PREM 19/261

Industrial Relations Legislation.
Picketing and the closed shop and funds for union ballots. Amendments by order of the Employment Protection Act.
Trade Union Immunities. Enquiry into union recruitment activities. The Leggatt report.
Employment Bill. Part 2.

INDUSTRIAL POLICY

PART 1: MAY 1979

PART 2: OCTOBER 19

PREM 19/261

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~4.10.79~~							
~~18.10.79~~							
~~22.10.79~~							
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~~31.1.80~~							
~~1.2.80.~~							
Part 2 ends							

PART 2 ends:-

HMT Internal Hlte 1.2.80

PART 3 begins:-

CBI Press Release 3.2.80

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
C(79) 43	12/10/79
CC(79) 17th Conclusions, Minute 4	18/10/79
C(79) 58	19/11/79
CC(79) 22nd Conclusions, Item 5	22/11/79
L(79) 95	30/11/79
E(80) 1	11/01/80
E(80) 1st Meeting, Item 2	15/01/80

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed C A Wayland Date 6 May 2010

PREM Records Team

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

1. Employment Bill, ref. 48/1 published by HMSO, 6 December 1979 [ISBN 0 10 309780 5]
2. TUC commentary on the Employment Bill, published by Trades Union Congress, January 1980

Signed C M Wayland Date 6 May 2010

PREM Records Team

SECRET

Personal copy
Mr Lankester
Mr Hoskyns

3

1. MR DIXON
2. CHANCELLOR OF THE EXCHEQUER

cc: Sir Douglas Wass
Mr Ryrie
Mr F Jones
Mr Monck
Miss Sinclair

Mr Davies (T. Sol).

INDUSTRIAL RELATIONS LEGISLATION

Following the meeting with the Prime Minister about steel on 28 January you asked for a draft which you might send as a pre-emptive letter to Mr Prior or a minute to the Prime Minister in order to stimulate Mr Prior to consider more radical alternatives for the new industrial relations legislation.

The attached draft, which is in the form of a minute but with a little amendment could serve either purpose, points to a number of measures which might be taken to strengthen the proposed legislation. It draws on information provided by Mr Hoskyns in his letter to you of 29 January, on Mr Abbott's letter of 5 January, and on material produced by the CBI. The Treasury Solicitor's Department have seen the draft, which does not of course purport to be a considered legal text but rather a catalyst for further work by Mr Prior. For this purpose, I have drafted it to include a large number of points which could be followed up. If, however, you consider that we should keep to the rather more limited aim of pressing Mr Prior to act on trade union immunities, I will gladly supply a draft to this effect.

The draft contains a paragraph suggesting that an interdepartmental group of officials should be set up to consider the matter further. This would probably be advantageous, as it would enable representatives of departments other than the Department of Employment to provide a continuing spur to a more radical review. If you consider this worthwhile, you will of course wish to send the draft as a minute to the Prime Minister.

SECRET

The draft does not contain any reference to the 1971 Act and to the other events of the time which, rather more than the Act, led to the defeat of the Heath Administration, but you may wish to include a reference to this on the basis of your personal knowledge of that time.

I understand that Mr Prior hopes to publish a consultation document on immunities next week, so that it is important that the minute should be dispatched quickly.

The draft does not refer to this, but you may wish to note that the proposal to confine immunity to actions where the sole or predominant motive was within the definition of a trade dispute could be of value in connection with the work of ECS on strikes with a political motive by civil servants.

If the attached draft does not reflect the points which you wished to make, I should welcome a discussion.

F A HEATON
1 February 1980

DRAFT MINUTE TO THE PRIME MINISTER

At E Committee on 15 January, when we discussed the question of immunities for trade unions, we agreed that, whilst in principle we would have preferred a more radical approach, for tactical and Parliamentary reasons it was best to proceed with the limited changes to the immunities proposed by Jim Prior.

But when we met in the House on 28 January there was considerable unease that, with the steel strike in progress, the measures which we are proposing might be considered patently inadequate. It was also argued that the present situation provided us with the best opportunity we were likely to ge to make the more radical changes to the law relating to industrial relations which we know to be necessary.

Jim has undertaken, in consultation with the law officers, to consider the possibilities, and in particular the scope for restricting the immunity of trade unions.

In my view, our decisions on industrial relations legislation will be amongst the most important which we shall take in this Parliament, and I am anxious to ensure that we have the opportunity to consider all the options. Thus, whilst the question of immunities for trade unions is probably the most important, and I refer to this first, I hope that we will be able to consider various other changes, many of which inter-act with the immunity issue.

At present the civil immunity of unions is absolute apart from actions for personal injury and damage to property, which means that their funds are protected.

Putting the funds of the big unions at risk would probably have a more salutary effect on them than anything else, including threats of imprisonment, and would also avoid the problem of martyrs. It could also be of genuine value to employers who suffer because at

present they are effectively prevented from seeking damages because individuals would be unable to pay.

not enough (1) One approach would be to limit the immunity of trade unions to acts done in contemplation or furtherance of a trade dispute; a more effective limitation would be to provide that, if (contrary to the amendment which we have already agreed on immunities) blacking extends beyond the parties to the dispute and direct suppliers and customers, and was ordered by one or more members of the Executive Committee of a union, the union itself should be liable. A different approach again would be to link immunity to action taken only after proceeding in accordance either with agreed disputes procedures or procedures prescribed by statute. This of course, would apply only in respect of official disputes.

not enough (2)

(3)

and trade unions

It would also, in my view, be worthwhile to look again at the ambit of immunities for individuals. At E we agreed to limit immunity for blacking to action taken against the first customer, supplier or provider of services. This would not, for example, have prevented participants in the present steel dispute from inducing employees of a steel stockholder who is the first customer of BSC to refuse to handle steel from a private sector source. Similarly, immunities would remain for attempts to induce railwaymen to black steel, assuming British Rail had contracts with BSC. Our aim should surely be to protect primary action, but to prohibit all secondary action. This could be achieved by amending the law to make it unlawful to take industrial action against a third party unconnected with the dispute who has not contributed material support to it. This was the formula employed (though never tested) under Section 98 of the Industrial Relations Act. But consideration would have to be given to whether the inducement of a breach of contract of employment between the third party and his employees should be unlawful. The Industrial Relations Act specifically excluded sympathetic action. We know that the CBI are concerned about sympathetic action, but it would be a very significant limitation on the freedom of trade unions to withhold immunity for sympathetic action.

remove immunity from (A)

(A)

Originally exempt from (A)

It is also for consideration whether we should further restrict picketing. Clause 14 of the Employment Bill confines peaceful picketing to attendance by a person at his own place of work or by a trade union official accompanying a member of that union at his place of work. One possible further restriction would be to permit such persons to picket for the purpose of peacefully persuading only those who also work at that place or for that employer and not, for example, a lorry driver employed by Esso and seeking to deliver fuel to the premises. Other possible restrictions would be to limit the numbers, or to have a procedure for the statutory authorisation and identification of pickets.

(B) difficult to enforce + not much help if the primary picketing is effective

A further area where the present law is clearly unsatisfactory is in regard to the definition of a "trade dispute". It would be possible to narrow the definition of a trade dispute by limiting it to a dispute between workers and their employer. This would limit the immunity to action taken directly against the employer in dispute, which would represent a considerable restriction on trade unions' existing freedom to take industrial action. There is also a case for saying that we should look again at the situation respecting the motivation of those who claim to be acting in contemplation or furtherance of a trade dispute, particularly in the light of the House of Lords decision in NWL Ltd v Nelson. As a result of this case, it now appears that action can qualify for immunity if there is some dispute over terms and conditions even if this is not the sole or predominant motive for the action. One possibility would be to confine immunity to actions where the sole or predominant motive was the advancement of legitimate aims in terms of the specific employment issues mentioned in Section 29 of the 1974 Act. An alternative possibility might be to re-introduce the provision in the Trade Disputes and Trade Unions Act 1927 (which was repealed in 1946) which declared that a strike was illegal if it was a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community. A further means of making the law relating to the definition of trade disputes more rational would be to introduce an objective test for determining whether action was "in furtherance" of a trade dispute in substitution for the subjective test applied by the House of Lords in Express Newspapers v MacShane. The test

(C) attractive; ✓ X

(D)

(E)

(F)

would be that the action, viewed objectively, was reasonably capable of being undertaken in contemplation or furtherance of a trade dispute.

I recognise that the suggestions above are not necessarily consistent, but they are intended to provide a starting point for the more radical assessment which I now consider necessary. I still attach most importance to the proposals for restricting immunities, particularly those of trade unions, but I would hope that it would be possible to examine the other suggestions as well.

Given the crucial importance of this issue, there might be advantage in an inter-departmental group of officials, including members of CPRS, DOI and the Treasury, examining the possibilities before Mr Prior reports back to you.

JPL

This is of course policy and relevant too.

AD.

[GEOFFREY HOWE]

CONFIDENTIAL

cc WSS/sa
Hookyns
Whitmore
Ingham

PRIME MINISTER

WORKING PAPER ON IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

I enclose a copy of the working paper that I intend to publish on Thursday 7 February (subject to surrounding events) and to send to the CBI and TUC for their comments.

The working paper puts forward the policy proposal agreed by E Committee on 15 January. I have discussed it in draft with the Lord Chancellor and the Solicitor General and have also taken account of the views of the Lord Advocate and Attorney General. I have also had the advantage of John Methven's views. In the light of all this the two methods of achieving the proposal are put neutrally in paragraph 9. I was initially attracted to the second method as seeming to offer greater clarity, but it is beginning to appear that the "general tests" approach may prove the more acceptable.

