

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

**Mr P Moloney**

**V**

**Nautilus International**

**Date of Decisions**

**26 April 2012**

**DECISIONS**

Upon application by Mr Moloney ("the claimant") under section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

1. I refuse to make the declaration sought by Mr Moloney that on or around 20 September 2011 Nautilus International breached rule 25 of its rules, in particular rule 25.1 and 25.2, by the decision to suspend him from membership allegedly having been made by the General Secretary.
2. I declare that Nautilus International breached rule 25.3 of its rules on or about 20 September 2011 in suspending Mr Moloney from membership without first posting to him a notice of suspension by registered post or the presently available equivalent to registered post.
3. I refuse to make the declaration sought by Mr Moloney that on or around 20 September 2011 Nautilus International breached rule 16 of its rules, in particular rule 16.3, 16.4 and 16.5, by its Council making a decision to suspend him other than at a meeting which complied with rule 16.

**REASONS**

1. Mr Moloney is a member of Nautilus International ("the Union"). By an application received at the Certification Office on 11 November 2011, he made complaints of various breaches of the rules of the Union which he maintained were related to the disciplinary proceedings of the Union. Following correspondence with Mr Moloney, three complaints were confirmed by him in the following terms:

**Complaint 1**

*That on or around 20 September 2011 the Union breached rule 25, in particular rule 25.1 and 25.2, by the decision to suspend Mr Paul Moloney having been made by the General Secretary.*

**Complaint 2**

*That on or around 20 September 2011 the Union breached rule 25.3 in suspending Mr Moloney without first posting Mr Moloney the notice of suspension by registered post.*

**Complaint 3**

*That on or around 20 September 2011 the Union breached rule 16, in particular rule 16.3, 16.4 and 16.5, by the Council making a decision to suspend Mr Paul Moloney. No Council meeting took place between the beginning of July to the beginning of October 2011 at which such a decision could have been taken in compliance with these rules.*

2. I investigated the alleged breaches in correspondence and a hearing took place on 4 April 2012.
3. At the hearing, Mr Moloney represented himself and gave evidence in accordance with his written witness statement. The Union was represented by Mr Edward Cooper of Russell Jones & Walker. Evidence of the Union was given by Mr Mark Dickinson, General Secretary, and Mr John Epsom, a former Chair of the Council of the Union. Each produced a written witness statement. There was in evidence a 148 page bundle of documents consisting of letters, emails, the rule book and the regulations of the Union and other documentation supplied by the parties for use at the hearing. Both the Union and Mr Moloney provided skeleton arguments. I gave leave to the Union at the hearing to adduce a supplementary bundle of 45 pages. I did so having regard to the relevance of the documents but find that the Union was remiss in not submitting these documents at the appropriate stage in the procedure.

**Findings of Fact**

4. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows:
5. Mr Moloney entered the employment of the Union in October 1997 as an Industrial Officer. As such he was entitled to membership of the Union and he became a member at about that time. After three promotions, he became the Assistant General Secretary in May 2009. On 18 July 2011 Mr Moloney was summarily dismissed by the Union for gross misconduct. He has since commenced a claim for unfair dismissal in the Employment Tribunal which remains outstanding at the time of this hearing. By a letter dated 20 September 2011 Mr Moloney was suspended as a member of the Union pending enquiries that were to be made with a view to disciplinary action being taken against him which could lead to his expulsion as a member. The case before me concerns the lawfulness of this suspension.
6. The origins of the Union go back to 1857. More recently, it has changed its name on a number of occasions in different circumstances. From 1968 it was known as the Merchant Navy and Airline Officers Association; from 1985 as NUMAST; from 2007 as Nautilus UK and from May 2009 as Nautilus International. As Nautilus International, its membership includes many Dutch seafarers having entered into an arrangement with a seafarers union in the Netherlands. By rule 19 there is to be a General Meeting which is to be held every four years. By rule 27, the General Meeting has the exclusive power to amend the rules of the Union. The last General Meeting was held in 2011 and the rules of the Union were most recently amended in

2007 and in 2011. By rule 12, "*The absolute control and administration of the affairs and properties of the Union ... shall be vested in Council*". This power is of course subject to the rules of the Union and the General Meeting. Ordinarily, Council is composed of 32 members together with the General Secretary but at the relevant time there were three vacancies. Rule 16 is headed "*Meetings of the Council*". It does not require a minimum number of meetings per year but in practice regular meetings of Council take place four times a year.

