

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

MR D BEAUMONT

v

AMICUS

Date of Decision

14 May 2004

DECISION

Upon an application made under Section 55(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

Declaration

- 1 I declare that in breach of section 46(1)(b) of the 1992 Act, Mr R Lyons, a Joint General Secretary of Amicus, has continued to hold a position to which Chapter IV of the 1992 Act applies for a period of more than five years without having been re-elected at an election which satisfies the requirements of that Chapter.

Enforcement Order

- 2 I order that Mr Lyons shall cease forthwith to hold office as Joint General Secretary of Amicus.

REASONS

- 1 By an application dated 29 December 2003 the Applicant made a complaint against his union, Amicus (“the Union”), alleging a breach of section 46(1)(b) of the 1992 Act. This is a matter within the jurisdiction of the Certification Officer by virtue of section 55(1) of the 1992 Act. Following correspondence with my Office, the complaint was identified in the following terms:-

In breach of section 46(1)(b) of the 1992 Act, Mr R Lyons, a joint general secretary of Amicus, has continued to hold a position to which Chapter IV of the 1992 Act applies for a period of more than five years without having been re-elected at an election which satisfies the requirements of that Chapter.

2. This matter was investigated in correspondence. As required by section 55(2) of the 1992 Act, the parties were given the opportunity of a formal hearing and such a hearing took place on 22 April 2004. The Union was represented by Mr J Goudie QC, instructed by Mr S Pinder of EAD Solicitors. Mr Goudie QC called no evidence but Mr Lyons was present at the hearing. The Applicant acted in person and he also called no evidence. 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. The 1999 rules of the Manufacturing, Science and Finance Union (“MSF”) were also before the hearing. Both parties submitted additional documents at the hearing, which I admitted as pages 95-108 of the bundle. Both parties submitted skeleton arguments. Mr Goudie QC also presented a chronology and list of issues.

Findings of Fact

3. Having considered the representations made to me and the documents to which I was referred I make the following findings of fact:-
4. Mr Lyons was born on 14 September 1942. He entered the employment of a predecessor union to Amicus in October 1966 and was elected to be General Secretary of MSF with effect from 1 September 1992. Mr Lyons was re-elected General Secretary of MSF in 1997, taking office pursuant to that election on 1 September 1997.
5. Mr Lyons’ contract of employment with MSF was dated 24 November 1992. With regard to the age of retirement, the contract stated:

“The General Secretary shall retire from his office on his 65th birthday (or such other earlier date after his 60th birthday as the General Secretary may in his absolute discretion decide).”

6. During the course of 2001, MSF held negotiations with the Amalgamated Engineering and Electrical Union (“AEEU”) on possible amalgamation. To facilitate these negotiations, Mr Lyons agreed to a variation of his contractual retirement age in return for which he was to be made certain post termination payments. This agreement is recorded in a letter dated 11 September 2001 to Mr Lyons from Mr Gardner, Chairman of the General Purposes and Finance Committee (“GPFC”) of the National Executive Council (“NEC”) of MSF. Mr Lyons expressly confirmed his agreement to the terms of this letter in a postscript. The terms of this letter are as follows:

“11th September 2001

Dear Roger,

I refer to recent discussions concerning the termination of your employment with MSF. As I understand it, we have agreed the following:

1. *We mutually agreed to terminate your employment with MSF and successor Unions with effect from 31st December 2004.*
2. *On becoming President of the TUC in September 2003 you will progressively hand over executive authority.*

3. *From the time that your Presidency of the TUC expires until the 31st December 2004, you will take sabbatical leave.*
 4. *It is further agreed that from the termination of your employment with the Union until 30th August 2007 you will receive from the Union the same emoluments that you will be receiving at the time of the termination of your employment.*
 5. *In respect of paragraph 4, you will receive the following:*
 - (a) *the equivalent of your annual salary which may be uprated by the value of the general salary award;*
 - (b) *the use of a car and contribution to your phone bill on the same basis as other officials of the Union;*
 - (c) *any other benefits you would have been entitled to under the Union's pension scheme and terms and conditions had you remained in office until 30th August 2007.*
 6. *You will also receive the retirement pension you would have received had you remained in office until 30th August 2007.*
 7. *This agreement is reached in the knowledge of the General Secretary of the AEEU, Sir Ken Jackson, who holds a copy.*
- Please acknowledge receipt of this letter and sign the attached copy in the space below.*

Yours sincerely,

John Gardner

I, Roger Lyons, confirm that I agree to the terms and conditions of my contract with the Union being varied in the manner set out above.