I must tell you that John Methven and my two industrialist advisory groups are emphatic that at this stage we should go no further than these proposals.

At your meeting on 28 January the question was raised again whether we should in this Bill attempt to amend or repeal Section 14 of TULRA 1974, which provides immunity for trade unions as distinct from their officials. This was in fact discussed in E Committee on 15 January when the proposal that is now in this working paper was approved. We concluded then that there would be disproportionate opposition to any such attempt in the present Bill. I am sure this was right. Any such move would have immense symbolic significance for the trade union movement who would see it as returning the law to the Taff Vale situation. By requiring the courts to decide when a union was responsible for acts done by its officials it would bring the law back into questions of internal trade union organisation. This, you will remember, was the basic issue in the trade unions' sustained campaign to undermine the 1971 Act.

Whatever we may decide to do ultimately - and I think it is important to see what the current CBI review produces later in the year - I am

absolutely certain that we cannot afford to go in this Bill beyond broadly the pre-MacShane position. My Second Reading reference to further action was confined to that and it would be quite wrong for us to react to any one single dispute and rush forward with instant solutions on matters so delicate and difficult. Our aim is to start the process of putting industrial relations in Britain on a sound legal footing for the future. That is a prize which, as a nation, we simply cannot afford to lose through over-hasty action.

Four weeks is the absolute minimum for consultation, given the need for both the TUC and the CBI to consult their member organisations, and even that is likely to be criticised by both of them as inadequate to the importance of the proposal. It is essential that we do carry the major employer organisations with us: any change in the law on immunities will be worthless if employers are not prepared to make use of it. Moreover, I should like to allow the Standing Committee the benefit of two intervening weekends before we debate the amendment. So if the necessary amendment is to be carried in time for the Bill to move from Committee by the Easter Recess, we ought to issue the working paper next week.

I therefore propose to make known next Wednesday by answer to a written question that the paper will be available on the following day. I have undertaken to let the Standing Committee have it in advance of publication on Thursday.

I see no need to defer publication in consequence of the case of Duport Steels v Sirs. The Court of Appeal judgements seem to have turned on the prior question whether there was a "trade dispute" that the action was intended to further, rather than whether it was properly "in furtherance", which is what the Lords judgements in MacShane were concerned with.

I am sending copies of this minute and the working paper to other members of E Committee, the Lord Chancellor, the Paymaster General, the Solicitor-General and Sir Robert Armstrong, the Attorney General and the Lord Advocate.

J P
February 1980

IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

The Government have under review the operation of the law on immunities stated in the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976. The Government have already consulted on the appropriate limitation of the immuniites in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrates the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

2. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without such immunity that person would be at risk of being sued every time he called or threatened a strike. It is also of great importance to everyone else, because the effect of the immunity is to remove from those persons who are injured by that action the right that they would otherwise have to obtain from the court such relief as may be appropriate to the injury being suffered.

3. The practical effect of the operation of the immunity should be made clear. First, people who sue union officials for inducing breaches of contract are very seldom concerned with getting damages. They want the action complained of stopped at once by an injunction from the court. It is most unusual for legal proceedings to be pursued to a final judgement for damages. Even if damages are sought, there is a duty in law on the plaintiff to do all he reasonably can to mitigate the loss that is being wrongfully done to him and he will get damages awarded only for loss which he could not reasonably have avoided. Secondly, the courts will not normally grant an injunction unless very serious loss is being suffered which cannot be compensated for in money.

4. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute"- and in such case neither party to the contract had any remedy against him, however great the damage suffered.

5. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and ultimately enacted in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It would be unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute, and it would be dangerously wide for the rest of the community which would be unable to protect itself against industrial action taken against people who were not parties to the trade dispute or had any immediate commerical concern in its outcome, and going well beyond those parties.

6. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13, even as extended in 1974 and 1976. For a time it appeared that the extent of the immunity would be governed by the application of tests, such as whether the action taken was too far

removed from the original dispute or too lacking in effect to be reasonably regarded as furthering the dispute. The way these tests were applied by the Court of Appeal in the cases which came before them suggested that the immunity under Section 13 would normally extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, but would not extend much beyond that.

There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

7. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is subjective ie it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the genuine belief that it will in some way further an imminent or existing "trade dispute". Thus, it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity were shown by the Lords judgement to be justified.

8. The Government believe that the statutory immunity should now be amended to restore a more widely acceptable balance of interests. In the case of secondary picketing, where the immunity has been much abused, Clause 14 of the Employment Bill now provides for the immunity to be restricted to acts done in the course of picketing undertaken by employees at their own place of work. In the case of other secondary industrial action, like blacking, the Government think it right at this point in time to bring the position on immunity broadly into line with that suggested by the Court of Appeal decisions before the House of Lords judgements in Express Newspapers v MacShane (ie as indicated in paragraph 6 above). The Government accordingly propose that the immunity should continue to extend to action breaking or otherwise interfering with the performance of contracts where it is taken by the employees of the party in dispute or, in furtherance of that dispute, by employees of his first suppliers and customers, but that it should not extend to action beyond that if it involves interference with commercial contracts.

9. There are two main ways of approaching this in statute:

(i) by laying down general tests of the kind adopted by the Court of Appeal (see paragraph 6 above) which have to be objectively applied and which would be intended to have the effect of limiting the extent of the immunity as proposed.

General tests of this kind are, of course, in the nature of guides rather than clear and precise indications to employers and unions in dispute whether action is "in furtherance". On the other hand, this approach allows flexibility in the application of the law to the varied situations which arise. Another approach would be

(ii) by expressly defining the scope of the immunity. This could be done by providing that the Section 13 immunity should continue to apply to inducements to break, or interfere with, contracts where the action, threatened or actual, is taken in furtherance of a trade dispute by

(a) employees of the party in dispute

(b) employees of his first suppliers or customers (who might be identified as someone who was not a party to the dispute but was in commercial contractual relationship with such a party);

but that the Section 13 immunity should no longer apply to such action in furtherance of the dispute by the employees of any other employer if it involves interference with commercial contracts. In the case of such an employer inducements to break his employees' contracts of employment would continue to attract immunity if in furtherance of the dispute, but there would no longer be immunity for any inducement to break his commercial contracts, whether directly, or indirectly through breach of the employment contracts.

This method would be more specific, although possibly more arbitrary in effect, depending on the nature of the commercial relationships of the party in dispute.

10. Views are invited on the proposal in paragraph 8 above and on the ways of providing for it in legislation set out in paragraph 9. In the light of the consultations, the Government propose to introduce the necessary amendment to the Employment Bill, currently before Parliament. Although this limited action is what the Government consider at this stage to be appropriate, their review of trade union immunities will continue.

1 February 1980

PRIME MINISTER

Top copy returned to John Hoskyns

TRADE UNION IMMUNITIES

We are now in a situation very similar to that of last winter, with colleagues divided as to whether to take the opportunity presented by events or to accept the status quo. It is worth remembering that at that time, Jim Prior was opposed to any legislative changes, including the ones in the present Bill.

Following discussions with David, this note summarises our view of the opportunity now open to us.

1. THE BASIC QUESTIONS ARE UNCHANGED

1.1 The fundamental question is whether we believe that we can make any impact on the UK economic problem, or win the next election, if we accept the trade union status quo (even after the present Bill). All the evidence is that further trade union reforms are a precondition for economic recovery; and that both the election and subsequent opinion research have shown that we were, and still are, expected to introduce these reforms.

1.2 One only has to talk to anyone who really understands the trade unions (I mean people like Leonard Neal, Andrew Sykes, Ray Boyfield, John Lyons of the Engineers and Managers Association) and one can have no illusions about what we are up against. The trade unions are part of the Labour movement and are therefore our political opponents. Their leaders and senior officials are not merely Labour Party members. They are, at best, weak and ineffective moderates (with a few brave exceptions), at worst Broad Left militants. It is utterly naive to think that we can win their goodwill by being "nice chaps". They do not speak for their members.

2. WHAT ARE THE ESSENTIAL CHANGES?

2.1 There are, of course, many possible changes and we are not legal experts. But we do believe that the two centre pillars of any change are (1) the withdrawal of immunities for all secondary action; and (2) the withdrawal of those immunities from trade unions as well as individuals.

2.2 We have become accustomed to the present situation, but it does not bear close examination. Why should a union in dispute with an employer take another company hostage, in order to increase its bargaining power? The fact that that company has contractual links with the employer in dispute is irrelevant.

Is it seriously suggested that such companies should have thought hard, beforehand, about whether to trade with other companies which might later be involved in disputes with powerful unions?

2.3 The whole position is absurd and public opinion knows it. For example, in the Times survey of 21 January 1980, the question was asked "Do you think sympathy strikes and blacking are legitimate weapons to use in an industrial dispute, or should the new law restrict their use?" 71% of respondents and 62% of trade union members said that the new law should restrict their use. Only 19% of the respondents and 31% trade union members said that sympathy strikes and blacking were legitimate weapons.

2.4 It should not be difficult to win public support for changes, including the exposure of trade union funds where union members take action which damages companies not involved in the dispute.

2.5 A possible variation would be to start by withdrawing individual immunities for secondary action and then later, perhaps when abuse highlighted the problem, withdraw union immunities as well. But our view is that we should do both together, now.

