

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

MR FLEMING-COONEY

v

UNITE THE UNION (Amicus Section)

Date of Decision

23 July 2009

DECISION

Upon application by Mr Fleming-Cooney (“the Claimant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

I dismiss the Claimant’s application for a declaration that Unite the Union breached rules 3.7, 3.7.1, 5.3 (v) and 5.3 (vi) of its then General Rules and rules 26(8) and (9) of its then Amicus Sectional Rules at a special meeting of its First Executive Council on 9 October 2008 by purporting to amend those rules beyond its powers to do so.

REASONS

1. Mr Fleming-Cooney is a member of Unite the Union (“the Union”). By an application received at the Certification Office on 18 November 2008, the Claimant made a complaint of breaches of union rules in relation to the amendments to the rules of the Union which were purported to have been made at a special meeting of its Executive Council on 9 October 2008. Following correspondence with the Claimant, his complaint was confirmed by him in the following terms:-

“that the Union acted in breach of General Rules 3.7, 3.7.1, 5.3 (v) and 5.3 (vi) and Amicus Sectional Rules 26(8) and (9) at a special meeting of its First Executive Council on 9 October 2008 by purporting to amend those rules beyond its powers to do so. I seek a declaration that the rules, as purportedly amended, are therefore null and void and the original rules continue to have effect”

2. The grounds upon which the Claimant alleged that the Union acted outside its powers were stated to be as follows:
 - i) *the purported amendments do not conform to and are in breach of the terms of the Instrument of Amalgamation;*
 - ii) *the Instrument of Amalgamation forms part of the rules governing the Union in the transitional period 27 April 2007 – 1 November 2008;*

- iii) *general rule 3.1 prohibits the Joint Executive Council (JEC) from amending those rules which relate solely to the internal affairs of the Amicus Section;*
- iv) *general rule 3.3 only allows the JEC to do such things and authorise such acts as are consistent with rules and objects of the Union;*
- v) *the purported amendment of general rule 3.7.1 is in conflict with the general rule 3.7; and*
- vi) *in the alternative, general rule 5.2 (ii) does not allow the amendments to the rules of the Amicus Section purportedly made by the First Executive Council in the circumstances of this case.*

3. I investigated the alleged breaches in correspondence. A hearing took place on 7 July 2009. At the hearing, the Claimant represented himself and called no witnesses, other than himself. The Union was represented by Mr Peter Edwards of Counsel instructed by Mr Paul Evans of Thompsons solicitors. The Union called one witness, Mr Doug Collins, an Assistant General Secretary of the Union. Both the Claimant and Mr Collins provided a witness statement. The Union provided a written skeleton argument. A 276 page bundle of documents was prepared by my office containing documents the parties considered relevant, including the rules of the Union.

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 Fleming-Cooney has been a member of the Union and its predecessors for over 50 years. He became a full-time officer in 1986 and accepted voluntary redundancy in 2004. He is a member of the Burnley branch of the Union and stated that he commenced this application only when the internal representations that his branch had made to Head Office about the purported rule amendments were not resolved to the satisfaction of the branch.
6. 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. On that date both Amicus and the TGWU ceased to exist. The Union was then called “The Amalgamated Union” but changed its name to Unite the Union on 23 May 2007.
7. The members of Amicus and the TGWU voted by large majorities to accept the amalgamation. They did so having been provided with the terms of the Instrument of Amalgamation and the proposed new General Rules. These 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, very importantly, 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:
- 7.1 Immediately following the effective date of the amalgamation there was to be a set of General Rules which would be binding on all members.
 - 7.2 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.