Roger Lyons"

7. On the same date, 11 September 2001, details of this agreement were put to an ad hoc meeting of eight members of the NEC who were attending the TUC Congress in Brighton. They endorsed the actions of Mr Gardner in reaching this agreement and also agreed that the Instrument of Amalgamation with the AEEU could now be signed. A week later, on 18 September, the Instrument of Amalgamation was signed and later lodged with the Certification Office. On 29 September a special meeting of the NEC of MSF endorsed a note of the ad hoc meeting in Brighton. At this meeting Mr Lyons reported on his intention to stand down as General Secretary with effect from 1 January 2005. In the course of his submissions to me, the Applicant stated that the members at this Special NEC meeting were unaware of the precise terms of the letter of 11 September. The Union disagreed. On the balance of probabilities, I find that the members attending the Special NEC meeting were aware of the terms of that letter, having regard to the established fact that those terms were put before the ad hoc meeting and seven NEC members who were present at the ad hoc meeting were also present at the Special NEC meeting.
8. On 1 January 2002 the amalgamation of MSF and the AEEU took effect and a new Union, Amicus, was created. The Joint General Secretaries of Amicus were Mr Lyons and Sir Ken Jackson. Until a comprehensive new rule book could be agreed, Amicus operated under framework rules. These provided for two sections, the MSF and AEEU sections, which continued to apply their

former rule books. It was anticipated that a new rule book would be agreed at a conference in the summer of 2003, as indeed it was.

9. In the summer of 2002 Sir Ken Jackson stood for re-election as Joint General Secretary, AEEU section, but was defeated by Mr Derek Simpson. On 19 October, in the light of this election result, the NEC of the MSF section agreed that Mr Lyons' contract of employment be varied to revert to his pre-existing retirement date in 2007. This decision prompted a Union member, Mr Hutchinson, to bring a legal challenge to Mr Lyons' position by way of an application to the Certification Officer dated 10 February 2003. He alleged that Mr Lyons was continuing in office in breach of section 46(1)(b) of the 1992 Act. Subsequently Mr Lyons confirmed that his retirement date would be 31 December 2004 and, on 11 July 2003, Mr Hutchinson's complaint was dismissed on withdrawal. Mr Lyons' retirement date of 31 December 2004 was confirmed at a meeting of the NEC of the MSF section on 12 July 2003 and by the full Joint Executive Council on 15 July.
10. At a further Joint Executive Council of Amicus on 16 September 2003 Mr Lyons was congratulated on being elected President of the TUC for 2003/4 and it was agreed that he would hand over his operational responsibilities for the Union to Mr Simpson with immediate effect, whilst continuing to be involved in wider strategic and policy issues, as well as campaigns.
11. The Applicant presented this application on 29 December 2003.

The Relevant Statutory Provisions

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

46 Duty to hold elections for certain positions

(1) A trade union shall secure –

- (a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and*
- (b) that no person continues to hold such a position for more than five years without being re-elected at such an election.*

(2) The positions to which this Chapter applies (subject as mentioned below) are –

- (a) ... (b) ... (c) ...*
- (d) general secretary;*

and the requirements referred to above are those set out in sections 47 to 52 below.

(6) The provisions of this Chapter apply notwithstanding anything in the rules or the practice of the union; and the terms and conditions on which a person is employed by the union shall be disregarded in so far as they would prevent the union complying with the provisions of this Chapter.

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.

57 Exemption of newly-formed trade unions, &c

(1) The provisions of this Chapter do not apply to a trade union until more than one year has elapsed since its formation (by amalgamation or otherwise).

For this purpose the date of formation of a trade union formed otherwise than by amalgamation shall be taken to be the date on which the first members of the executive of the union are first appointed or elected.