2.6 Other measures which would be politically popular and, most important, easily communicated, would be action on Supplementary Benefits (we prefer a more radical approach of ending Supplementary Benefits to strikers' families, but making loans to trade unions available so that hardship does not occur) and a legal requirement for secret ballots for elections and before strikes. Each of these is politically saleable, provided that, instead of being defensive, we put the onus on trade union leaders to defend the present situation and practices. The union position simply could not survive sustained and open debate - which still has not happened.

3. WEIGHING THE RISKS

3.1 If we agree, as we have done in the past, that the status quo is not enough and that we will have to take action some time, the question is - when should this be done? Jim Prior says that if we restrict immunities, there will be a general strike. I am not sure if he is saying that this would happen if we did so now, or whether he is saying that this will happen whenever and if ever we make further changes. Is he saying that no further changes are therefore possible at all? Does he believe that this Government can make much impact on the country's problems without such changes?

3.2 Our view is that, even after this opportunity, we have still to make further changes to bring us more into line with the rest of the Western world; and that we are unlikely to have a better opportunity to start, between now and the next election.

There is now heightened awareness of the trade union problem, the law is uncertain, and the next general election is 4 years away. There is therefore plenty of time for the dust to settle and for the country to discover (as the financial community found, with the abolition of exchange controls) that the heavens do not necessarily fall when a Government dares to make a change.

3.3 Nevertheless, we should think carefully about what sort of response would come from the trade unions if we do introduce major changes. For example, just how easy would it be for them to mount a general strike? Would it be possible, if there was no genuine grass roots feeling (rather than the normal rank and file obedience to union orders)? What about Tory-voting trade unionists in such a blatantly politically strike? Do trade union members really want to bring the whole country to a halt and stop earning, start starving, in the process? Are the union leaders today charismatic enough to make it happen? Should we do some opinion research on this?

3.4 We believe that now is our best and last chance to make the major changes which will reduce trade union capacity to disrupt industry and - perhaps even more important - make Government's task impossible in the public sector, over the next 4 years. We suspect that Len Murray realises this more clearly than we do, which is why he is making great efforts to frighten us off taking advantage of the situation.

4. CONCLUSION

4.1 Of course the introduction of further changes carries risks. There are no risk-free solutions to the problems we face. We should certainly not court risk for its own sake. Once we accept that a high-risk strategy is the only valid strategy, then we should do everything we can in preparatory planning and communications to reduce those risks to a minimum.

4.2 But we feel that the refusal even to contemplate such a course implies an assumption that the trade unions will no longer obey the law and that we must therefore leave them to a large extent outside it - in the end, a dangerously self-fulfilling prophesy.

I am copying this minute to the Chancellor.

JOHN HOSKYNS

CONFIDENTIAL

(NS PBZ

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

VMS

31 January, 1980

Dear Jim

PL 1/2

Thank you for sending me a copy of your letter of 17th December to Keith Joseph about the Fair Wages Resolution.

Leaving aside the question of ILO Convention 94, I am not sure what further review is needed. The basic policy principle of abolition has been effectively determined by our decision on Schedule 11. As for Government contracting policy, I judge that the effects of abolishing the FWR should yield some price benefits. The chances, given abolition, of cases arising where the Government might reasonably be held to account for awarding business to firms paying unfairly low wages seem to me slight, and capable in any event of being dealt with on a case-by-case basis.

I am amazed that ILO Convention 94 apparently means that we cannot abolish the FWR before 1983. I am very reluctant to accept this. I suggest that officials should look at this again with a view to finding a way of terminating the FWR by the end of 1980 at the latest. This should be done as a matter of urgency: if the conclusion really is, as I hope it will not be, that there is no alternative to waiting until 1983, then we must presumably set the necessary steps under the Convention in hand as soon as possible before the timetable slips behind any further.

I am sending copies of this letter to the recipients of yours.

Yours

(GEOFFREY HOWE)

The Rt. Hon. James Prior, MP

CONFIDENTIAL

31 JAN 1980

SUBJECT.

Ind Pol.

NOTE FOR THE RECORD

The Secretary of State for Employment called on the Prime Minister at 15.30 hrs today.

Mr Prior said that the purpose of his coming to see the Prime Minister was to warn her of the head of steam which he saw building up on the unions' side against the Government. The unions' mood had changed markedly for the worse since Christmas. This was because of a number of developments, but in particular: the steel dispute and BSC's closure plans, the rumours of deindexation of social security benefits, public service manpower cuts, problems in the coal industry arising from the steel strike, the Employment Bill, and the rising unemployment trend. In his view, the unions would be putting increasing pressure on the Government, and the situation could well be dangerous. He was amazed at the ease with which the ISTC had managed to call out the private steel workers, and the one-day of action in Wales on Monday was also indicative of the worsening situation. The unions were, of course, also upset at the lack of dialogue with the Government, and this - together with the other factors he had mentioned - were enabling them to unite against the Government.

Mr Prior went on to say that he was not arguing against the Government strategy nor against the particular measures - e.g. on the public expenditure front - Ministers were intent on implementing. But it was important to orchestrate the presentation of these measures very carefully. For example, it would be best not to announce any further public expenditure cuts while the steel strike was continuing; and he hoped that the Chancellor would not have to draw attention to the deindexation of social security benefits in the budget and that he should concentrate instead on the cash increases.

The Prime Minister said that she did not altogether share Mr Prior's pessimism, but she took note of his view.

She then asked Mr Prior why ACAS were not doing more to bring BSC and the unions together in the steel dispute. It appeared that they were not even trying to appoint a mediator. If it was impossible to get the unions to agree to talk to BSC directly or to get the two sides to agree to a mediator, ACAS should surely come out in public and say so.

/This

This would put pressure on the unions. Her own impression was that ACAS were not up to the job of conciliating in this dispute. If so, it was worth considering whether they really had a role.

Mr Prior said that ACAS had not been inactive and that it was very difficult for them to act effectively in a dispute of this magnitude. However, he agreed with the Prime Minister that ACAS ought perhaps to be putting pressure on ISTC by "going public", and that they also ought to be doing more to consider the appointment of a mediator. He would take urgent advice on this, and report back to the Prime Minister at the meeting on steel later this evening.

R.

30 January 1980

cc:- Mr Wolfson
Mr Hoskyns

PRIME MINISTER

Meeting with Mr. Prior

Mr. Prior's purpose in coming to see you is - I believe - to tell you of his concern about the deterioration in the trade unions' attitude to the Government. He will no doubt cite widespread industrial action in Wales on Monday - amongst other things. Presumably, he wants you to take all this into account in reaching decisions on, in particular, public expenditure and the Employment Bill.

On the Employment Bill, Mr. Prior is, I understand, still planning to put ~~down~~ out his consultation document next week. This will propose the reversal of MacShane. In view of the need to consider whether we should not be going further than this (e.g. by repealing Section 14 on union immunities, or by taking the immunities back to the dispute itself), I am sure it would be wrong to publish the paper until we have had time to consider further. You might mention this to Mr. Prior.

The latest situation on the steel dispute is as follows. Sirs and Scholey have not yet met again. Scholey has been trying to contact Sirs, but Sirs is playing hard to get. It seems unlikely that he is interested in sitting down for negotiations while the "Denning episode" goes on. Nonetheless, Len Murray had discussions with both Sirs and Smith this morning to try to get them to sit down with BSC later this week alongside the craftsmen and other unions. We don't know the outcome of these discussions yet. No firm date has been set for the further negotiations between the craftsmen etc. and BSC: they are likely to wait until tomorrow or Friday to see whether the ISTC are prepared to join them in negotiations. They may indeed wait until Friday since the ISTC have an Executive meeting that day.

Sirs has gone to the Midlands this afternoon to join in the pay negotiations of the private steel workers there. Solly Gross believes that he may encourage his members to get into a dispute with the employers as a response to the Denning ruling.

/The following

The following are other areas of most likely difficulty:

(i) Water Manuals. Negotiations are to be resumed on Friday. The employers will offer 17 per cent. This will almost certainly be rejected and the employers are likely to offer a good deal more and finance the settlement by higher water charges.

(ii) London Docks. The PLA have offered a general pay increase of 10 per cent plus 2 per cent for productivity. There have already been some unofficial one-day strikes, and one of the unions has given notice of official strike action in three weeks time. In addition to the dispute over pay, the PLA yesterday announced the closure of one of the Upper Docks. This has so far been received fairly quietly but it could aggravate the action over pay.

(iii) Railways. The railways settlement date is 1 April, but there could well be trouble before then. Although their financing limit for 1980/81 is enormous (£750 million), it is still pretty tight unless they can achieve substantial redundancies. Having put up their fares in January, their scope for recovering higher wages through this route must be limited. We face a situation not unlike steel.

(iv) Gas and Electricity. Negotiations will be starting fairly soon. If the water workers get a big increase in their attempt to catch up with gas and electricity workers no doubt this will influence the latter in going for a big settlement. The high profits of BGC do not help, though we have asked for urgent proposals for a gas tax.

/(v) Civil

(v) Civil Service. Faced with a cash limit of say 14 per cent and PRU recommended increases of possibly 17-18 per cent, there could well be a repeat of last year's trouble. Recent statements from the unions' General Secretaries suggest that they are in a very militant mood.

R.

30 January 1980

PERSONAL AND CONFIDENTIAL

10 DOWNING STREET

29 January 1980

The Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
LONDON SW1

Dear Geoffrey,

This note summarises the discussion last night with Keith Joseph, Leon Brittan and David Wolfson, and suggests our first thoughts on how to proceed.

1. SUMMARY OF THE DISCUSSION

The conclusions we reached can be summarised as follows:

(i) The unions are, in the end, more concerned about their funds than about anything else. A bankrupt union would have few friends or members.