7. In 2008 it was announced that the then General Secretary, Mr Orrell, would be retiring in 2009 and the Assistant General Secretary would be retiring in 2010. An election was organised for the position of General Secretary which would begin in 2008 and end in 2009. The majority of the members of Council supported the candidature of Mr Dickinson but there was an issue as to whether Mr Moloney would also stand. Mr Moloney gathered sufficient nominations to stand but eventually decided not to do so. Latterly, he too indicated his support for Mr Dickinson. In May 2009 Mr Dickinson was elected unopposed as the General Secretary. Subsequently, Mr Moloney was appointed as Assistant General Secretary.
8. At a meeting of Council on 30 June 2011 there was a discussion of the motions to be put to the General Meeting to be held in October 2011. It later emerged that Mr Moloney was one of 20 signatories to a motion that, if successful, would have required "*any issues concerning the strategic future of the Union to be brought before the membership before any decisions are made*". It became controversial that Mr Moloney, as an Assistant General Secretary, should put his name to such a motion and he gave evidence that he believed his subsequent suspension as a member was intended to prevent him from speaking to this motion at the General Meeting.
9. On 18 July 2011, Mr Moloney was summarily dismissed as an employee of the Union. An attempt was made to secure an amicable parting by way of resignation and a compromise agreement but this was unsuccessful. The Union sent a dismissal letter to Mr Moloney dated 1 August in which it stated that the reason for termination was gross misconduct, in that Mr Moloney's activities over a long period had resulted in a serious breach of trust and confidence. The letter referred to Mr Moloney's actions in the run up to the 2009 elections. It also referred to him having obtained by misrepresentation information from a member of staff regarding the General Secretary's activities, including correspondence marked private and confidential. It further referred to his support of the motion to the General Meeting without having informed the Senior Management Team, which was considered to be an attempt to undermine the position of the General Secretary and Senior Management Team.
10. Mr Moloney appealed against his dismissal and his appeal was heard on 9 September 2011. The 'Designated Body' which heard the appeal upheld the aspect of his appeal regarding his actions in the run up to the 2009 elections but rejected his other grounds and so dismissed his appeal.
11. On 13 September 2011, the General Secretary caused an email to be sent to the members of Council which was to initiate disciplinary proceedings against Mr Moloney as a member. The email was in the following terms:

"To all Council Members,  
Dear Members, You will be aware from previous communications that Paul Moloney has been dismissed for Gross Misconduct and this decision has been upheld by the Designated Body established by the Council to hear his appeal.

I now believe it is appropriate to use the procedures of Rule 25 and Regulation (Copy attached below) for the Council, under Rule 25.2.2 "... cause enquiries to be made ... as to the conduct of a member ... with a view to the Council considering the expulsion ... of such member". This would be on the basis of Rule 25.1(a) and/or (b). I am therefore firstly recommending the Council to instruct me (under Rule 25.2) to make such enquiries in the case of Mr Moloney.

Such an investigation and the related procedures will take some months as detailed in Regulation 8. This delay could be disruptive to the running of the Union, especially with the General Meeting coming up. Accordingly I am secondly seeking the approval of the Council under Regulation 8.7 to suspend on a temporary basis the membership of Mr Moloney while the inquiry is under way and a determination is reached by the Council under Regulation 8.6. Such a suspension does not presume any particular outcome to the inquiry.

For the avoidance of doubt I can confirm that a motion signed by Mr Moloney, which is on the Agenda of the forthcoming General Meeting, will still be on the Agenda as it has more than the minimum of four signatories required under the Rules.

I should be grateful if Council members could respond to this email as soon as possible and in any event not later than Wednesday 21 September with their approval of the two recommendations detailed above.

Mark Dickinson  
General Secretary"

Copies of the relevant rules and regulations were sent with this email as attachments.

12. Over the next week a number of responses to this email were received from members of Council by email. These were included in the supplementary bundle I admitted at the hearing. By 20 September 2011, the Union had received 15 responses from members who accepted both the recommendations in the General Secretary's email. One member accepted the recommendation to instruct the General Secretary to make enquiries into Mr Moloney's conduct but rejected the proposal to suspend him. These, together with the 'vote' of the General Secretary, constituted a majority of the then 29 members of Council.
13. On 20 September 2011 Mr Dickinson wrote to Mr Moloney in the following terms:

"Dear Paul

**Membership of Nautilus International**

Following your Dismissal for Gross Misconduct, upheld by the Designated Body established by the Council to hear your Appeal, consideration has been given to your membership of Nautilus International.

The Council has instructed me (under rule 25.2) to make enquiries with regard to your conduct as a member. This would be on the grounds laid out in rule 25.1(a) and/or (b).

Such an investigation and the subsequent procedures will take some time, as detailed in regulation 8.