(2) Where a trade union is formed by amalgamation, the provisions of this Chapter do not apply in relation to a person who –

- (a) by virtue of an election held a position to which this Chapter applies in one of the amalgamating unions immediately before the amalgamation, and
- (b) becomes the holder of a position to which this Chapter applies in the amalgamated union in accordance with the instrument of transfer,

until after the end of the period for which he would have been entitled in accordance with this Chapter to continue to hold the first-mentioned position without being re-elected.

(3) Where a trade union transfers its engagements to another trade union, the provisions of this Chapter do not apply in relation to a person who –

- (a) held a position to which this Chapter applies in the transferring union immediately before the transfer, and
- (b) becomes the holder of a position to which this Chapter applies in the transferee union in accordance with the instrument of transfer,

until after the end of the period of one year beginning with the date of the transfer or, if he held the first-mentioned position by virtue of an election, any longer period for which he would have been entitled in accordance with this Chapter to continue to hold that position without being re-elected.

58 Exemption of certain persons nearing retirement

(1) Section 46(1)(b) (requirement of re-election) does not apply to a person holding a position to which this Chapter applies if the following conditions are satisfied.

(2) The conditions are that -

- (a) he holds the position by virtue of having been elected at an election in relation to which the requirements of this Chapter were satisfied,
- (b) he is a full-time employee of the union by virtue of the position,
- (c) he will reach retirement age within five years,
- (d) he is entitled under the rules of the union to continue as the holder of the position until retirement age without standing for re-election,

- (e) *he has been a full-time employee of the union for a period (which need not be continuous) of at least ten years, and*
- (f) *the period between the day on which the election referred to in paragraph (a) took place and the day immediately preceding that on which paragraph (c) is first satisfied does not exceed five years.*

(3) *For the purpose of this section “retirement age,” in relation to any person, means the earlier of -*

- (a) *the age fixed by, or in accordance with, the rules of the union for him to retire from the position in question, or*
- (b) *the age which is for the time being pensionable age (within the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995)*

61 Other supplementary provisions

- (1) *For the purposes of this Chapter the date on which a contested election is held shall be taken, in the case of an election in which votes may be cast on more than one day, to be the last of those days.*

The Union Rules

- 13. The provisions of the MSF rules relevant for the purposes of this application are:-

34 Functions and Powers of the NEC

- (a) *The duties of the NEC shall consist of the general management of the affairs of the Union. The NEC shall have authority over Branch Councils and Committees, Regional, District and Area Committees and District Councils within the Rules, Regulations and policy of the Union, and, between meetings of the Annual Conference, shall be the arbiter in respect of interpretations of the Rules, Regulations and policy of the Union. The National Executive Council shall have authority to issue Regulations for the administration of Rules; any such Regulations shall be reported to the next Annual Conference which shall decide whether the Regulation shall continue to apply.*

46 Officers and Staff

All employment rights under existing agreements relative to all full-time officers and clerical and support staff shall be continued until new arrangements have been negotiated.

The salaries and conditions of employment of all full-time officials shall be determined by the NEC after negotiation with the representatives of the full-time officials and shall be recorded in the minutes of the NEC and reported to the following Annual Conference. Expenditure reasonably and properly incurred by officials in the performance of their duties shall be reimbursed.

All employees of MSF shall be members of their appropriate trade union.

The Applicant's Submissions

14. The Applicant noted that pursuant to his most recent election, Mr Lyons had taken office as General Secretary of MSF on 1 September 1997, and that he should therefore have stood for re-election before 31 August 2002. However, the Applicant accepted that, although Mr Lyons had not stood for re-election at any time after 1997, no complaint could be made about this during 2002 because of the provisions of section 57(1) of the 1992 Act. He nevertheless maintained that Mr Lyons had held office unlawfully since 1 January 2003. The Applicant recognised that Mr Lyons could still argue that he held office lawfully if he met each of the six qualifying conditions in section 58(2), which provide exemption from the obligation of periodic election when a person is approaching retirement age. He did not dispute that Mr Lyons met three of these qualifying conditions; namely section 58(2)(a),(b)and (e), but he contested the other three:-