(ii) If their funds are not at risk, no action by them is voluntarily forgone, if it can be seen to achieve a benefit for their members. Even moderate leaders dare not discipline militants without a practical reason (ie I am doing this to protect the union).

(iii) If union funds are at risk, the big unions would have to behave responsibly. Nothing else (including the threat of imprisonment) will do.

(iv) All primary action should be protected. All strike action against the employer should be protected. These are basic rights which should be affirmed. But the employer should similarly be free to dismiss the striker.

(v) All other secondary action should no longer be immune. Those suffering damages should be able to take action against the union, not against individuals.

(vi) There will inevitably be some uproar (we call it "Havoc '80), but the choice is between having uproar in instalments, timed to ensure that Labour wins in 1984, and getting it over now with solutions which are built to last. The proposal to make unions liable for damages caused by secondary action is simple to communicate and to understand, in terms of natural justice, and is widely popular.

I attach a list of all the points that came up in the discussion as background, but they are not essential reading. I also attach

a copy of the Policy Unit's minute to the Prime Minister before the recent E Meeting which only narrowly and reluctantly concluded that it was not possible to introduce further amendments at this stage.

The conclusion of last night's meeting was that this was probably the best opportunity we would get to make this change and the sooner it was made the better. We understand that a leader of one of the big unions has, in private, conceded that if the Tories had the nerve to take action of this kind, they would in the end win. The trade unions would be unable to prevail, because the more trouble they caused, the stronger would be the public feeling against them, especially if it happens so soon after the lessons of last winter.

2. IMMEDIATE QUESTIONS

The immediate questions are on the legal side, on which we are not competent. What is the minimal change in the law that would bring about this state of affairs? Is it possible for those affected by secondary action to get at the union funds in practice? How would it work on the ground? Most important of all, perhaps, how would these proposals differ from 1971? This last question is relevant for two reasons: first, from the point of view of lessons learnt from past efforts; and, second, because this is the main objection from gun-shy colleagues who may have an alarming feeling of deja vu. This is where the carefully built up mythology that the 1971 legislation (which so nearly worked and would have done if there hadn't been the February 1974 election) was a disaster from start to finish, is so paralysing in its effect.

3. HOW DO WE MAKE THE CHANGE?

This is no more than a check list at this stage, but we need to do work as soon as possible, in the following areas, in parallel with the work being done to answer the questions in section 2 above:

(i) Get a realistic assessment of "Havoc '80", recognising that it is bound to happen anyway and we might as well get it over early, but that (and this should not be underestimated) the proposed changes may themselves effectively outflank the predictable union response.

(ii) We need to anticipate the nature of the union propaganda war during the period of consultation.

(iii) Should we consult in the normal way on the amendments? Or should we be considering a completely new Bill, which would cause further delay, but is worthwhile if the solution is really built to last as a major stepping stone? Alternatively, we should perhaps not dismiss too readily the idea of introducing the change as a fait accompli and consulting afterwards. This would depend on our assessment of union-orchestrated resistance (3(ii) above). On the face of it, it looks unattractive - the Opposition would withdraw co-operation, would hint to the unions that, in view of our method of introduction, any action was morally justifiable etc.

At the same time, it would possibly outflank the unions more immediately, heighten the sense of emergency, show firm Government in a chaotic situation with an urgent need for quick clarification of the law - particularly in this case where all opinion research shows great distaste for all forms of secondary action and concern about union power.

(iv) We have to prepare (on the lines of our preparations for the steel propaganda battle) to dominate the debate during both consultation and the remainder of "Havoc '80".

I am sending copies of this letter (but without the attachments) to the Prime Minister, and with the attachments to Keith Joseph.

It is worth reminding ourselves, perhaps, that neither the discussion nor this note proposes drastic changes. We are simply suggesting the areas in which calm and careful thought is necessary before we can decide whether or not the present situation offers an opportunity - or even perhaps a bigger potential penalty than appears at first sight - if we do not grasp it.

JOHN HOSKYNS

TRADE UNION REFORM

CONFIDENTIAL

(Note of a conversation with Sir Keith Joseph, David Wolfson, Leon Brittan, Monday, 28 January 1980)

1. Whatever action we take , must be done in such a way as not to sacrifice goodwill. But we're not talking about goodwill from moderate leaders, we're talking about goodwill from rank and file.

2. The union leaders will laugh about the inadequacy of our proposed legislation, in private, but they will protest in public. Our proposals on the closed shop are regarded as a joke. They won't be effective, but they will be bitterly opposed as if they were.

(this cannot be right)

3. 94% of unofficial strikes are made official. A familiar Tory objection to more radical changes is "it's very hard on the T&G if we take action against them when the action they have taken is unofficial". But the correct response to that is "good, it will make them act". They will quickly decide that this sort of thing can't go on if it hurts union funds. The unions own their members, because they can expel them on the instant. The only way in which unions can discipline militants, in order to avoid facing the legal consequences of action taken by their members acting against their union's instructions, is for them to dismiss the striking member and not to readmit him. (This echoes Andrew Sykes' comments, that unions are prepared to discipline people who won't strike when ordered to do so, but are never prepared to discipline those who strike against their union's orders, nor will the unions let the management do that either.)

4. The only way to penalise unions is to attack their funds. Never go after the individual, he has neither funds to pay damages, nor should he be offered martyrdom - which many of them would like. The only thing the union leaders really care about is their funds. (This echoes the Christopher Storey thesis - that unions are really simply financial enterprises which operate on a no-risk basis, with large funds which are really used simply to sustain the enterprise, produce benefits and so on for its officials, but not to support strikes etc.) Our position is that unions are free to be as militant as they like, but it will cost them money. And in the end that will mean higher dues from their members. Use market forces, make people pay for the actions they take.

5. This Government will fail if the law on immunities is not changed. This is not a matter of intellectual or legal tidiness, but of power. If we don't do it now, we'll be taken to pieces in 1983 in time to lose the next election. "How dare the unions wreck us, Labour, and then refuse to do the same to the Tories, their political enemies?"

6. The right to withdraw labour is absolutely fundamental and would be preserved. Similarly, the employer should be free to dismiss someone who does so. The individual must decide whether he is prepared to take that risk in withdrawing labour. There should be no other immunities except these immunities for primary action.

7. Never for one moment assume that the union leaders speak for their members on these issues. There should be no immunities for secondary action of any kind. A civil action should always lie against unions who take secondary action. Secondary blacking is simply immoral. Unions would therefore have to strike, so that their members lost pay.

8. The employee today fears his union more than he fears the employer. This change would reduce his fear of the union, would reduce the power of the shop steward over him. That would be welcome. Very popular. In dozens of appeal cases to get a man's card returned to him, it has turned out that the shop steward in almost every case simply didn't like the individual concerned and therefore victimised him.

9. Going back to the pre-1974 situation, in which immunities only apply to breaches of contracts of employment, rather than breaches of contract of any kind, only goes part of the way. It isn't enough.

10. Don't kid ourselves that the employers are going to do the work for us. They can only do that as the whole climate of opinion changes. We didn't discuss what that really meant in practice, or how reluctant employers would be to take civil action.

11. It is quite unrealistic to think that people would be persuaded to black leg. In the real world, that is seen as morally indefensible for union members. (This arose from a point raised by Leon Britton, but I missed that point - this was the rejoinder to it.)

12. Police are useless on the picket line. They will deal with gross breaches of order, but it is quite unrealistic to expect them to spot who is threatening whom and take names.

13. Gravediggers etc, workers in essential industries - no fundamental objection to having a "no-strike" law, but the comparability alternative is unattractive.

14. If we don't act, Frank Chapple will in due course be replaced by militants, and then the switches could be turned off. Similarly, Scargill will eventually succeed Gormley.

15. Everything in the end depends on communications and explanation. Will people obey the law, or disregard it in a way which makes a mess of their own lives (no water in their own houses etc).

16. The water workers' strike is seen as breakable, because it is not skilled work, troops could do it (but what about knowing your way around a very old sewerage system?) Would people tolerate bringing in experts from overseas to run power stations?

17. Once the framework of law is changed, we have more chance of progress with the TUC which does contain some responsible men (even if they

have lost control of their unions) than with the PLP which is reckless and irresponsible.

18. Crucial to stand firm on British Steel. If we lose on pay, we'll fight all over again on closures, and it will be one battle after another through to 1983.

19. Go-slows and works-to-rule can only be handled by the employers. The employers should be free to dismiss someone who breaks their contract.

20. It was suggested if there was one single action that was essential it was the right to take civil action in cases of secondary blacking. This is more important than picketing. But ideally we should go for secondary action of all kinds.

21. An up-and-coming potential General Secretary of one of the unions has said in confidence that he knows that everything that is going on now is crazy, and commented "it's amazing what they (the Tory Government) let us do".

22. Why should we try to take all this in one step? Why not push through the present Act and then do a one clause Bill later? The answer was that the public would say "why do they have to keep going on at this, do they know what they're doing, why can't they get it right in one"? And we would have lost a year by then anyway. Better for the Prime Minister to say that the situation has changed, things have moved on, and that we have to make another major change in what is otherwise a perfect set of laws. Just this one change and it will meet the requirements. On the face of it this is not quite a coherent answer because the McShane judgment did not affect the question of union funds, making unions liable rather than individuals, but the answer to that is that we simply have to aim off in the light of our experience and what is happening in the steel dispute. The strong view was put forward repeatedly, that we should take the action now, as amendments to the present Bill, that we couldnot afford to wait and start again later. The opportunity window is open.