The Council has also agreed to suspend your membership under regulation 8.7 on a temporary basis while the inquiry is under way and a determination is reached by the Council under regulation 8.6. This suspension does not of course presume any particular outcome to my enquiries or subsequent procedures. Accordingly your membership was suspended with effect from the 19<sup>th</sup> September 2011.

During the period of suspension a member forfeits all rights, benefits and officers paid or otherwise and for the avoidance of doubt this includes the right to attend General Meetings. Your Direct Debit will not be activated during the suspension.

..."

This letter was sent to Mr Moloney by ordinary post and email. In his evidence, Mr Moloney stated that he received this letter within a few days of it being posted and that he opened the email at about the same time, having been away on holiday.

14. On 3 October 2011 the Council met in Rotterdam. A report was made to Council of Mr Moloney's suspension. The minute of that item does not indicate that Council voted upon it in any way.
15. On 4 and 5 October 2011 the General Meeting took place, also in Rotterdam. The motion to which Mr Moloney had put his name was called for debate. Council invited delegates to vote against it and it was defeated.
16. On 11 November 2011 Mr Moloney's complaint in this case was received at my office. After certain aspects were clarified with Mr Moloney, his complaints were put to the Union on 9 December.
17. On 14 and 15 December 2011 there was a further meeting of Council. At this meeting Council again considered the position of Mr Moloney, in the light of his complaint to me. Council approved a further resolution both to have enquiries made as to Mr Moloney's conduct and to suspend him on a temporary basis pending those enquiries and any subsequent determination.
18. By a letter dated 21 December 2011, the General Secretary informed Mr Moloney of the decision of Council to adopt a fresh resolution to suspend him as "*it would not be appropriate to assume the Certification Officer would find for the Union.*" This letter was sent to Mr Moloney by special delivery.

### **The Relevant Statutory Provisions**

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

#### ***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).*

- (2) The matters are –
- (a) the appointment or election of a person to, or the removal of a person from, any office;
  - (b) disciplinary proceedings by the union (including expulsion);
  - (c) the balloting of members on any issue other than industrial action;
  - (d) the constitution or proceedings of any executive committee or of any decision-making meeting;
  - (e) such other matters as may be specified in an order made by the Secretary of State.

**108B Declarations and orders**

- (2) If he accepts an application under section 108A the Certification Officer -
- (a) shall make such enquiries as he thinks fit,
  - (b) shall give the applicant and the union an opportunity to be heard,
  - (c) shall ensure that, so far as is reasonably practicable, the application is determined within six months of being made,
  - (d) may make or refuse the declaration asked for, and
  - (e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.
- (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 Union Rules**

20. The National Rules of the Union which are relevant to this application are as follows:-

**Rule 2 Objects**

The Objects of the Union are:-

Rule 2(q) The Council shall have powers to issue Regulations and amend these from time to time, to give effect to the detailed implementation of general powers under the Rules and any such Regulations shall have the same force as if they were in the Rules.

**Rule 3 Membership**

Rule 3.1 Those eligible for membership shall be those persons regularly engaged or employed as:

- (i) Maritime professionals including shipmasters, officers, ratings, other seafarers and other staffs engaged in or supporting the maritime transportation of goods and passengers or other forms of maritime activity, including inland navigation,
- (ii) Officials and senior staff, as defined by the Council, employed by the Union, and
- (iii) Such other descriptions of persons, including persons engaged in non-maritime activity, as the Council may from time to time decide to be eligible.

## **Rule 12 Powers and Composition of the Council**

*Rule 12.1 The absolute control and administration of the affairs and property of the Union and the furtherance of the objects of the Union and the provision of all the benefits together with the necessary power to utilise Union funds and monies shall be vested in the Council subject only to any direction of the Union given by its members at a General Meeting convened in accordance with these rules. The Council may delegate any of its powers to an Executive Committee that shall be composed solely of members of the Council and be of such numbers as the Council shall determine.*

*Rule 12.5 The Council shall have power and authority to construe the rules and to determine on all matters where the rules are silent. Any such construction or determination by the Council shall be binding upon all members and shall remain in operation unless reversed by the Council or by the members in General Meeting.*

*Rule 12.6 The Council may, under Rule 2(q) determine detailed regulations for the operations of this Rule.*

## **Rule 16 Meetings of the Council**

*Rule 16.1 Meetings of the Council shall be held as required and may be called by either:*

- a) resolution of the Council or*
- b) the General Secretary when deemed by the General Secretary expedient to do so, or*
- c) on notice in writing to the General Secretary signed by not less than eight members of the Council stating the business to be considered.*