- (a) Section 58(2)(c). The Applicant contested that Mr Lyons “will reach retirement age within five years”. He submitted that the start date for this calculation was the last date by which Mr Lyons should have stood for re-election, namely 31 August 2002. He went on to submit that Mr Lyons’ retirement age must be 65, namely 14 September 2007, as under the definition of “retirement age” in section 58(3) any earlier age must have been “fixed by, or in accordance with, the rules of the Union”. The Applicant submitted that the letter of 11 September 2001 did not so fix Mr Lyons’ retirement date at 31 December 2004 for three reasons. First, the letter makes no reference to retirement age. Secondly, the reported change was not “fixed by or in accordance with the rules”. Thirdly, the purported change was not in accordance with a number of policy statements requiring transparency in all contractual matters, especially those concerning the contract of employment of the General Secretary. Accordingly, the Applicant contended, there was a period of more than five years between the start date, 31 August 2002, and the end date, the age of retirement, on 14 September 2007.
- (b) Section 58(2)(d). The Applicant argued that Mr Lyons was not “entitled under the rules of the union to continue as the holder of the position until retirement date without standing for re-election”. He submitted that this provision required there to be a positive rule entitling the General Secretary to continue to retirement age and it was not enough that the rules be silent. He further submitted that if the Union had wanted to retain Mr Lyons as its General Secretary in the circumstances, it could easily have changed its rules in line with this provision.
- (c) Section 58(2)(f). The Applicant contested that the period between the day on which Mr Lyons’ last election had taken place and the date immediately preceding that on which section

58(2)(c) was first satisfied did not exceed five years. The Applicant submitted that the date upon which an election takes place is not necessarily the same as the date the successful candidate takes up office. On the facts of this case, the Applicant stated that the close of voting in Mr Lyons' last election was in April or May 1997, the result of his election was declared on 14 June and he took up office on 1 September. Turning to the date five years preceding the retirement date, the Applicant submitted that for this purpose he could treat Mr Lyons' retirement date as being either his 65th birthday, 14 September 2007, or the date he ceased receiving payment of salary under the 11 September 2001 letter, namely 30 August 2007. The Applicant argued that in either case there was more than five years between 14 June 1997 (taking that as the date the election took place) and either 13 September 2002 or 29 August 2002 (being the days immediately preceding the fifth anniversary prior to whichever retirement date was chosen).

By way of additional arguments, the Applicant submitted that if a retirement age was to be changed lawfully for the purposes of section 58, that change must be implemented prior to the last election in which the person stood as a candidate. He further submitted that Parliament could not have intended to allow a General Secretary, once elected, to change his or her retirement date so as to avoid any further election. He argued that this would create a loophole in the law and invite possible abuse. The Applicant also argued that even where a union had changed its rules or varied a contract of employment to take advantage of the section 58 exemption, that change might still fall foul of section 46(6). This provides that the statutory obligations of Chapter IV prevail over both the rules of the union and any relevant contracts of employment. Finally, the Applicant submitted that the effect of section 57 was not to postpone the operation of the five year period of office, as he said the Union contended, so as to enable Mr Lyons to hold office under his September 1997 election for six years until September 2003. In the Applicant's view, the effect of section 57 was merely to delay the date of the breach.

The Union's submission

15. Mr Goudie QC, for the Union, did not pursue the argument raised in an earlier skeleton that Mr Lyons was de facto no longer Joint General Secretary of the Union. He submitted a list of issues which contained four points addressing the interpretation of section 58 of the 1992 Act and one point, by way of an alternative submission, on the interpretation of section 57. First, Mr Goudie QC submitted that Mr Lyons' retirement age was fixed by the agreement of 11 September 2001 as being his age at 31 December 2004, as endorsed by the NEC of MSF at its special meeting on 29 September 2001. Secondly, he submitted that this retirement age "had been fixed in accordance with the rules", within the meaning of section 58(3)(a). He contended that the variation to Mr Lyons' contract of employment on 11 September 2001, as later endorsed by the NEC, had been agreed under the powers given to the NEC by