23. Workers are not in favour of public spending cuts, even though they may want lower taxes. But they don't like modern trade unionism, they do feel trade unions have too much power. They do think Government should do something about it.

24. The Charing Cross pickets preventing lorries coming in with oxygen or oil etc would mean that the haulier could take action against new NUPE. Okay for the pickets to prevent their own fellow workers coming in, but not to prevent others. That is secondary action.

25. Straw polls showed that if there had been a ballot in the steel dispute, there would have been no strike. The polls showed a clear majority against the strike. This was why the militants would not let Sirs hold a ballot.

26. What was the cause of the drastic shift in union behaviour and attitudes since 1971/4? A combination of two things. First, the loosened legal framework which led inevitably to the exercise of greater power. If the power is there it is used, and if the legal framework is loose enough, a Mafia culture begins to take over. Combined with this is the fashionable tendency towards decentralisation. Unions should be run by very strong, autocratic rulers (Bevin, Deakin etc). It is the only way in which they can function well and not disintegrate into mob rule. That seems to be the lesson of past history. With the present very loose framework in which the militants exploit their power to the full, the moderate leaders daren't be out-done by the militants. If the framework was tightened, the moderate leaders (while they would go through ritual protests etc) would in fact be grateful. For they would then be able to act more moderately while saying to their members and the militants that they now had no choice, because the law did not permit them to do anything else. They aren't strong enough people to set their own rules. It has to be set for them.

27. It was suggested that we should take no action on supplementary benefits for strikers' families. Although in logic and justice there should be no benefits, this is still an emotive issue on which many sensible people, especially in the unions, feel that the present arrangements are "fair". If we decide to go for the really important area of secondary action where the great mass of union members would be with us, why risk losing their goodwill on a much less important issue?

JOHN HOSKYNS

CONFIDENTIAL

PRIME MINISTER

Mr. Prior's paper on trade union immunities is due to be discussed by E Committee on Tuesday. At our dinner last Thursday you agreed that the Employment Bill before the House was only the first phase in a series of measures to reform the trade unions. The minutes of E Committee's discussion on 27 September record Mr. Prior as saying:

> "The choice lay between limiting trade union immunity from suit to contracts of employment, or extending them to breaches of other contracts. This extension would have the effect of stopping all secondary action. There is no need for a decision on this point immediately. It would be wise to await the decision of the House of Lords in the MacShane case, and to see whether the CBI attitude developed further."

His latest paper argues that the main measure of reform should remain the restriction of immunities over picketing, contained in the Employment Bill. He recognises that immunity for other forms of action now needs some limitation and proposes to give statutory effect to the position as it was largely understood to be before the MacShane judgement - that the immunities should extend to action at the first customer, first supplier and the first provider of services, but not beyond.

This proposal is the minimum possible response to the MacShane judgement. It could be argued that the need to restrict the immunities in any case, coupled with the vivid reminder of their extent provided by the steel dispute, gives us an opportunity to take a bigger step now in what must be a long series of steps (not all of which will involve legal changes) in this whole field. We are not experts, but the most obvious alternative would be to give a right of action to anyone who is not party to a primary dispute. Mr. Prior finds three "compelling objections" to this (paragraph 5 of his paper). When reading those we must remember that the immunities enjoyed by British trade unions do not exist for their counterparts in any of our successful competitors. Against a sensible standard, none of these objections has real substance, though it is no doubt true that a proper reform would produce a howl of anguish. But is it really unreasonable that any employer who is not party to a dispute should be able to seek some protection?

Another approach would be to restrict the immunity to inducing breaches of contract of employment. For this to be effective in protecting employers against secondary action, it would need to be made clear that immunity did not extend to either direct or indirect measures to induce breach of commercial contract. I understand that this was a point of much confusion prior to 1971.

*Which would only "compel" a Trade Unionist or D of Emp. Official

/There are

*whether or not "contaminated" by contractual links.

There are many other possible approaches. The provisions in the Employment Bill on picketing and Mr. Prior's latest proposal are all directed towards restricting the immunities for individuals, not trade unions themselves. This means that employers will be able to seek injunctions, but are effectively prevented from seeking damages because individuals would be unable to pay costs or damages. Many of our supporters would argue that the immunities of the trade unions themselves need to be restricted if they are to be made more responsible for unofficial action. However you may feel that E Committee generally accepted the Secretary of State for Employment's view that it would be courting too great a confrontation to make this change.

It has also been suggested that the immunities could be linked to circumstances. For example, it would be possible to confer immunity only in cases where strike action was preceded by 60 days notice, or a secret ballot, or by a complete exhaustion of procedure agreements. This approach would have the effect of obliging trade unions to take responsibility for preventing unofficial disputes. Again, it may be best to make this kind of change later.

We suggest that unless you feel satisfied that last September's E Committee ruled out fuller reforms at this stage, Mr. Prior should be asked to enlarge upon some alternative approaches to the restriction of immunities so they can be properly discussed. Once the present changes have been made there will be strong pressure from some quarters to give them several years in which to be tested. How long can we afford to wait? At the very least a discussion now of the alternative approaches might be used to extract a clearer perception of the problem and a commitment from Cabinet doves to move again sooner rather than later.

We also feel that Mr. Prior's paper does not make sufficiently clear the impact of his proposals on recent cases. For example, participants in the present dispute would retain immunity to induce employees of a steel stockholder who is a first customer of BSC to refuse to handle steel from a private sector source. Immunities would remain for attempts to induce railwaymen* to black steel. The same would be true for drivers whose employer had a contractual relationship with BSC. We suggest you should ask the ~~Solicitor~~ Attorney General to provide examples of the effect of Mr. Prior's proposals in the steel dispute and one or two other prominent cases.

Finally, paragraph 14 of the annex to Mr. Prior's paper briefly considers changing the statutory definition of a trade dispute, thus withdrawing immunity from a wide range of recognition and demarcation disputes. We think colleagues should have a chance to consider the implications of this more fully.

John Hoskyns

11 January 1980

* assuming BR have contracts with B.S.C.

The Times
Monday 28 January

Law Report January 26 1980

Private sector steel strike 'would have disastrous effect throughout British industries'

Court of Appeal

Duport Steels Ltd and Others v Sirs and Others

Before Lord Denning, Master of the Rolls, Lord Justice Lawton and Lord Justice Acanter.

It is strongly arguable that a strike which has the object of coercing the government is not a strike "in contemplation or furtherance of a trade dispute" within the meaning of section 13(1) of the Trade Union and Labour Relations Act, 1974, as amended; and where such a proposed strike would have disastrous economic consequences for the country, the court in its discretion has jurisdiction to grant an injunction to restrain it.

The Court of Appeal allowed an appeal by the plaintiffs, Duport Steels Ltd and 15 other private sector steel companies, against the refusal of Mr Justice Kenneth Jones in chambers to grant an injunction restraining the defendants, Mr William Sirs, Mr Leslie Bramley and Mr E. Mapplebeck, sued on their own behalf and on behalf of all members of the executive council of the Iron and Steel Trades Confederation, from instructing members of the confederation to break their contracts of employment with the plaintiffs by striking or interfering with the supply of steel or steel products to or from the plaintiffs or by taking any other industrial action.

Section 13(1) of the Trade Union and Labour Relations Act, 1974, as amended by section 3(2) of the Trade Union and Labour Relations (Amendment) Act, 1976, provides: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—(a)—that it induces another person to break a contract or interferes or induces any other person to interfere with is performance..."

Section 17(2) of the 1974 Act, as amended by the Employment Protection Act, 1975, section 125 (1), Schedule 16, Part III paragraph 6, and the Trade Union and Labour Relations (Amendment) Act, 1976, section 3(2) provides: "(2) It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14(2) or 15 above, afford a defence to the action."

Section 29 provides: "(1) In this Act 'trade dispute' means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following, that is to say—(a) terms and conditions of employment, or the physical conditions in which any workers are required to work..."

Mr Alexander Irvine, QC, and Mr Christopher Carr for the plaintiffs; Mr J. Melville Williams, QC, and Mr John Hendy for the defendants; Mr Peter Scott, QC, and Mr Bruce Coles for Sheerness Steel Co Ltd.

The MASTER OF THE ROLLS said that it was important to distinguish between the public sector and the private sector of the steel industry. The public sector accounted for 40 to 50 per cent of production, the private sector for nearly 20 per cent of production and about 25 per cent of processing products, the annual turnover being £1,500m.

At the beginning of this year a dispute arose between the British Steel Corporation and the workers, who through their union demanded higher wages. As they could not get what they wanted, the union decided to call a strike. On January 16 the union took the important decision to call out the workers in the private sector. The union had no dispute with the private employers: all was peaceful. Ballots had shown that the majority of the men wanted to carry on working. Nevertheless they were ordered to strike; and if there was no court order they would have to strike or lose their union cards and perhaps their employment.

January 27 at 6 am, was fixed by the union executive on January 16 for the beginning of the strike in the private sector; and all steel movements in and out of the United Kingdom were also to cease at that time.

Why did the trade union decide to extend the strike to the private sector? It was amply shown that, by letters written by Mr Sirs and instructions given to union branches that the union had decided that one way of achieving their ends was to bring pressure to bear on the government. By that time the union knew that BSC had no money, and that the government had declined to give any more money—or to print more—to increase the wages of the workers. Section 4 of the Iron and Steel Act, 1975, dealt with the general powers of the Secretary of State in relation to the British Steel Corporation.