*Rule 16.2 The General Secretary shall convene all Council Meetings by communication in writing and, except for business deemed urgent by the General Secretary, not less than seven days' notice thereof shall be given to the members of the Council.*

*Rule 16.3 The business shall be decided by a majority of the Council present and voting. The Chair of any Council meeting shall upon equality of votes have a second and casting vote.*

*Rule 16.4 The Council shall not have power to determine on any business unless there is present:*

- a) a quorum of one-quarter of the elected members plus*
- b) either the Chair, Vice-Chair or Deputy Vice-Chair of the Council, plus*
- c) the General Secretary, or in a non-voting, non-advisory capacity during his unavoidable absence, his appointee as a recorder of the meeting or in the event that the General Secretary has not made such an appointment, the Deputy General Secretary, if any, or an Assistant General Secretary appointed by those members of the Council present for this purpose.*

*Rule 16.5 Voting shall be by a show of hands but the Chair of any Council meeting may decide that a vote be taken by ballot and shall do so if a majority of the members present so request.*

## **Rule 25 Expulsion and Suspension of Members**

*Rule 25.1 The Council or the Executive Committee if so authorised by the Council shall have the right to expel or suspend from the Union any member who in*

*the opinion of the Council or of the Executive Committee has (a) acted in breach of these rules or prejudicially to the interests and objects of the Union or (b) has behaved in such a manner as to render his further membership detrimental to the interests of the Union or its members or (c) participated in the activities of a political party determined by the Council, to the extent permitted by law, under regulations to have objects contrary to the objects of the union.*

*Rule 25.2 The Council, on information supplied or obtained from any source, may instruct the General Secretary to cause inquiries to be made within the provisions of this rule as to the conduct of a member or members with a view to the Council considering the expulsion or suspensions of such members or members.*

*Rule 25.3 If the Council or Executive Committee decides to expel or suspend a member such expulsion or suspension shall be operative from the time notice or the expulsion or suspension is posted by registered post to the member concerned.*

*Rule 25.4 Any member expelled from the Union shall forthwith forfeit all rights benefits and offices, paid or otherwise, and, notwithstanding Rule 8.3, shall have no right to the return of any subscriptions and/or entrance fee. The Council may, or if directed by the appeals committee shall, reinstate such rights.*

*Rule 25.5 A Member on suspension shall forfeit all rights benefits and offices, paid or otherwise, but the Council may in its absolute discretion reinstate such rights on hearing any appeal made by the member or members.*

*Rule 25.6 The Council shall under Rule 2(q) determine detailed regulations for the operation of Rule.*

21. The Regulations of the Union which are relevant to this application are as follows:-

***Regulation 8***

***Purpose – to determine detailed regulations regarding the Expulsion and Suspension of Members under Rule 25***

*8.1 If either:*

- a) the Council considers that there is evidence to suggest that any member may have
  - i. acted in breach of the Rules or prejudicially to the interests and objects of the Union or*
  - ii. behaved in such a manner as to render his further membership detrimental to the interests of the Union or its members or*
  - iii. participated in the activities of a political party determined by the Council, to the extent permitted by law, under regulation to have objects contrary to the objects of the union, (together called "the offences"); or**
- b) the General Secretary receives a petition signed by 10 or more members which suggests that a member may have committed one or more of the offences.*

*the Council may make such inquiry as it shall deem necessary.*

*8.2 If as a result of such an inquiry it finds no reason to take any action under rule 25 no entry thereof shall be made in the minute book.*



- 8.3 *Should the Council find reason to proceed it shall direct the General Secretary to write to the member concerned calling upon such member to explain or rebut in writing the opinion of the Council provide a satisfactory explanation, then no further action shall be taken. Should such member fail to explain his/her conduct to the satisfaction of the Council or at all, the Council may thereupon consider the expulsion or suspension of the member in accordance with Regulation 8.4.*
- 8.4 *The member concerned shall be given had (sic) at least three months written notice prior of the meeting of the Council or of the Executive Committee as the case may be considering the member's expulsion or suspension. The member may appear before the Council or the Executive Committee and may be accompanied by a Full Member of the union acting in an advisory capacity.*
- 8.5 *At least seven day's notice shall be given to each member of the Council or of the Executive Committee that the business of the day will include the question of the expulsion of a member but the name of such members shall not be included in the notice to any member of the Council or the Executive Committee.*
- 8.6 *The General Secretary shall notify the member in writing of the decision of the Council or the Executive Committee, who may determine not to take any action, may suspend the member from membership for such period as they may consider appropriate or may expel the member from membership.*
- 8.7 *Notwithstanding anything hereinbefore contained the Council or Executive Committee if so authorised by the Council and upon such terms as the Council may lay down, may in exceptional circumstances on or following an inquiry under Regulation 8.1 suspend a member for the period until a determination is reached under Regulation 8.6 or, if earlier, a decision has been reached not to take any further action against the member under this regulation but in all cases for a period not exceeding 12 months.*