- 7.3 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 the next EC would be elected in a common ballot of the whole membership.
- 7.4 The New Rules were to become effective by 1 November 2008, at which time the Amicus and TGWU sections would cease to exist.
- 7.5 The two General Secretaries of the former unions were to become the Joint-General Secretaries of the New Union. Their positions were carefully crafted to maintain the balance of power between the two sections. For example, General Rule 3.2 provided that either Joint-General Secretary could require any resolution before the JEC to achieve a 75% majority if he considered the issue to be so fundamental.
- 7.6 In the negotiations leading up to the amalgamation, an issue arose about the retirement date of the proposed Joint-General Secretaries. Mr Simpson was the General Secretary of Amicus. He was to retire on 22 December 2009, upon reaching 65. Mr Woodley was the General Secretary of the TGWU. He was to retire in January 2013, upon reaching 65. To avoid the situation whereby Mr Woodley would be the sole General Secretary for a period of just over 3 years, it was agreed that Mr Simpson would postpone his retirement by a year to December 2010 and that Mr Woodley would retire 12 months after Mr Simpson left office, effectively bringing forward his retirement by one year.
- 7.7 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.
- 7.8 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.
8. It is significant in the context of this case that section 46 of the 1992 Act provides, amongst other things, that a general secretary shall not hold such a position for more than five years after having been elected without being re-elected in an election which satisfies the requirements of Chapter IV of the 1992 Act. Mr Simpson was last elected in July 2002 and Mr Woodley in 2003. Accordingly, for them to act as Joint-General Secretaries or General Secretary until 2010 and 2011 respectively, they would either need to have stood for re-election or be exempted from this requirement by section 58 of the 1992 Act, by virtue of being a person nearing retirement. It was considered by both former Unions that section 58 applied.
9. I accept the Union’s evidence that in the period before the ballot on the amalgamation it was well known, although not universally known, within Amicus that Mr Simpson would be 65

in December 2009 and that the proposed structure would involve him remaining in office for an additional year beyond 2009.

10. Following the amalgamation, the constitutional arrangements were duly followed. On 24 April 2008, the JEC agreed the New Rules for the whole Union. On 1 May 2008, the FEC took up office. On 31 July 2008, the membership voted on the New Rules and approved them by an overwhelming majority.
11. The event which precipitated the present problem arose in August 2008. A complaint was made to me that, in effect, Mr Simpson was unable to comply with section 58 of the 1992 Act and would therefore be unable to continue in office after his 65th birthday on 22 December 2009. The Union do not concede that Mr Simpson was unable to comply with section 58 but decided, they say out of an abundance of caution, to hold an election for Joint-General Secretary of the Amicus section. If Mr Simpson won such an election, he would then satisfy the requirement of section 46 of the 1992 Act. However, the rules of the Union did not provide for an election of a Joint-General Secretary. To overcome this difficulty, the FEC (which had by then taken office) decided to amend the rules.
12. The General Rules of the Union enabled both the General Rules and the Section Rules to be amended by a 75% majority of the EC. General Rule 5.2 provides as follows:

General Rule 5.2(i)

The general rules may be amended by a resolution of the Joint Executive Council supported by not less than seventy-five per cent of its members provided that any such amendment shall cease to have effect on the second anniversary of the date in which it took effect if it has not been ratified in the meantime by a majority of those voting in a postal ballot of all the members of the Union.

General Rule 5.2(ii)

Notwithstanding the provision of these rules, the Joint Executive Council shall have power by a resolution supported by not less than seventy-five per cent of its members to amend any of the general or sectional rules to:

- (a) *Ensure that the general and sectional rules do not conflict with any requirement of law, whether imposed by statute or otherwise.*
- (b) *Give effect to the terms of the Instrument of Amalgamation pursuant to which the Union came into being.*

13. On 9 October 2008, there was a special meeting of the FEC which carried the proposed amendments by a majority of 69 to 3, an 85% majority of the membership of the FEC. These amendments had the following broad effects:
 - 13.1 The coming into effect of the New Rules was postponed from 1 November 2008 to 1 May 2009.
 - 13.2 There was to be an election for the position of Joint-General Secretary of the Amicus section, to be completed before 1 May 2009.
 - 13.3 The term of office of the newly elected Joint-General Secretary would be from 23 December 2009 to 23 December 2010.
 - 13.4 Mr Simpson could stand in that election.