rule 34. Rule 34 provides, inter alia, that the duties of the NEC shall consist of “the general management of the affairs of the Union.” In any event, Mr Goudie QC submitted that “in accordance with the rules” in section 58 means fixed in a way not incompatible with the rules. Thirdly, he submitted that the fixing of the retirement age in the contract of employment of a General Secretary was not rendered invalid by the operation of section 46(6). With reference to the history of section 46(6), counsel submitted that its intention and effect was to exclude the deliberate subversion of Chapter IV and had nothing to do with the interpretation of section 58. Mr Goudie QC’s fourth point was that the retirement age fixed in September 2001 had not been ‘unfixed’ by the actions of the NEC of the MSF section in September and October 2002. He noted, however, that this argument had not been pursued by the Applicant. Finally, by way of an alternative submission, Mr Goudie QC maintained that the effect of section 57 was to suspend all the obligations of Chapter IV for a year following an amalgamation and that accordingly Mr Lyons could validly have held office under his 1997 election until 31 August 2003. As to the contentious paragraphs of section 58(2), Mr Goudie QC submitted:

- (a) Section 58(2)(c). The five year period began on the 1 January 2003, when it might first be said that, subject to section 58, Mr Lyons would be holding office unlawfully. Accordingly, the period of five years ended on 31 December 2007 which made any of the alleged retirement ages within time.
- (b) Section 58(2)(d). Mr Goudie QC submitted that the expression “entitled under the rules” does not require there to be an express rule permitting the office holder to continue in office until retirement age without standing for election. He argued that this requirement was satisfied so long as there was nothing inconsistent in the rules or, put differently, if the office holder is not disentitled under the rules. Mr Goudie QC noted the general powers of the NEC to contract with the General Secretary under rules 34 and 46.
- (c) Section 58(2)(f). Mr Goudie QC accepted that the date on which Mr Lyons’ election “took place” must logically precede the date on which he took office and that this could not be later than the date the election result was declared on the 14 June 1997. Counsel went on to submit that the end date for the calculation under this paragraph was 30 December 1999, being the day immediately preceding the fifth anniversary prior to Mr Lyons’ retirement date of 31 December 2004. Mr Goudie QC submitted that accordingly there was not a period in excess of five years between the 14 June 1997 and 30 December 1999.

Conclusions

16. Mr Lyons was first elected as General Secretary of MSF in 1992 and was re-elected in 1997. He took up office pursuant to the 1997 election on 1 September 1997. The MSF rule book contained no provision for the election, re-election or even the period of office of the General Secretary. Accordingly, Mr Lyons' period of office fell to be determined by his contract of employment and the relevant statutory provisions; in particular by section 46(1)(b) of the 1992 Act. This provides:

s.46(1) "A trade union shall secure:

- (a) *that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it in an election satisfying the requirements of this Chapter, and*
- (b) *that no person continues to hold such position for more than five years without being re-elected at such an election"*

Ordinarily, therefore, Mr Lyons would have had to stand for re-election prior to 30 August 2002.

17. Following the formation of Amicus on 1 January 2002, by the Amalgamation of MSF and AEEU, the provisions of section 57(1) of the 1992 Act took effect. Section 57(1) provides:

S. 57(1). "The provisions of this Chapter do not apply to a trade union until more than one year has elapsed since its formation (by amalgamation or otherwise)."

I find that the effect of section 57(1) is that the requirement for Mr Lyons to stand for re-election was effectively suspended until 1 January 2003 or, more accurately, until such a time prior to that date as would enable him to take up office from 1 January 2003 pursuant to an election satisfying the requirements of Chapter IV of the 1992 Act. I do not accept the argument that this section impacts directly upon the calculation dates for the purposes of section 58, other than by delaying the date of the alleged breach.

18. The Union's case that there had been no breach of section 46(1)(b) of the 1992 Act rested mainly upon whether Mr Lyons could claim the benefit of the exemption in section 58 for persons nearing retirement age. Section 58(1) provides that section 46(1)(b) does not apply to a person holding a position to which Chapter IV applies if certain conditions are satisfied. Section 58(2) sets out the six specific conditions that must be met. Section 58(3) defines "retirement age". The Applicant accepted that three of the conditions in section 58(2) were met, namely section 58(2)(a),(b) and (e). The three remaining conditions were in dispute. However, each of the conditions in dispute requires the correct identification of Mr Lyons' "retirement age". I will therefore consider Mr Lyons' "retirement age" both as a matter of contract and by reference to the statutory definition.
19. Mr Lyons' contract of employment with MSF provided for his retirement age to be 65 but gave him a discretion to elect an early retirement date after he had reached 60. I find that this retirement date was varied by agreement on or about 11 September 2001 whereby Mr Lyons agreed to the termination of his