## **Consideration and Conclusions**

### **Complaint One**

22. Mr Moloney's first complaint is as follows:-

*"That on or around 20 September 2011 the Union breached rule 25, in particular rule 25.1 and 25.2, by the decision to suspend Mr Paul Moloney having been made by the General Secretary".*

23. Rules 25.1 and 25.2 of the rules of the Union provide as follows:

- 25.1 *The Council or the Executive Committee if so authorised by the Council shall have the right to expel or suspend from the Union any member who in the opinion of the Council or of the Executive Committee has (a) acted in breach of these rules or prejudicially to the interests and objects of the Union or (b) has behaved in such a manner as to render his further membership detrimental to the interests of the Union or its members or (c) participated in the activities of a political party determined by the Council, to the extent permitted by law, under regulations to have objects contrary to the objects of the union.*
- 25.2 *The Council, on information supplied or obtained from any source, may instruct the General Secretary to cause inquiries to be made within the provisions of this rule as to the conduct of a member or members with a view to the Council considering the expulsion or suspensions of such members or members.*

## Summary of submissions

24. Mr Moloney submitted that the decision to suspend him with effect from 19 September 2011 was made by the General Secretary and not by Council, as is required by rule 25. He argued that the General Secretary had made the decision to suspend him before sending the email of 13 September to the members of Council. In Mr Moloney's submission, the purpose of this email was to seek retrospective approval for a decision already taken. Mr Moloney derives support for his argument from the wording of the General Secretary's email. He observed that the email omitted any reference to the Council "instructing" the General Secretary to make enquiries and that it also omitted the words "on information supplied or obtained from any source" that appears in rule 25.2. Mr Moloney commented that there was no evidence that the members of Council had been given any material to support his suspension. He was also critical of the fact that the General Secretary had made a recommendation to the members of Council, not leaving it up to them to make their own decision. He noted that members of Council had not been told that they could reject the recommendation. Further, he noted the response of Ulrich Jurgens was merely "OK with me" and commented that this clearly did not amount to an instruction. Mr Moloney went on to submit that, in any event, there were no exceptional circumstances to justify his suspension, as required by Regulation 8.7.
25. Mr Cooper, for the Union, submitted that this complaint was misconceived as rules 25.1 and 25.2 were not engaged by the facts upon which Mr Moloney relied. He examined the terms of these rules and noted that rule 25.1 gave Council the right to expel or suspend a member as a disciplinary sanction. He also noted that rule 25.2 gave Council a discretion to cause enquiries to be made with a view to expulsion or suspension in due course. Mr Cooper submitted that the substance of these rules was therefore not engaged by this complaint. Further, Mr Cooper argued that the suspension envisaged in rule 25 was a disciplinary suspension, whilst Mr Moloney's suspension was under regulation 8.7 which provided for a temporary suspension pending a disciplinary decision. Mr Cooper categorised this as an administrative suspension. He maintained that such a suspension was not comprehended within rule 25 and accordingly rule 25 was not engaged on these facts. Whilst Mr Cooper submitted that these arguments were sufficient to dispose of Mr Moloney's first complaint, he went on to argue that as a matter of fact, it was Council not the General Secretary, which made the decision to suspend. He argued that this was clear from the terms of the General Secretary's email of 13 September 2011 and the responses from members of Council. He noted that the format of seeking approval from Council to a recommendation was the usual format in which matters were placed before Council, as accepted by Mr Moloney in cross-examination. He further noted that the full text of the relevant rules and regulations had been sent to the members of Council as an attachment to the General Secretary's email and that the email had recommended that the General Secretary be "instructed" by Council. Mr Cooper considered that it was fanciful to argue that Council members were not aware that they could reject a recommendation from the General Secretary. As to the "exceptional circumstances" in regulation 8.7, Mr Cooper noted that Mr Moloney had been the only employed official summarily dismissed for at least 10 years and probably much longer, and that the members of Council could have regard to the serious nature of the misconduct that had been found against him.