14. By 20 October 2008, the nomination process for the election of Joint-General Secretary of the Amicus section had begun and on 7 March 2009 the result was declared. Mr Simpson was elected. He received 60,048 votes, Mr Hicks 39,307, Mr Coyne 30,603 and Mr Reuter 28,283.
15. On 1 May 2009, the New Rules came into effect. These replaced the General Rules and the Rules of the two sections. The former Amicus and TGWU sections then no longer existed, having been subsumed within the Union as a whole under the New Rules.
16. This complaint was made by a registration of complaint form received at my office on 18 November 2008.

The Relevant Statutory Provisions

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

Section 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) ...*

The Instrument of Amalgamation

18. The Instrument of Amalgamation provides as follows:

“THIS INSTRUMENT OF AMALGAMATION

made between Amicus and the Transport and General Workers Union

(“TGWU”) (together “the merging unions”) shall, if duly approved by a resolution of the members of each of the merging unions take effect upon the date of registration of this instrument (“the effective date”)

IT IS HEREBY AGREED AS FOLLOWS:-

- 1 Upon the effective date the members of each of the merging unions shall become members of the New Union and shall become subject to that Union’s rules.*
- 2 The name of the amalgamated union shall be “The Amalgamated Union”.*
- 3 The rules of the New Union shall consist of:*
 - 3.1 The general rules which are set out in the Schedule hereto.*
 - 3.2 The rules of the Amicus Section which shall consist of the rules of Amicus in force immediately before the effective date insofar as they are consistent with the general rules. The Amicus Sectional Rules shall apply to all members of the New Union who were members of Amicus immediately before the effective date or who, having joined the New Union since the effective date, have been allocated to the Amicus Section.*
 - 3.3 The rules of the TGWU Section shall consist of the rules of TGWU in force immediately before the effective date insofar as they are consistent with the general rules. The TGWU Sectional Rules shall apply to all members of the New Union who*

were members of TGWU immediately before the effective date or who, having joined the New Union since the effective date, have been allocated to the TGWU Section.

3.4 The general rules provide that a new set of rules to supersede the general rules and the sectional rules shall be prepared to come into effect on 1st November 2008 or such earlier date as may be agreed when those new rules are approved.

4 The assets, funds and property of the merging unions shall, upon the effective date, continue to be held by the corporate trustees or individuals who were the trustees of the merging unions prior to the effective date in trust and for the benefit of and in accordance with the rules of the New Union.

5 Upon the effective date the members of Amicus shall become members of the Amicus Section and the members of TGWU shall become members of the TGWU Section of the New Union. Members joining after the effective date shall be allocated to the appropriate Section in accordance with the provisions of the general rules.

6 As from the effective date the members of the Amicus and TGWU Sections of the New Union shall pay contributions to the appropriate Sections at the same rates as those payable to their respective merging unions immediately before the effective date.

7 As from the effective date the members of the Amicus and TGWU Sections of the New Union who before the effective date paid contributions towards the political fund of their respective merging unions shall continue to pay contributions towards the political fund of the New Union until such time as notice is given by a member requesting an exemption from doing so, or in the case of a contributing Northern Ireland member, until such time as the member gives a notice of withdrawal.

8 Upon the effective date the employees of the merging unions shall become employees of the New Union upon terms and conditions of employment no less favourable than those in force immediately before the effective date. No employee of either of the merging unions shall be declared redundant as a direct result of the amalgamation of those unions without that employee's consent.

9 Upon the effective date:-

9.1 The Joint Executive Council of the New Union shall consist of 30 members being 15 members from each of the Amicus and TGWU Sections.

9.2 The members from the Amicus Section shall be elected by and from the National Executive Council of the Amicus Section. If a member of the Amicus Section who is a member of the Joint Executive Council shall cease to hold that office for any reason the vacant position shall be filled by such member of the National Executive Council of the Amicus Section as that National Executive Council shall determine.