On January 17 Mr Sirs wrote to the Independent Steel Employers Association saying: "Whilst agreeing that there is no dispute with any independent steel employer [my executive council] were firmly of the opinion that this dispute is becoming politically stage-managed by the Conservative government. We feel that with not being made an offer of any new money, that we are being singled out for a direct government and British Steel Corporation attack. It is because of the political intervention that my executive council feel that we should now take the action of involving the private sector in the public battle against the government attitude."

His Lordship said that the union knew that they were going against all the industrial agreements that they had made because Mr Sirs continued: "I recognize the fact that our procedure agreements do exist and we do not have a dispute with you, nevertheless these points have been made to our executive who have ultimately taken this decision."

On January 21 Mr Sirs stated in a letter to branch secretaries that after the executive had considered a progress report: "It was apparent that the strike was developing into a confrontation between the government and the trade unions."

It was clear that the union's aim was to force government intervention in order to bring pressure on the government to increase payments to BSC.

There was evidence that a strike in the private steel sector would have a disastrous effect not only on all the private companies but throughout British industries. Our competitors abroad would clap their hands.

It was not surprising that 15 companies had brought the present action for an injunction to stop such a disastrous strike. The judge felt that he must refuse It because of the recent decision of the House of Lords in *Express Newspapers Ltd v McShane (The Times*, December 14, [1980] 2 WLR 89) from which It was to be inferred that the view of the majority was that the test for an act being "In . . . furtherance of a trade dispute" was purely sub-

jective and that if the trade union leaders honestly believed that they were acting in furtherance of a trade dispute they would have complete immunity from legal action and the courts could do nothing. Their Lordships had gone through the judgments in that case and they were not nearly so clear as some would believe.

By section 29 of the 1974 Act a "trade dispute" meant *inter alia* "a dispute between employers and workers". There was certainly a "trade dispute" between BSC and its workers.

Was that the only dispute? On the evidence there was arguable ground for thinking that there was a second dispute, not between workers and employers in the private sector, but between the union and the government in which the union was putting pressure on the government—to bring them to heel—so that they would provide more money—taxpayers' money—for the industry. There was no immunity in respect of it.

The second dispute could not be regarded as a trade dispute. It was said that it was connected with the first dispute because it concerned "terms and conditions of employment". But it was arguable that those further acts were done to bring pressure on the government and not in furtherance of a trade dispute.

In *McShane* there was only one member of the House of Lords, Lord Wilberforce, who dealt with the question of remoteness and he expressed the law as his Lordship had always understood it to be. He said (at page 94): "It is always open to the courts—indeed their duty—with open-ended expressions such as those involving cause, or effect, or remoteness, or in the context of this very Act, connexion with . . . to draw a line beyond which the expression ceases to operate. This is simply the common law in action. It does not involve the judges in cutting down what Parliament has given. . . ."

In *Associated Newspapers Group v Wade* ([1979] 1 WLR 697) the Court of Appeal granted an injunction because the acts relied upon were too remote from the trade dispute. His Lordship said (at page 713): "Some acts are so remote from the trade dispute that they cannot properly be said to be 'in furtherance' of it. When conduct causes direct loss or damage to the employer himself (as by withdrawing labour or stopping his supplies) it is plainly 'in furtherance' of it. But when trade unions choose not to cause damage or loss to the employer himself, but only to innocent third parties —who are not parties to the dispute— . . . the act done may then be so remote from the dispute itself that it cannot be reasonably be regarded as being done 'in furtherance' of it."

It was arguable in the present case that there was no immunity for calling out the men in the private sector because it was a dispute with the government, with no immunity.

As to section 17(2) of the 1974 Act (concerning the granting of interlocutory injunctions) which was considered by the House of Lords both in *NWL Ltd v Woods* ([1979] ICR 867) and *McShane* their Lordships had pointed out that there were other matters to be considered in addition to the likelihood of success at the trial (see Lord Diplock, page 881). Lord Scarman (page 890) said: "I do not rule out the possibility that the consequences to the plaintiff (or others) may be so serious that the court feels it necessary to grant the injunction; for the subsection does leave a residual discretion with the court."

Again in *McShane* (page 105) Lord Scarman said: "In a case where action alleged to be in contemplation or furtherance of a trade dispute endangers the nation or puts at risk such fundamental rights as the right of the public to be informed and the freedom of the press, it could well be a proper exercise of the court's discretion to restrain the industrial action pending trial of the action."

There was a residual discretion in the court to grant an injunction to prevent action, as here, which could cause grave damage to the economy and the life of the country, and put the whole nation and its welfare at risk, unless it was clear or in the highest degree likely that there was a defence that was likely to succeed at the trial. The calling out of the private steel workers would have such a disastrous effect that an injunction should be granted, and the appeal should be allowed.

LORD JUSTICE LAWTON, agreeing, said that no doubt the union had hoped for victory after a short, sharp strike. The history of the past two decades tended to show that whenever there had been a dispute between unions and nationalised industry there was a tendency for government intervention, followed fairly quickly by a settlement to the advantage of the strikers. Unfortunately for the union in the present dispute there was no government intervention, and it had become clear that there was not going to be any intervention in the foreseeable future. It followed that there would be no quick victory and that the dispute would be one of long attrition.

Mr Sies, in his letter of January 21, referred to the strike developing into a confrontation between the government and the union; and it was decided to involve the private sector, although the union had no quarrel with it. Steel would be stopped going to industry, work would cease and there would be unemployment.

Any trade union could bring pressure to bear on a government provided it did so in a lawful way, but immunity from legal action applied only where the pressure was in contemplation or furtherance of a trade dispute. Was what was done after January 16 in contemplation or furtherance of a trade dispute? It was strongly arguable that a strike the object of which was to coerce the government was not a strike in contemplation or furtherance of a trade dispute. So there were two disputes; one a trade dispute, and one not.

Prima facie it looked as if the decision to involve the private sector was for the purpose of coercing the government. The court could look to see whether what was done was in contemplation or furtherance of a trade dispute, and only if that were so did *McShane* come into operation.

On the evidence it was strongly arguable that what happened after January 16 was not in contemplation or furtherance of a trade dispute. So section 13(2) was of very little value.

LORD JUSTICE ACKNER, also agreeing, said that the court was not deciding the action. The question was whether in the court's discretion the pre-trial relief of injunction should be granted. His Lordship agreed that there was a seriously arguable question whether there were two disputes. If there was a second dispute with the government that would not be a trade dispute.

The appeal was dismissed with costs, and leave to appeal to the House of Lords refused.

Solicitors: Allen and Overy; Russell, Jones and Walker; Slaughter and May.

DUPONT STEELS LTD. & ors.

v.

WILLIAM SIRS & ors

THE MASTER OF THE ROLLS: It is important to distinguish between the public sector and the private sector of the steel industry. The public sector is under the control of the British Steel Corporation. It accounts for 40 or 50 per cent of the production of crude steel and the processing of it. But there is an important private sector which covers about 20 per cent of the rest of the industry. It is run by many private companies. The turnover is something in the region of £1,500,000,000 a year in the private sector.

At the beginning of this year there was a dispute between the workers with the British Steel Corporation and with their employers the British Steel Corporation itself in regard to wages. Through their union, the Iron and Steel Trades Confederation, the workers in the public sector demanded higher wages. As they did not achieve what they desired, they called a strike (I think the first for many, many years in the industry) on the 2nd January of this year. They called out all the workers in the public sector: and brought the whole of that great sector to a standstill.

The strike does not seem to have achieved the objective which the union desired. So, on Wednesday, 16th January, an important decision was made by the union or its representatives. They made the decision that they would call out the members of the union who were employed in the private sector.

Let it be said at once that those workers in the private sector had no dispute

whatever with their employers ~~in the private sector~~. All was peaceful and contented. They were ready to go on, and wanted to go on, with their work - processing the steel, making it, supplying it, and so forth. When ~~it was~~ the Union suggested - indeed ordered - that those in the private sector should come out, ballots were taken in some cases, which ~~showing~~ showed that the workers in the private sector did not want to come out. We know that the majority in a secret ballot did not. There is other evidence to show that many others of them did not want to come out. Nevertheless, if ordered to do so by their union, they would have no option: because, if they did not obey the union call, they would lose their union card and in due course their employment.

On the 16th January of this year there was a meeting of the Executive Council of the union. They came to ~~the~~ a decision to extend the dispute into the private sector. They decided to call out all those men: and the date they chose for this action was the 27th January, 1980 at 6.00 a.m.

Meanwhile, ~~long before deciding to call the men out,~~ the movement of all steel throughout the United Kingdom was to cease from 6.00 a.m. on Thursday, 17th January, 1980.

So there was a most important decision. The Iron and Steel Trades Confederation decided to call out the men, who had no quarrel whatever with their own employers - or between the employers and the men. They decided to call them out in regard to a dispute with which they were not in any way concerned. So the question must be asked, and is asked: Why did the trade union extend the strike to the private sector?

It is amply shown by ~~a~~ letters which ~~were~~ written by Mr. William Sirs on the 17th January, 1980 and by instructions

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which were given to all the branches. I will read a sentence or two ~~of that~~ from the letter: because it is quite plain to my mind that by this time the trade union had determined that the one way in which they could achieve their ends - or might hope to achieve their ends - was by bringing pressure to bear on the Government. They knew - as is indeed so by an Act of Parliament - that the British Steel Corporation is in many respects under the general direction and control of the Secretary of State. That appears in the Iron and Steel Act 1975, section 4, which provides:

"The Secretary of State may, after consultation with the Corporation, give to the Corporation directions of a general character as to the exercise and performance by the Corporation of their functions (including the exercise of rights conferred by the holding of interest in companies) in relation to matters which appear to him to affect the national interest; and the Corporation shall give effect to any directions so given".