employment “with MSF and successor unions” being brought forward to 31 December 2004. He did this as part of the wider negotiations for his union’s amalgamation with the AEEU. This agreement also provided for certain payments to be made to Mr Lyons. He was to receive the same “emoluments” as he would have continued to receive as General Secretary between the date of his retirement and 30 August 2007 and to then receive a pension calculated on the basis that he had remained in office until that date. The Applicant argued that the effect of these payments was that Mr Lyons remained an employee of the Union in fact and in law until the 30 August 2007. I do not accept that submission. In my judgment the agreement of the 11 September 2001 varied Mr Lyons’ retirement date and provided for him certain post-retirement benefits. I also reject the Applicant’s submission that the agreement of the 11 September 2001 does not set any retirement date as it contains no reference to the word “retirement”. I find that an express reference to retirement is not necessary for this purpose and that the meaning of the agreement is clear from its terms and context.

20. The statutory definition of retirement age is contained in section 58(3) of the 1992 Act and is in the following terms:

S 58(3). “ For the purposes of this section “retirement age”, in relation to any person, means the earlier of –

- (a) the age fixed by, or in accordance with, the rules of the union for him to retire from the position in question, or*
- (b) the age which is for the time being pensionable age within the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995.”*

It is to be observed that the statute refers to the retirement age, whereby Mr Lyons’ contract of employment provides for a termination date. I find that there is no conflict between these two concepts. It is not that unusual for a retirement date to be fixed by reference to events other than the office holder’s birthday and it cannot have been the intention of Parliament to have restricted the exemption of section 58 to circumstances in which retirement is triggered only on a person’s birthday. The two concepts can be reconciled by taking the officer holder’s precise age at the date of retirement. On the facts of this case, Mr Lyons had his retirement age fixed at 62 years 16 weeks, when his retirement date was fixed at 31 December 2004.

21. In applying the statutory definition of “ retirement age” in section 58(3) to the facts of this case, the most contentious point was whether the retirement age was “**fixed by or in accordance with the rules of the union**”. It is clear that the 31 December 2004 date was not fixed by the rules; but was it fixed in accordance with them? Mr Goudie QC contended that this expression requires no more than that the retirement age is fixed in a way not incompatible with the rules. In my judgement, however, this sets too low a test. I find that, in the context of section 58 as a whole, the requirement for the retirement age to be fixed in accordance with the rules requires that the method or process of fixing the retirement age is provided for in the rules or otherwise comprehended by them. There must be a sufficient link between the decision to fix the retirement age and the rules. The sufficiency of the link is to be determined on the facts of the particular case. On the facts of this case,

the retirement age of Mr Lyons was fixed by the NEC of MSF which was acting within its general authority in rule 34 and its specific authority in rule 46. I find that this is a sufficient link for the purposes of section 58(3). The Applicant's argument that the agreement with Mr Lyons was reached in breach of various union policies was misconceived, as the statute requires only a consideration of the union's rules and I find that the discretion of the NEC to make the agreement with Mr Lyons of 11 September 2001 was not circumscribed by any of the policies to which I was referred. Accordingly, I find that Mr Lyons' retirement date of 31 December 2004 was a retirement age fixed in accordance with the rules of the union, within the meaning of section 58(3).

22. I now turn to examine those qualifying conditions within section 58(2) which remained in dispute.

23. First, section 58(2)(c): this requires of the relevant person that:

S. 58(2)(c) "he will reach retirement age within five years".

To test whether this condition is satisfied, it is necessary to know the start date or, put differently, within five years of when? The Applicant contended that the start date was 31 August 2002 when the authority conferred by Mr Lyons' previous election had expired. I disagree. In my judgment the start date for this purpose is the first date upon which it is alleged that the relevant person was holding office in breach of section 46(1)(b). Accordingly on the facts of this case, the start date is 1 January 2003 and Mr Lyons' retirement age, as at 31 December 2004 is clearly within five years of 1 January 2003. Furthermore even those retirement ages alleged by the Applicant to arise in 2007 would be within five years of 1 January 2003 start date.