9.3 The members from the TGWU Section shall be elected by and from the General Executive Council of the TGWU Section. If a member of the TGWU Section who is a member of the Joint Executive Council shall cease to hold that office for any reason the vacant position shall be filled by such member of the General Executive Council of the TGWU Section as that General Executive Council shall determine.

10 The period of membership of every member of the New Union who was a member of either of the merging unions immediately prior to the effective date shall be treated, for all purposes, as a continuous period of membership of the New Union from the date of the member's last entry into membership of either of the merging unions.

Signed on behalf of Amicus

**Signed on behalf of The Transport
and General Workers Union**

.....
DEREK SIMPSON
General Secretary

.....
TONY WOODLEY
General Secretary

.....
National Executive Council Member

.....
General Executive Council Member

.....
National Executive Council Member

.....
General Executive Council Member

The Relevant Union Rules

19. The General Rules of the Union, before and after they were amended, provided as follows:

General Rule 3.1

The government, management and control of the Union shall be vested in the Joint Executive Council except that each Section, shall, subject to the provisions of these general rules, have autonomy in respect of all matters which relate solely to the internal affairs of that Section and which do not affect the interests of the other Section or any of the members of that other Section.

General Rule 3.2

The Joint Executive Council shall make its decisions on the basis of a simple majority of those present, with each member being entitled to one vote, except in matters relating to the drafting of the rules to be prepared in accordance with general rule 5.3 or when either or both of the Joint General Secretaries believe that an issue is so fundamental to the Union that a majority of not less than seventy-five per cent of those voting shall be required.

General Rule 3.3

The Joint Executive Council may do such things and authorise such acts consistent with the rules and objects of the Union as it may deem expedient to promote the interests of the Union or any of its members. The Joint Executive Council's powers shall include, inter alia, the authorization of industrial action, approval of dispute benefit and repudiations for the whole Union (covering both sections).

General Rule 3.7

The General Secretary of Amicus and the General Secretary of the TGWU at the time of the registration of the Instrument of Amalgamation shall both serve as Joint General Secretaries of the New Union; each additionally being responsible for the section representing their respective predecessor union.

General Rule 3.7.1

In order to provide continuity from the transitional period into the New Union and, together with the other Joint General Secretary, to oversee the election of the General Secretary Designate of the New Union the Joint General Secretary of the Amicus Section shall be entitled to remain in office until 23 December 2010. If at the date the Joint General Secretary of the Amicus section's elected term of office would otherwise expire, he has been a full time employee of the New Union and its predecessor unions for 10 years (whether or not continuous) and is within 5 years of retirement age, he shall be entitled to continue in office until retirement age without further election.

General Rule 3.7.1 (After being amended)

There shall be an election for the position of Joint General Secretary of the Amicus Section before 1 May 2009. The term of office of the successful candidate in that election shall begin no earlier than 23 December 2009 and shall expire on 23 December 2010. The Joint General Secretary of the Amicus section as at October 2008 may stand as a candidate in that election and if elected his retirement age shall be 66. The election shall, subject always to the provisions of these General Rules, take place in accordance with the Amicus Sectional Rules except that references in the Amicus Sectional Rules to the National Executive Council shall be read as references to the Executive Council provided for by these General Rules. Where the Amicus Sectional Rules are inconsistent with these General Rules, these General Rules shall prevail.

General Rule 3.7.2

An election will be held for a General Secretary Designate of the New Union, elected by all members of the New Union, in the last twelve months during which the Joint General Secretary of the Amicus section holds office so that the election will be concluded within the last month of that twelve month period. In the event of this being impossible, such election will be concluded as soon as possible after the Joint General Secretary of the Amicus Section has ceased to hold office.