### **Conclusion, Complaint One**

26. This complaint has been brought as a breach of rule 25.1 and 25.2. Having considered the content of those rules, I accept the Union's submission that they are not engaged on the facts of this complaint. Rule 25.1 addresses the right of Council to suspend or expel after a finding of misconduct. However, at the time of Mr Moloney's suspension there was no finding of misconduct. His temporary suspension was decided upon under regulation 8.7. Rule 25.2 gives Council a discretion to require there to be an inquiry into a member's conduct. As such, it does not address the issue of suspension at all and certainly does not address Mr Moloney's central complaint that his suspension on 19 September 2011 was decided upon by the General Secretary. Accordingly, I find that Mr Moloney's complaint of a breach of rules 25.1 and 25.2 is misconceived.
27. I have, however, also considered the merits of Mr Moloney's first complaint. It was common ground that the decision to suspend a member could only be taken by Council, not by the General Secretary. In commencing this complaint, Mr Moloney was suspicious that the General Secretary had not put this issue to Council for its decision and he requested that the Union provided him with evidence to establish that the General Secretary had done so. Mr Moloney commented in correspondence that he would withdraw this complaint if the Union was able to evidence that the decision was taken by Council. He also stated in his Skeleton Argument that "Complaints One and Three cannot both be upheld" and that there was no evidence that the email of 13 September had ever been sent to members of Council. Two days before the hearing the Union belatedly supplied copies of the email responses of the members of Council. The delay in providing these documents to my office and Mr Moloney does the Union no credit. The email responses were crucial evidence in this complaint. Having considered these responses, I accept the evidence of the General Secretary that he did not make the decision to suspend Mr Moloney but merely made a recommendation to the members of Council and acted upon the responses of a majority of those members. I would therefore also reject this complaint on the facts.
28. For the above reasons I refuse to make the declaration sought by Mr Moloney that on or around 20 September 2011 Nautilus International breached rule 25 of its rules, in particular rule 25.1 and 25.2, by the decision to suspend him from membership allegedly having been made by the General Secretary.

### **Complaint Two**

29. Mr Moloney's second complaint is as follows:-

*That on or around 20 September 2011 the Union breached rule 25.3 in suspending Mr Moloney without first posting Mr Moloney the notice of suspension by registered post.*

30. Rule 25.3 of the rules of the Union provides as follows:

*25.3 If the Council or Executive Committee decides to expel or suspend a member such expulsion or suspension shall be operative from the time notice or the expulsion or suspension is posted by registered post to the member concerned.*

## Summary of submissions

31. Mr Moloney submitted that the letter from the General Secretary of 20 September 2011 by which he was allegedly suspended, had not been sent by registered post and was therefore not 'operative'. He argued that rule 25.3 provides for the manner in which the notice of suspension is sent and for the time from which the suspension is operative. Mr Moloney considered that, as no notice was sent to him by registered post, his suspension was ineffective. He argued that this was a strict procedural requirement which should be applied even though he accepted that he had received the letter of suspension shortly after 20 September. Mr Moloney acknowledged that there was no longer any registered post but submitted that the rules should be read as applying to the nearest equivalent currently available post, such as special delivery.
32. Mr Cooper for the Union, noted that rule 25.3 could not be applied literally as there was no longer any registered post. It was further noted that Mr Moloney had accepted that he had received a letter of suspension of 20 September shortly after it had been sent to him. Against this background, Mr Cooper made two submissions. First, he argued that the suspension under regulation 8.7 was of a nature distinguishable from a disciplinary act of suspension under rule 25.1 or regulation 8.6. He maintained that the suspension was more akin to an administrative act than a disciplinary sanction and submitted that rule 25.3 applies only to a suspension by way of a disciplinary act. Mr Cooper's second submission was that, if rule 25.3 applied (which he denied) it focussed on and determined the time at which the suspension took effect, providing that suspension took effect from posting rather than at a later date "of receipt". He submitted that a failure to send a notice of suspension by registered post (or a comparable methodology) did not mean that the suspension was not "operative"; rather it meant that it would not operate from the date of posting but from the later date of receipt.

## Conclusion – Complaint Two

33. I accept Mr Cooper's distinction between a suspension imposed as a disciplinary penalty and a suspension imposed for an administrative or precautionary purpose pending the determination of the disciplinary process. Rule 25 deals expressly with the expulsion and suspension of members. Rule 25.5 provides that "the Council shall, under rule 2(q) determine detailed regulations for the operation of these rules". The Union has formulated regulations under rule 2(q) which enables such regulations to be made "to give effect to the detailed implementation of general powers under the rules". Such regulations are to have the same force "as if they were in the rules". Pursuant to this power, regulation 8 sets out the process regarding expulsion and suspension which is provided for in rule 25. Regulation 8.7 provides as follows:

*8.7 Notwithstanding anything hereinbefore contained the Council or Executive Committee if so authorised by the Council and upon such terms as the Council may lay down, may in exceptional circumstances on or following an inquiry under Regulation 8.1 suspend a member for the period until a determination is reached under Regulation 8.6 or, if earlier, a decision has been reached not to take any further action against the member under this regulation but in all cases for a period not exceeding 12 months.*

In my judgement, a suspension imposed under regulation 8.7 is conceptually different to a disciplinary suspension. Nevertheless, the effect on the individual member is identical for the period of suspension. In the context of a membership organisation, suspension from all the rights of membership is a most serious matter. The power to suspend is accordingly one which would ordinarily be found in the rules. On the facts of this case, I find that it would be inappropriate for a freestanding power to suspend to be introduced through regulations, having regard to the requirement in rule 2(q) that regulations are only "to give effect to the detailed implementation of general powers under the rules ...".

34. Applying the above analysis to the facts of this case, I find that the power to suspend in regulation 8.7 is not a freestanding power but one which is contemplated within rule 25. As a consequence, however, the procedural safeguard within rule 25.3 applies. A suspension is only operative from the time that the notice of suspension is posted to the member concerned by registered post.
35. I take notice of the fact that there is no longer any registered post. In my judgement that does not invalidate the whole of rule 25.3. I find that rule 25.3 must be read as referring not to registered post but to the nearest equivalent which will provide similar evidence of posting and receipt as registered post. I observe that Council has since adopted a report under rule 12.5 to construe rule 25.3 to mean that the expulsion or suspension of a member shall be operative from the time notice of the expulsion or suspension is despatched by whatever means provides objective evidence of despatch.
36. In reaching this decision I am aware that it has implications which are counter intuitive. For example, must notice by registered post be sent to someone who has been told to his or her face at a meeting, that he or she is suspended or to someone who has been handed a letter of suspension at that meeting? Notwithstanding such issues, there are many good reasons to have a rule which identifies with certainty the operative date of such a significant event as suspension from membership. Those who drafted the rules must be taken to have had in mind the competing advantages and disadvantages of such a provision. They were entitled to consider the importance to members of suspension or expulsion, the advantages in knowing the precise date of any such suspension or expulsion, as well as the comparative ease for the Union to ensure that notice is sent as required by the rules. Having regard to such matters, I find that the fact that Mr Moloney had actual knowledge of his suspension does not drive me to an interpretation of rule 25.3 which would be at such variance to its ordinary literal meaning. The Union has adopted a rule which sets a very specific, but not unduly onerous, hurdle to be overcome before a member can be deprived of his or her rights. Having set that hurdle, the Union is bound by it. Nevertheless, I accept the evidence of the Union that it considered in good faith that there was no need to give notice by way of registered post in the case of an administrative suspension under regulation 8.7 in contrast to a disciplinary suspension and that, in any event, Mr Moloney had actual notice of his suspension under regulation 8.7 shortly after 20 September.

37. Accordingly, I find that the letter of suspension sent by the General Secretary to Mr Moloney on 20 September in the ordinary course of post was not sent in accordance with rule 25.3. I therefore declare that Mr Moloney's second complaint is upheld.
38. When I make a declaration, I must also make an enforcement order under section 108B(3) of the 1992 Act unless I consider that to do so would be inappropriate. On the facts of this case, Mr Moloney's suspension was reconsidered by Council at its meeting on 14/15 December 2011. Council decided again to suspend him and communicated this decision to him by special delivery. In these circumstances I do not consider it appropriate to make an enforcement order. The enforcement order that Mr Moloney requested that I make related to the giving of a warning to the General Secretary for his conduct in this matter and to the completion of any disciplinary enquiry into Mr Moloney's conduct by August 2011. Any such enforcement orders would be outside my jurisdiction.

### Complaint Three

39. Mr Moloney's third complaint is as follows:-

*"That on or around 20 September 2011 the Union breached rule 16, in particular rule 16.3, 16.4 and 16.5, by the Council making a decision to suspend Mr Paul Moloney. No Council meeting took place between the beginning of July to the beginning of October 2011 at which such a decision could have been taken in compliance with these rules".*

40. Rules 16.3, 16.4 and 16.5 of the rules of the Union provides as follows:

*16.3 The business shall be decided by a majority of the Council present and voting. The Chair of any Council meeting shall upon equality of votes have a second and casting vote.*

*16.4 The Council shall not have power to determine on any business unless there is present:*

- a) a quorum of one-quarter of the elected members plus*
- b) either the Chair, Vice-Chair or Deputy Vice-Chair of the Council, plus*
- c) the General Secretary, or in a non-voting, non-advisory capacity during his unavoidable absence, his appointee as a recorder of the meeting or in the event that the General Secretary has not made such an appointment, the Deputy General Secretary, if any, or an Assistant General Secretary appointed by those members of the Council present for this purpose.*