They knew that the government had declined to print any more money for the purpose of increasing the wages of the workers. In these circumstances, the trade union seems to have directed its attack on the government.

On the 17th January, 1980 Mr. Sirs wrote to the Independent Steel Employers Association. He said: "... whilst agreeing that there is no dispute with any independent steel employer, (they) were firmly of the opinion that this dispute is becoming politically stage-managed by the Conservative Government. We feel that with not being made an offer of any new money, that we are being singled out for a direct Government and British Steel Corporation attack. It is because of the political intervention that my Executive Council feel that

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we should now take the action of involving the private sector in the public battle against the Government attitude".

They knew that they were going against all the industrial agreements which had been made: because the letter goes on to say: "I recognise the fact that our procedure agreements do exist and we do not have a dispute with you, nevertheless these points have been made to our Executive, who have ultimately taken this decision".

That letter was sent by Mr. Sirs to the independent employers. Then on the 28th January Mr. Sirs sent out a general direction to the union branches. "It was apparent," he said, "that the strike was developing into a confrontation between the government and the trade unions. It was also apparent that the continued operation of the private sector was not only having the effect of prolonging the trade dispute: but was creating a feeling of injustice within other trade unions."

There was further evidence, such as a statement broadcast on the B.B.C. on the 16th January. They left no doubt that their aim was to force the government intervention. Passage after passage in the newspapers and on the evidence, show that the action taken against the private sector was in order to bring pressure to bear on the government: so as to make the government alter its policy and increase the payments to the British Steel Corporation - out of the taxpayers' money, I suppose.

That action taken was ratified, we are told, unanimously by all the 21 members of the Executive Council on the 24th January, which was last Wednesday. This action is timed to take place at six o'clock tomorrow morning.

There is evidence of the disastrous effect which this

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action will have, not only on all the companies in the private sector, but to much of British industry itself. The private sector, as I have said, has a turnover - if it continues to work - of £1,500,000,000 a year. The turnover in the private sector is about £30,000,000 a week. If the men are called out in the private sector, all these companies would have to shut down at enormous loss. Not only will they have to shut down, but all the firms which they supply will not be able to carry on with their work. They will not be able to make their steel. British Leyland, who depend on 80 per cent of their supplies from the private sector, will have to shut down too. Not only that: we will lose trade here in this country, and our competitors abroad will clap their hands in anticipation of being able to send their products into England because our industry is at a standstill.

In these circumstances, it is not surprising that 16 of the big private steel companies in this country have come to the courts - hoping they can get here in time - to restrain the three principal members of this union (Mr. Sirs, Mr. Bramley and Mr. Makepiece) calling this disastrous strike, which is going to injure British industry so much.

The judge below heard the application yesterday afternoon. He felt that he had to refuse it because of the recent case in the House of Lords of Express Newspapers Ltd. v. McShane (1980) 2 Weekly Law Reports 89. He inferred from that that the majority of the House held that the test was purely subjective: and that if the trade union leaders honestly believed that what they were doing was in furtherance of a trade dispute, they would have complete immunity: and the courts can do nothing, because they would be exempt from judicial review.

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We have gone through that case, and have read the judgments. They are not nearly so clear on the point as some would believe: but I will deal with them as we come to consider the case. But, first, there is a preliminary point to be considered: What was the dispute here? Was it a trade dispute? Section 29 of the Trade Union and Labour Relations Act 1974 defines a "trade dispute". It is quite plain that the dispute between the workers and the employers of the British Steel Corporation was certainly a trade dispute. It was "a dispute between employers and workers ... connected with ... terms and conditions of employment". Beyond all doubt, it was a trade dispute. In regard to any acts done in contemplation or furtherance of that dispute, they were entitled to immunity under section 13 of the 1974 Act.

But was that the only dispute in this case? On the evidence which I have read, it seems to me that there is good ground at least for thinking that, besides that initial dispute, there was a second dispute: not between the union and the private steel companies, because they were all in agreement and were happy working together: but a dispute between the union and the government of this country. I have read enough already to show that the union leaders were complaining of 'political stage management' by the Conservative government. They were engaged 'in a public battle against the government's attitude'. There was 'a confrontation between the union and the government'. All this goes to show that there is evidence that there was a second dispute here: a dispute between the union and the government, in which the union were seeking to bring pressure to bear on the government to make them change their attitude and provide more money, or take other steps in relation to the

British Steel Corporation, so as to bring them to heel.

It seems to me that that second dispute cannot be regarded as a trade dispute within section 29 at all. In so far as the acts done - or the calling out of these workers - was in furtherance of that second dispute, they are entitled to no immunity whatsoever. It is not a trade dispute. It is between the union and the government.

Then it was suggested by Mr. Melville-Williams that in any event it was in furtherance of that earlier dispute with the British Steel Corporation. That may be a question on the facts. It ~~is hardly a matter of~~ state of mind, or anything of that kind. I must say that it seems to me arguable that this step taken of calling out all the employees in the private sector - stopping all the movement of steel into and out of the country - was taken in furtherance of a dispute with the government. To try and bring the government to heel - and not in furtherance of the original dispute. If that be so, then they are not protected: because they are only protected for acts done in contemplation or furtherance of the original trade dispute.

That is the first part of the case. But I would say at this point that there was only one member of the House of Lords who dealt with the question of remoteness. That was Lord Wilberforce: and he certainly expressed the law as I have always understood it to be. He said at page 94:

"... it is always open to the courts - indeed their duty - with open-ended expressions such as those involving cause, or effect, or remoteness, or in the context of this very Act, connection with" - or, I would add, "in furtherance of" - "to draw a line beyond which the expression ceases to operate. This is simply the common law in action. It does not involve

the judges in cutting down what Parliament has given: it does involve them in interpretation in order to ascertain how far Parliament intended to go".

In the cases which we have had very recently in this court, particularly in Associated Newspapers Group Ltd. v. Wade (1979) Industrial Cases Reports 664, we granted an injunction especially because the act was too remote to be considered in furtherance of it. It is significant that ~~not one of these cases (there were three of them) was~~ overruled by the House of Lords or was said to be erroneous. I need only repeat what I said in the case of Associated Newspapers v. Wade at page 694: "Some acts are so remote from the trade dispute that they cannot properly be said to be 'in furtherance' of it. When conduct causes direct loss or damage to the employer himself (as by withdrawing labour from him or stopping his supplies) it is plainly 'in furtherance' of the dispute with him. But when trade unions choose not to cause damage or loss to the employer himself, but only to innocent third persons - who are not parties to the dispute - it is very different. The act done may then be so remote from the dispute itself that it cannot reasonably be regarded as being done 'in furtherance' of it" - I cited Greaverbrook Newspapers Ltd. v. Keys (1978) Industrial Cases Reports 582; ~~Express Newspapers Ltd. v. McShane~~ (1979) Industrial Cases Reports 210 and United Biscuits (U.K.) Ltd. v. Fall (1979) Industrial Relations Law Reports 110 - "Thus when strikers choose to picket, not their employers' premises, but the premises of innocent third persons not parties to the dispute - it is unlawful. 'Secondary picketing' it is called. It is unlawful at common law and is so remote from the dispute that there is no immunity in regard to it".

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~~As I say~~, The House did not say that ~~any of these~~ cases were wrongly decided.

A ~~Departing~~ from that ~~for the moment~~, it seems to me, as I have said, that it is arguable in this case that there is no immunity for these acts done in calling out the private sector, because those acts were done in furtherance of the dispute with the government. It was not a trade dispute at all. It is arguable that they were not done in furtherance of the original trade dispute with the British Steel Corporation.

C ~~Having said~~ it is arguable, ~~that brings me~~ to the other point in this case ~~which~~ ~~is raised by~~ the amended section 17 of the statute, which is in the Schedule to the Employment Protection Act 1975. That section says, in respect to an interlocutory injunction, that "the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action". That section was much considered by the House of Lords in two recent cases - N.W.L. Ltd. v. Woods (1979) Industrial Cases Reports 867; and the recent case of Express Newspapers Ltd. v. McShane (1980) 2 W.L.R. 89. It is very interesting to see how the House of Lords have been dealing with section 17. They point out that it does not mean that the likelihood of success is to be the paramount or sole consideration in granting an injunction: there are other matters to be considered. In particular, damage to the employers or to the public, or even to the nation can be considered in considering whether to grant or refuse an injunction. Although he put it in the form of a double negative, I would quote what Lord Diplock said (removing the double negative and putting it into the affirmative) in N.W.L. v. Woods at page 881:

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"... there may be cases where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought to be granted, unless there is a high degree of probability that the defence will succeed".

Then Lord Fraser speaks to the same effect at page 883. He said that the likelihood is not to be regarded as overriding or of paramount importance. And Lord Scarman, on that point, said at page 890:

"... I do not rule out the possibility that the consequences to the plaintiff (or others) may be so serious that the court feels it necessary to grant the injunction; for the subsection does leave a residual discretion with the court".

That seems to me to be the view of the majority of the House in the case of N.W.L. v. Woods. It was taken up by Lord Scarman in particular in the McShane case. It had not been raised by counsel in the court, but he thought it so important that he brought it up himself. He referred to that passage, which I have quoted, by Lord Diplock, and went on to say (page 105):

"... in a case where action alleged to be in contemplation or furtherance of a trade dispute endangers the nation or puts at risk such fundamental rights as the right of the public to be informed and the freedom of the press, it could well be a proper exercise of the court's discretion to restrain the industrial action pending trial of the action. It would, of course, depend upon the circumstances of the case: but the law does not preclude the possibility of the court exercising its discretion in that way".