General Rule 3.7.2 (After being amended)

An election shall be held for a General Secretary Designate of the New Union, elected by all members of the New Union, in the 12 month period ending 23 December 2010 so that the election will be concluded within the last month of that twelve month period. In the event of this being impossible, such election will be concluded as soon as possible after the Joint General Secretary of the Amicus Section (elected pursuant to rule 3.7.1 above) has ceased to hold office.

General Rule 3.7.3

The remaining Joint General Secretary shall retire no more than twelve months after the date on which the Joint General Secretary of the Amicus Section leaves office and shall be entitled to continue in office without re-election until twelve months after the Joint General Secretary of Amicus has left office.

General Rule 3.7.3 (After being amended)

The Joint General Secretary of TGWU Section shall retire no more than twelve months after the date on which the Joint General Secretary of the Amicus Section elected pursuant to General Rule 3.7.1 leaves office and shall be entitled to remain in office without re-election until twelve months after such Joint General Secretary of the Amicus Section has left office.

General Rule 5.2(i)

The general rules may be amended by a resolution of the Joint Executive Council supported by not less than seventy-five per cent of its members provided that any such amendment shall cease to have effect on the second anniversary of the date in which it took effect if it has not been ratified in the meantime by a majority of those voting in a postal ballot of all the members of the Union.

General Rule 5.2(ii)

Notwithstanding the provision of these rules, the Joint Executive Council shall have power by a resolution supported by not less than seventy-five per cent of its members to amend any of the general or sectional rules to:

- (c) Ensure that the general and sectional rules do not conflict with any requirement of law, whether imposed by statute or otherwise.*
- (d) Give effect to the terms of the Instrument of Amalgamation pursuant to which the Union came into being.*

General Rule 5.3(v)

The First Executive Council for the whole New Union will arrange for a ballot of the whole membership of the Union for approval of the new rules in time for these rules to replace and supersede both the sectional and the general rules, and to become the entire rules for the New Union no later than eighteen months from the effective date of the Instrument of Amalgamation, or such earlier dates as may be agreed by that First Executive Council.

General Rule 5.3(v) (After being amended)

The First Executive Council for the whole New Union will arrange for a ballot of the whole membership of the Union for approval of the new rules in time for these rules to replace and supersede both the sectional and the general rules, and to become the entire rules of the Union on 1 May 2009.

General Rule 5.3(vi)

For its period of office prior to the new rules coming into force, the first Executive Council will assume the powers of the Joint Executive Council (which, together with the Sectional

Executives shall have ceased to exist upon the First Executive Council taking office), save that it will not have the power to amend the provision of the New Rule Book as approved by the Joint Executive Council. After the New Rule Book comes into force (no later than six months into the period of office of the First Executive Council) the powers of that Executive Council will be as stated in that New Rule Book.

General Rule 5.3(vi) (After being amended)

For its period of office prior to the new rules coming into force, the first Executive Council will assume the powers of the Joint Executive Council (which, together with the Sectional Executives shall have ceased to exist upon the First Executive Council taking office), save that it will not have the power to amend the provision of the New Rule Book as approved by the Joint Executive Council. After the New Rule Book comes into force, the powers of the Executive Council will be as stated in that New Rule Book.

20. The rules of the Amicus Section of the Union provided as follows:

Amicus Sectional Rule 26(8)

The General Secretary shall retire on attaining age 65. If at the date the General Secretary's term of office would otherwise expire, he/she has completed 10 years' continuous service as a full time officer and is within 5 years of age 65, he/she shall be entitled to continue in office until retirement without further election.

Amicus Sectional Rule 26(8) (After being amended)

If at the date the General Secretary's term of office would otherwise expire, he/she has completed 10 years' continuous service as a full time officer and is within 5 years of age 65, he/she shall be entitled to continue in office until retirement without further election.

Amicus Sectional Rule 26(9)

A candidate for election as the General Secretary must be eligible to vote in the election; have 10 years' continuous adult membership of the Union; (unless he/she is seeking re-election) be less than 60 years of age at the date the term of office will commence: and have received nominations from at least 25 branches and from at least 25 workplace representatives employed at 15 different workplaces.