*16.5 Voting shall be by a show of hands but the Chair of any Council meeting may decide that a vote be taken by ballot and shall do so if a majority of the members present so request.*

### Summary of submissions

41. Mr Moloney submitted that the decision to suspend him from membership could only be taken by Council at a meeting convened in accordance with rule 16. He argued that the decision to suspend him was not made at such a meeting and was therefore in breach of rule 16. Mr Moloney noted that rule 16.3 and 16.4 referred to members being "present" at a meeting and rule 16.5 refers to members voting by show of hands. He submitted that when the decision to suspend him was taken, there were no members "present" and the voting was not by show of hands. He further argued

that in any democratic body, Council must discuss and debate before it takes a decision as important as the suspension of a member. Mr Moloney submitted that it was no excuse for the Union to argue that in a union of seafarers it was difficult to call an urgent meeting of Council as the quorum for such meetings had been reduced to 25% of those eligible to attend and that its powers could be delegated to an Executive Committee. He further submitted that for Council to make decisions other than at a meeting which conformed with rule 16, there would need to be an express rule to that effect. As there was no such express rule, either permitting or prohibiting Council from making a decision in this way, Mr Moloney argued that the rules were silent and rule 12.5 required a positive decision by Council to determine any matter on which the rules are silent. As there was no such positive decision, Mr Moloney concluded that all decisions must be taken by Council in accordance with rule 16.


42. Mr Cooper, for the Union, submitted that a consideration of the circumstances in which Council could make decisions required the rules to be read as a whole and not merely a consideration of rule 16. Mr Cooper referred in particular to rule 12.1 which vests absolute control and administration of the affairs of the Union in Council, subject only to the rules and the General Meeting. He argued that, read in context, rule 16 was in effect the standing orders governing meetings of Council and was not exhaustive as to how Council could operate. Mr Cooper considered it be significant that when the General Secretary sent his email of 13 September 2011, no member of Council responded by either seeking or requisitioning a meeting in accordance with rule 16.1. He also referred to the evidence of Mr Epsom, which demonstrated occasions when a meeting of Council was inquorate and he, as the then chairman, proceeded by taking so-called "Chairman's action" with his decisions being ratified at the next meeting of Council. Further, Mr Cooper observed that there were provisions which required there to be a meeting of Council, such as regulation 8.4 requiring disciplinary decisions to be taken at a meeting, but that otherwise there was no such requirement to call a meeting of Council to consider a suspension under regulation 8.7.

### **Conclusion – Complaint Three**

43. The issue at the heart of this complaint is whether Council can make decisions other than at meetings which satisfy the various requirements of rule 16, in circumstances in which the rules do not require that such a meeting is held. This issue requires a consideration of the rules as a whole and in context. The rules of the Union clearly anticipate the calling of regular meetings for the transaction of business following full debate and it may fall outside the scope of the rules if it became the practice for all decisions of Council to be taken by email exchange. However, it is less clear that Council has no power to reach a decision outside a meeting in any circumstances. In my judgement there are four main factors which indicate that Council has such a power. First, the absence of any rule requiring all decisions of Council to be taken at a meeting. Secondly, the wide powers of Council in rule 12.1. Thirdly, the express requirement in regulation 8.4 for there to be a meeting to determine disciplinary issues. Fourthly, the ability of members of Council to refuse to participate in such an exercise and, with sufficient support, to requisition a full meeting. The answer to the argument regarding possible abuse of such a decision-making process is that at all times power remains in the hands of members of Council. With this in mind, it seems less surprising that, properly construed, the rules do not prohibit members of Council

making a decision outside the strict requirements of a meeting if they consider that the circumstances are appropriate for them to do so. Having regard to these factors, I find that the rules of the Union do not prohibit the taking of a decision by Council outside a meeting convened in accordance with rule 16.

44. Accordingly, I find that the decision reached by a majority of the members of Council by 19 September 2011 that Mr Moloney be temporarily suspended as a member of the Union pending a disciplinary enquiry was a decision which was validly made and did not constitute a breach of rule 16 as alleged.
45. For the above reasons I refuse to make the declaration sought by Mr Moloney that on or around 20 September 2011 Nautilus International breached rule 16 of its rules, in particular rule 16.3, 16.4 and 16.5, by the Council making a decision to suspend him other than at a meeting which complied with rule 16.

A handwritten signature in black ink, appearing to read 'David Cockburn', written over a horizontal line.

**David Cockburn**  
**The Certification Officer**