24. Secondly, section 58(2)(f): this provides as follows:

S. 58(2)(f) "the period between the day on which the election referred to in paragraph (a) took place and the day immediately preceding that on which paragraph (c) is first satisfied does not exceed five 5 years."

This formula is complex and requires careful application. The first part of the formula requires a determination of when the relevant person's last election "took place". There is no statutory definition of this precise term, but section 61(1) provides a definition of when an election is "held":

S. 61(1). "For the purposes of this Chapter the date on which a contested election is held shall be taken, in the case of an election in which votes may be cast on more than one day, to be the last of those days."

Mr Goudie QC rightly conceded that the date upon which the election "took place" must logically precede the date the person elected takes up office and in my judgement, a strong case can be made out for the relevant date being the same as the one defined by section 61. However there is no need to determine this issue conclusively on the present facts as the second part of the formula results in a date which is clearly within the five year period, no matter when in

1997 the election took place. As Mr Lyons' retirement age/date is 31 December 2004, the day immediately preceding that on which section 58(2)(c) is first satisfied is 30 December 1999. Accordingly the period between the date the election took place in 1997 and 30 December 1999 plainly does not exceed five years and section 52(2)(f) is satisfied.

25. Thirdly, section 58(2)(d): this provides:

S. 58(2)(d) "he is entitled under the rules of the union to continue as the holder of the position until retirement age without standing for re-election."

The contested words in this paragraph are "**entitled under the rules of the union**". Looking at the rules of the MSF section of the Union, one is struck by their total lack of reference to the election of General Secretary. Mr Goudie QC submitted that the absence of any such reference is sufficient to comply with section 58(2)(d); it means that Mr Lyons is doing nothing inconsistent with the rules by remaining in office until retirement. Put differently, Mr Lyons was not disentitled under the rules from remaining in office. I adopt a different approach. I note that section 58 introduces an exemption to the general obligation in section 46(1)(b) and it was common ground that, as an exemption, section 58 should be construed restrictively. I also take into account the Applicant's arguments regarding possible abuses and/or loopholes. I further note the distinction between the formulation in section 58(3)(a) "*fixed by, or in accordance with, the rules ...*" and the formulation in section 58(2)(d) "*... entitled under the rules ...*". In my judgement, the expression "entitled under the rules" is plainly more prescriptive than the expression "in accordance with the rules," and this distinction supports an interpretation which requires there to be an explicit rule to that effect. It might be argued for the Union that one is entitled to do anything which is not expressly forbidden. However this is to overlook the fact that section 46(1)(b) does expressly forbid a person remaining in office for in excess of five years without election. Most significantly, however, I find that the plain meaning of the words "entitled under the rules" in the context of section 58 requires there to be a rule, express or implied, granting entitlement to continue in office until retirement age without standing for re-election. Such a requirement does not impose an unreasonable barrier on any union seeking to prolong the tenure of its General Secretary, but it does require the issue to be addressed and decided upon at the highest level within the union's democratic structure. As there is no such rule upon which Mr Lyons can rely, I find that the condition set out in section 58(2)(d) has not been satisfied on the facts of this case. Accordingly, Mr Lyons is unable to take advantage of the exemption provided for in section 58.

26. I therefore declare that in breach of section 46(1)(b) of the 1992 Act, Mr R Lyons, a Joint General Secretary of Amicus, has continued to hold a position to which Chapter IV of the 1992 Act applies for a period of more than five years without having been re-elected at an election which satisfies the requirements of that Chapter.

27. By section 55 of the 1992 Act, I am obliged to make an enforcement order unless I consider that to do so would be inappropriate. In the circumstances of this case I do not consider that it is inappropriate to do so. Mr Lyons is currently holding the joint highest office in the Union without the authority of a valid election. I am not persuaded that his agreement to withdraw from an operational role in the union whilst continuing to be held out as Joint General Secretary is a ground for not making an order. I accordingly order that Mr Lyons shall cease forthwith to hold office as Joint General Secretary of Amicus.

DAVID COCKBURN
The Certification Officer