Amicus Sectional Rule 26(9) (After being amended)

A candidate for election as the General Secretary must be eligible to vote in the election; have 10 years' continuous adult membership of the Union and have received nominations from at least 25 branches and from at least 25 workplace representatives employed at 15 different workplaces.

Summary of Submissions

21. Mr Fleming-Cooney submitted that each of the rule changes made by the FEC at its special meeting on 9 October 2008 were null and void as they were made outside its powers. His primary submission was that the Instrument of Amalgamation was part of the Rules of the Union until the New Rules were adopted and that the Instrument of Amalgamation provided for the New Rules to be adopted by 1 November 2008. He argued that General Rule 5.2 did not allow for any amendments to the Instrument of Amalgamation, that the amendment to General Rule 5.3(iv) was therefore ineffective and that accordingly the New Rules did come into effect on 1 November 2008. He also argued that the New Rules, read together with the Instrument of Amalgamation, impliedly provided that their commencement date was 1 November 2008 and that General Rule 5.2 provided no power to amend the New Rules, as is made clear by General Rule 5.3(iv). In this event, Mr Fleming-Cooney submitted that the election for Joint-General Secretary could not have been continued after 1 November 2008. As to the rules relating to Mr Simpson's election, Mr Fleming-Cooney pointed out that there was a conflict between General Rule 3.7.1 and Amicus Section Rule 26(8), in that the

Section Rule required the General Secretary to retire at the age of 65, whereas the General Rules stated that he was to remain in office until 23 December 2010 when Mr Simpson would be 66. In his complaint, Mr Fleming-Cooney described the inclusion of a reference to 2010 in Rule 3.7.1 of the General Rules as being a mistake but asserted that the consequences of this mistake was that Mr Simpson would have to vacate office in December 2009, as the purported amendment to Rule 3.7.1 was ineffective. He argued that the identities of the Joint-General Secretaries of the Union were fixed by General Rule 3.7 as being Mr Simpson and Mr Woodley and that General Rule 3.7.1 concerned only the date upon which Mr Simpson left office. He maintained that General Rule 3.7.1 could not be amended to provide for Mr Simpson's re-election and that, if it did, it would then conflict with General Rule 3.7 which established who are to be the Joint-General Secretaries. Mr Fleming-Cooney argued that the FEC should therefore have also amended General Rule 3.7 and that by not doing so the amendment to General Rule 3.7.1 was a breach of General Rule 3.7. Mr Fleming-Cooney withdrew his argument that General Rule 3.1 prohibited the FEC from amending any of the rules of the Amicus section on the basis that General Rule 3.1 provided for the section to be autonomous. He accepted that a Joint-General Secretary had responsibilities that went beyond his particular section. However, Mr Fleming-Cooney maintained that the amendments that were made were contrary to the rules and objects of the Union and therefore invalid as being a breach of General Rule 3.3. In the alternative, Mr Fleming-Cooney submitted that the amendments of the rules of the Amicus section were outside the scope of the amendments which were allowed by General Rule 5.2(ii).

