of the 1992 Act. Mr Edwards submitted that section 48 deals with the election address which candidates have submitted for circulation with the voting papers and section 48(6) deals with the facilities and restrictions relating to that particular document. He argued that section 48(6) does not deal with other electioneering material that the candidates, their supporters or the Executive may publish and that there is no statutory restriction on such materials. In support of this submission, Mr Edwards referred in particular to the decision of the then Certification Officer in the case of **Re USDAW (1997) D/2/97** (see paragraph 52 below). He also referred to the following cases decided by the Certification Officer:-

#### **Re TGWU (1996) D/1-3/96 at paragraph 70**

*“70. ... I accept the union’s argument that the requirement for equality of treatment in section 48(5) is confined to “facilities or information relating to the method of producing copies of election addresses”. That in my judgment, is the proper interpretation of the section and the one that seems most consistent with the whole of section 48 which contains several, precisely defined and limited requirements to treat all candidates equally (eg 48(1) and 48(6))”*

**Re Association of Teachers and Lecturers (1999) D/6/99** at paragraphs 27 and 29:

*"27. Turning to section 48(6) I find that this section also deals with the technical and practical processes involved in the production of election addresses for distribution to members with voting papers. Put simply, sections 48(4)(5) and (6) places on trade unions the responsibility to ensure that the election addresses circulated to members with voting papers are a true reproduction of the election addresses provided by the individual candidate. Any modification or change to the candidates' election address is not permitted other than at the request or with the consent of that candidate or because it is necessarily incidental to the reproduction process. The same method of production of election addresses is required to be applied, as far as reasonably practicable, to each candidate's election address. To read any more into this section is to make the election process unnecessarily complicated.*

*29. ... I have previously made observations regarding the fairness or otherwise of the statutory requirements governing trade union elections conducted under the 1992 Act. In this case the complainant, who had no particular support for either candidate, used such terms as "to fly in the face of natural justice" and "gross injustice" to describe the issue of the President's letter. I can do no more than to repeat what I have said before:*

*'... however 'unfair' a member or candidate might feel it to be, the legislation does not prohibit a union's executive seeking to persuade members to nominate and vote for one candidate rather than another. The law does provide that the process of preparing and distributing election addresses, distributing voting papers, of voting and of counting votes shall be done in an essentially even handed way but it does not prohibit the support of the 'establishment' candidate. In the circumstances it is not for me to interpret the technical requirements of the election and voting process in a way that seeks to impart a degree of 'fairness' not inherent in the legislative provisions.'* (Re USDAW (1994) D/1-2/94)

**Klee v Association of School and College Leaders (2009) D/35-36/09** at paragraphs 13, 15 and 16:

*"13. Mr Klee submitted that he was disadvantaged and his electoral prospects were damaged by the letter from the General Secretary having been included with the voting paper, alongside his election address. He considered that the letter made it look that his election address was untruthful and cast doubt upon his professional integrity and honesty Mr Klee submitted that section 48(4) and (5) of the 1992 Act should be interpreted to prevent any unfairness or injustice such as that caused by the disadvantage to which he had been put ...*

*15. Mr Klee believes that he has been dealt with unfairly by his Union. However, whilst concepts of fairness and justice guide all judicial decision-making, the 1992 Act provides no general protection from allegedly unfair treatment. Complaints of breach of statute require a claimant to specify and make good an alleged breach of a particular provision, which must then be carefully considered.*

*16. I respectfully agree with the view of my predecessor ... that the document that I am required to examine by section 48(4) is the election address that has been "submitted to" the Union which is "to be distributed" and that I must decide whether that address has been modified or changed. Mr Klee frankly accepted, as he had to, that the text of his proposed election address was the same as the text of the one distributed to members.... The letter of the General Secretary was clearly intended to affect the voters' understanding of Mr Klee's election address but Parliament has not imposed any restriction on the stance that a Union takes in such an election ."*

In conclusion, Mr Edwards submitted that Mr Lyons' complaint was in reality one about the inadequacy of the Union's rules or one about abuse of Union funds but that in neither case was this a breach of section 48(6). He further relied upon the grounds given by Professor Brown, as Election Commissioner, for rejecting a similar complaint (see paragraphs 17 and 18 above). He also considered that the letter in question was not self evidently an electioneering document, as it made no direct invitation to the reader to vote for Mr Simpson.

## Conclusion

51. I find that Mr Lyons reasonably considered that Mr Simpson's undated circular of early February 2009 was electioneering material, having regard to its timing, to whom it was sent and its content. The issue that I have to determine, however, is whether the circulation of this letter constituted a breach of section 48(6) of the 1992 Act.
52. It has been decided in a number of cases by both myself and my predecessor that section 48 of the 1992 Act does not require a Union to be neutral in the elections to which Chapter IV applies. It has also been decided that section 48 has a narrow application to the election addresses which are submitted by the candidates for circulation with ballot papers. Mr Edwards helpfully reproduced a number of those authorities in his Skeleton Argument which I have set out above. He relied particularly on paragraph 11 of **Re USDAW (1997) D/2/97** which provides as follows:

*"11. I saw the leaflet "Vote for Bill Connor" and it was quite clearly a campaigning leaflet and not an election address within the meaning of the 1992 Act. The union assured me (no one contradicted this and indeed one of the complainants confirmed it in part), that it gave both candidates an opportunity to produce election addresses in their own words, that both did so and that these addresses were circulated, as submitted, with the ballot papers. In doing that, the union satisfied the requirements of the law in respect of election addresses set out in section 48 of the 1992 Act. The campaign material circulated by or on behalf of Mr Connor, and probably also the other candidate, did not constitute an election address within the meaning of that section. There are no statutory restrictions on the circulation of other material by anyone. There was therefore no infringement of the requirements relating to election addresses."*

53. Whilst understanding the concerns of Mr Lyons, I am also aware of the difficulties faced by any General Secretary seeking re-election and the inevitable criticism he or she will face that an unfair advantage is being obtained by any membership-focussed activity or national publicity during the re-election period. This is undoubtedly a difficult area, as recognised by Professor Brown in his email to Mr Coyne of 11 February 2009 (paragraph 17). Some unions have chosen to deal with it through their rules. Others have not done so. In my judgment, however, section 48 was not intended to engage with such a general issue. Parliament has left it to each union to determine through its rules what, if any, regulation of this area is considered appropriate. Section 48 deals specifically with creating a level playing field between candidates regarding the respective election addresses that they submit for inclusion with the ballot papers. It does not prohibit or regulate the sending of other election material by or on behalf of any candidate.
54. Mr Lyons has made no allegation that Mr Simpson enjoyed a specific advantage with regard to the facilities and restrictions regarding the actual election address that Mr Simpson submitted for circulation with the voting papers regarding its preparation, submission, length or modification. Rather, Mr Lyons submitted that the circular letter in question constituted a second election address. Whilst I find that the circular could reasonably be considered electioneering material, I also find that section 48(6) does not prohibit candidates or the union from publishing election material in addition to the election address regulated by section 48. In my judgment the circular in question was not an election address within the meaning of, and regulated by, section 48(6) of the 1992 Act.

55. For the above reasons I refuse to make the declaration sought by the Claimant that on or about 11 February 2009 the Union breached section 48(6) of the 1992 Act by the sending of a letter from Mr Simpson to all members of the Amicus section of the Union, which allegedly constituted a second election address.

**David Cockburn  
Certification Officer**