22. For the Union, Mr Edwards submitted that the Instrument of Amalgamation did not constitute a part of the rules of the Union at any time but was rather an agreement between the two former unions, which unions ceased to exist at the date the Instrument of Amalgamation was registered. He argued that, from the effective date, the rules of the Union were the General Rules and the Sectional Rules, including the provision of the General Rules which provided for their amendment. He maintained that the reference to 1 November 2008 in paragraph 3.4 of the Instrument of Amalgamation was a reference to what was to be contained in the General Rules and to which effect was given by General Rule 5.3(iv) and 5.3(vi). Mr Edwards further submitted that General Rule 5.2 (read together with General Rule 5.3(vi)) gave the FEC the power to amend both the General and Sectional Rules. He argued that there was an unconditional power to amend the General Rules in General Rule 5.2(i) and that accordingly the challenges to the amendments to General Rules 3.7.1, 5.3(iv) and 5.3(vi) could not stand. He also pointed out that there had been no amendment to General Rule 3.7, so the complaint relating to that rule could not stand in any event. With regard to the amendments to the rules of the Amicus section, Mr Edwards submitted that these were unnecessary as General Rule 2.2 provided that the General Rules were to prevail over the Sectional Rules when in conflict. However, he maintained that the amendments were precautionary and were within General Rule 5.2(ii) as they were to ensure that the Section Rules did not conflict with the General Rules. He argued that the requirements imposed by the General Rules were "*a requirement of law*" for the purposes of General Rule 5.2(ii)(a). He further argued that the amendments were to give effect to the terms of the Instrument of Amalgamation as the Instrument expressly incorporated the General Rules and these made it clear that Mr Simpson was intended to remain as Joint-General Secretary until December 2010, which it was the purpose of the amendment to secure. By way of general comment, Mr Edwards stated that the structure that had been designed for the amalgamation was one intended to secure continuity and a balance of power between the two former unions during the transitional stage. He argued that this is what the members had voted for originally and which they confirmed both in their votes on the New Rules and

when re-electing Mr Simpson. He submitted that it was this structure which the amended rules were intended to preserve.

Conclusions

23. Mr Fleming-Cooney's complaint is in the following terms:
"that the Union acted in breach of General Rules 3.7, 3.7.1, 5.3 (v) and 5.3 (vi) and Amicus Sectional Rules 26(8) and (9) at a special meeting of its First Executive Council on 9 October 2008 by purporting to amend those rules beyond its powers to do so. I seek a declaration that the rules, as purportedly amended, are therefore null and void and the original rules continue to have effect"
24. In order to determine this complaint I must consider what amendments were made by the FEC on 9 October 2008 and whether those amendments were made within its powers.
25. I observe firstly that no amendment was made to General Rule 3.7 by the FEC on 9 October 2008 or at any other time. Accordingly, the complaint that this rule was amended outside the powers of the FEC is misconceived.
26. As to the remainder of the rules about which complaint is made, the Union maintains that it had the power of amendment contained in General Rule 5.2. Although I have set this out earlier, it is appropriate that I set it out again.

General Rule 5.2(i)

The general rules may be amended by a resolution of the Joint Executive Council supported by not less than seventy-five per cent of its members provided that any such amendment shall cease to have effect on the second anniversary of the date in which it took effect it has not been ratified in the meantime by a majority of those voting in a postal ballot of all the members of the Union.

General Rule 5.2(ii)

Notwithstanding the provision of these rules, the Joint Executive Council shall have power by a resolution supported by not less than seventy-five per cent of its members to amend any of the general or sectional rules to:

- (a) *Ensure that the general and sectional rules do not conflict with any requirement of law, whether imposed by statute or otherwise.*
- (b) *Give effect to the terms of the Instrument of Amalgamation pursuant to which the Union came into being.*

27. General Rule 5.2 makes a distinction between General Rules and Section Rules. General Rule 5.2(i) deals with General Rules and gives the EC a broad power of amendment if it can achieve a 75% majority of members and if the result is ratified by a postal ballot within two years. This latter condition is not in issue and I am satisfied that the EC secured a majority of more than 75% for each of the proposed amendments. Accordingly, I find that the amendments of General Rules 3.7.1, 5.3(v) and 5.3(vi) were carried out within the powers of the FEC. By General Rule 5.3(vi) the FEC assumed all the powers of the JEC upon assuming office.
28. The rules of the Amicus section were purportedly amended in accordance with General Rule 5.2(ii). There were two such amendments; to rules 26(8) and 26(9). First, the amendment to rule 26(8) of the Amicus section removed the requirement that the General Secretary should retire on attaining age 65. As noted by Mr Fleming-Cooney, this rule was in conflict with General Rule 3.7.1 which provided for Mr Simpson remaining in office for a further year to 2010. Such conflicts are provided for in General Rule 2.2, which establishes that in these circumstances the General Rule shall prevail. Accordingly, the removal of the above

requirement from Section Rule 26(8) was arguably unnecessary as the requirement had no effect after the amalgamation. I nevertheless find that the amendment was to give undisputed effect to General Rule 3.7.1. I further find that the General Rules were expressly incorporated into the Instrument of Amalgamation by paragraph 3.1 of that Instrument and that, accordingly, the amendment of Section Rule 26(8) was to give effect to the terms of the Instrument of Transfer. I therefore conclude that the amendment of Section Rule 26(8) was within the power conferred on the FEC by General Rule 5.2(ii).

29. Secondly, the amendment to rule 26(9) of the Amicus section removed the words “; (*unless he/she is seeking re-election*) *be less than 60 years of age at the date the term of office will commence*”. The effect of this amendment was to permit candidates to stand who would be 60 years of age or more at the date the term of office would commence. Mr Simpson was in this category as regards the subsequent election. However, he would have been able to stand in any event as he was seeking re-election and therefore fell within the words in parenthesis in the deleted passage. In these circumstances, it is questionable whether this deletion was for either of the purposes permitted by General Rule 5.2(ii). In considering this issue I have had regard to the situation in which the Union found itself in August 2008 when considering whether to hold a further election and the necessary rule changes to enable there to be such an election. The Union’s predecessors had experience of two former General Secretaries, Mr Lyons and Mr Jackson, who had both encountered difficulties in attempting to rely upon the exemption in section 58 of the 1992 Act. The Union decided to make not only those amendments which were strictly necessary to achieve its objective and also others which were described by Mr Edwards as “*precautionary*”. I find that the amendment to rule 26(9) of the Amicus section fell within this latter description. It had no other purpose but to give effect to the method that had been devised for ensuring that the new Union had continuity and a balance of power. This method had been set out in the General Rules which had themselves been incorporated into the Instrument of Amalgamation and voted upon. I therefore find that the amendment to rule 26(9) of the Amicus section was to give effect to the terms of the Instrument of Amalgamation and that it was therefore within the power conferred on the FEC by General Rule 5.2(ii).
30. Mr Fleming-Cooney’s main submission was that the Instrument of Amalgamation formed part of the rules of the Union, at least until the New Rules took effect, and that accordingly, by paragraph 3.4 of the Instrument, the New Rules had to take effect by 1 November 2008. I reject this submission on the basis that the terms of the Instrument of Amalgamation were not a part of the General Rules of the Union, even though the General Rules were expressly incorporated into the Instrument. In voting to accept the amalgamation, the members of the two former unions agreed to be bound by the rules of the new Union. The Instrument of Amalgamation was an agreement between the two former unions which set out what these rules would contain at the date of Registration of the Instrument. It would have been possible to entrench certain rules, such as the date upon which the New Rules would take effect, making it impossible for such rules to be amended under General Rule 5.2 by the JEC or FEC, but none of the rules in question were entrenched. It was therefore possible for the new Union to use its power of amendment at any time after it came into existence. Within 15 months of Registration, the Union met with a problem which could have dislocated the careful basis upon which agreement to the amalgamation had been obtained. Its proposed solution to this problem required an amendment to the rules. In these circumstances I find nothing improper in the use of an express provision which allows for the amendment of rules. I find that such amendments do not constitute acts which are inconsistent with the rules and objects of the Union within the meaning of General Rule 3.3.

31. For the above reasons I dismiss Mr Fleming-Cooney's application for a declaration that Unite the Union breached rules 3.7, 3.7.1, 5.3(v) and 5.3(vi) of its then General Rules and rules 26(8) and (9) of its then Amicus Sectional Rules at a special meeting of its First Executive Council on 9 October 2008 by purporting to amend those rules beyond its powers to do so.

David Cockburn
The Certification Officer