Those passages which I have read from the judgments of the House of Lords do show that there is a residual discretion in

the courts to grant an injunction restraining such action as in this case, where it is such as to cause grave danger to the economy and the life of the country, and puts the whole nation and its welfare at risk. In those circumstances, the courts have a residual discretion to grant an injunction: unless it is clear - or in the highest degree probable - that there is a defence which is likely to succeed.

I have said enough in this case to show that there is a very good ground for argument that the so-called defence - the immunity - is not likely to succeed. To call out these private steel workers, who have no dispute at all with their employers, would have such a disastrous effect on the economy and well-being of the country that it seems to me only right that the court should grant an injunction to stop these people being called out tomorrow morning: to stop all this picketing: and to stop all these people who are preventing the movement of steel up and down the country.

It seems to me that this is a case where, in our residual discretion, we should grant the injunction in the terms asked. I would allow the appeal.

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PRIME MINISTER

1 I understand that you have asked for a note for the meeting of E on 15 January on the effect the picketing provisions in the Employment Bill and my proposals for changing the law on immunities would have in the circumstances of the current steel dispute. I attach a note prepared by my officials.

2 As you know I feel very strongly that our decisions on changes in the law on immunities should not turn on their relevance to a particular dispute but must take account of long term industrial relations needs and practicalities.

3 I am sending copies of this minute and note to E Committee colleagues, the Lord Chancellor, the Attorney General the Solicitor General and Sir Robert Armstrong.

J P

14 January 1980

THE STEEL STRIKE AND THE LAW ON SECONDARY PICKETING AND IMMUNITIES

Industrial Action in the Steel Dispute

1. In addition to the strike of BSC employees there have been 2 main types of action:

(1) "Secondary Picketing" at stockholders, steel processors, engineering "users" and private steel producers: movement of goods has been restricted by the pickets and the reluctance of people to cross picket lines.

(2) Blacking of imported steel, mainly at East Coast ports: it is not entirely clear who is responsible for this but dockers have given assurances that goods will be unloaded but not moved. Steel movements have virtually halted and the Department of Transport suggest this is due to action by dockers and railmen. Lorry drivers seem willing to move steel so long as there is someone to load it.

The Effect of the Picketing Provisions in the Employment Bill

2. The Employment Bill will make it unlawful for a person to induce breaches of contracts of employment or commercial contracts by picketing other than at their own place of work. This means that if employees of BSC picketed the docks, at private steel producers or at suppliers and customers of BSC, and if in the course of that picketing they persuaded employees at those places not to go into work or interrupted the supply and movements of goods, the employers so affected would be able to seek an injunction in the High Court to restrain the pickets.

3. Hence picketing by BSC employees other than at their own place of work - and all forms of flying pickets - would not attract immunity.

Other Secondary Action and the proposed changes in the law on immunities

4. Under the proposals in E(80)1 other forms of secondary action (ie blacking, blockading and sympathetic strikes) would not attract immunity unless they were undertaken at first customers or suppliers of BSC "in contemplation

or furtherance" of the dispute between BSC and its workers. In other words, only the employees of employers who have a direct contractual relationship with BSC would be able to take secondary action with immunity. This would mean, for example, that in the case of BSC products held at stockholders (assuming these have contracts with BSC) immunity would apply to any action by employees of the stockholder but not to action by employees of the transport company hired by the stockholder or the receiving company.

Similarly blacking by dockers or railwaymen would attract immunity only if their employers had a contract with BSC: on the basis of current contractual relationships this is more likely in the case of British Rail than of dock employers.

Industrial Policy

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PRIME MINISTER

TRADE UNION IMMUNITIES
E(80)1
and letter from the Secretary of State for Trade
to the Secretary of State for Employment of 11 January

BACKGROUND

1. The Committee last discussed this subject in October (E(79) 9th meeting), before the McShane judgement. At that time, Ministers agreed to confine legislative changes, so as to restrict the immunity of individuals taking part in or encouraging strikes, and to limit the scope for picketing. These proposals were embodied in the Bill introduced before Christmas.

2. Since then, both the McShane judgement and the conduct of pickets in the steel strike have caused a second look to be taken. The Secretary of State's new paper, E(80)1, proposes further changes. Unlike the earlier ones, these were not agreed with the Solicitor General, who was away. Both he and the Attorney General are attending this meeting.

3. You yourself saw the paper over the week-end. I believe you felt it might not go far enough to meet the Committee's wishes, and you also asked that Mr Prior should be prepared to spell out the exact implications of his proposals. He may circulate a further Note on this point. The Secretary of State for Trade (in his letter to Mr Prior of 11 January) has also critised the proposals as not going far enough.

HANDLING

4. After an introductory statement by the Secretary of State for Employment, I suggest you divide the discussion into four parts:

the effect of the present proposals; whether they go far enough; other possible options; and the future timetable.

5. a) What would the present proposals achieve? It might be useful to test them against the circumstances of the current steel dispute and of the recent partial tanker-drivers' strike. For example:-

i. Would they allow the steel unions to picket steel stockholders?

ii. Would they allow similar picketing outside Hadfields in Sheffield?

iii. Would they allow picketing of alternative supplies of fuel oil to a hospital?

There are other similar hypothetical situations against which these proposals could be tested, no doubt these will emerge in discussion. You will want the views of the Attorney and the Solicitor General as well as of the Secretary of State.

b) Do they go far enough? Some of these hypothetical cases may throw some light on this question. You yourself were inclined to think they did not. Mr Nott's minute of 11 January takes the same line. (However, he backs Mr Prior over the special problem of the Nawala case). Against this, you have to reckon Mr Prior's judgement on the tactical situation he faces, in negotiation with the TUC and in getting the Bill through the House.

c) What other options are available? Mr Nott's minute lists some of these. Otherwise the main contenders are:-

i. An attack on trade union immunities as well as those of individuals (despite its title, Mr Prior's paper is almost entirely about Section 13 Immunity of Individuals).

ii. The remoteness test. McShane has overturned the previous tests applied by the Courts. It is proposed to substitute a direct test: "Is the victim of picketing or blacking a party to the dispute, or in direct contractual relationship with such a party?" Is this "one-remove" concept good enough, or should the rights be restricted to direct parties to the dispute?

iii. Should immunities be limited, as they were in the 1974 Act, to action directed to a breach of contract of employment?

I do not think that the Committee can reach a final view on these, or any other, additions to the Bill not covered by the paper. They need a further note by Mr Prior setting out considered views on any proposals which look like starters.

d) Timetable. If Ministers feel that the present proposals do not go far enough, or want more work done, then you will have to ask Mr Prior to bring fresh proposals to a meeting of this Committee next week (Wednesday 23 January on present plans). Cabinet the following day is already over-subscribed with business. I do not think he can risk leaving it any longer, if he is to go through

genuine consultation with the TUC and prepare amendments before the Bill comes to the end of Committee stage.

CONCLUSIONS

6. The conclusions of the meeting will either be:

i. To approve Mr Prior's proposals and invite him to arrange for Government amendments to be moved on these lines; or

ii. Ask him to consider further options for amendments to the law, and to bring fresh proposals to the Committee at its next meeting.

P Le CHEMINANT

14 January 1980

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(F2)

SECRETARY OF STATE

cc All Ministers
Secretary
Mr Burgh
Mr Steele
Mr Lanchin G
Mr Morris SP
Mr Simpson SP
Mr Howlett Sols
Mr Smith G

TRADE UNION IMMUNITIES: E(80)1

You have already written to Mr Prior with an alternative proposal to his (Annex A). This brief summarises the legal background, analyses the alternative proposals for change, and suggests arguments with which you could both support your proposal and resist criticisms of it. It also suggests a fallback position for use if necessary. It is of course agreed with Shipping Policy Division.

The Legal Background

2. As the law stands, Section 13 of the 1974 TULRA gives immunity from civil proceedings to any action "in contemplation of furtherance of a trade dispute"; and a trade dispute is any dispute over terms and conditions of employment, or any of the other matters listed in S29 (1). Thus the dispute does not have to be with the employer of the workers taking action, or over their own terms and conditions

3. Secondary action is action against an employer other than the one with whom the dispute exists. But note that workers may also engage in a primary dispute with an employer not their own; (eg the Nawala case was a primary dispute between the Redcar dock workers and the owners of the ship, over the terms and conditions of the ship's crew, even though the latter were not in dispute. It was not a secondary dispute).

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4. It is convenient shorthand to call some forms of secondary action "tertiary", if they are not against the immediate customers or suppliers of the primary employer, but against some other employer with a remoter connection (eg a competitor).

5. The Employment Bill already withdraws immunity from secondary picketing. What is now at issue is other secondary action, mainly blacking.

Mr Prior's Proposal

6. This is simply to withdraw immunity from tertiary action, but to leave it undisturbed for secondary action against immediate customers or suppliers. Thus it would eg withdraw immunity from the dock workers now blacking imports of steel, but leave it for the railway workers blacking BSC steel. The immunity would also remain for primary action by employees against an employer not their own (eg to cut out competition from a non-union firm). As in the case of secondary picketing, the right of action would be against the individuals taking or inducing the action in question (including trade union officials), but not against the trade unions themselves, whose own immunities, (separately defined in S14 of the Act) are unaffected. This means that although aggrieved employers will be able to obtain injunctions restraining tertiary action, they will in practice be able to recover damages only by suing union officials in person in the hope that their unions will stand behind them. It remains to be seen whether the unions will feel this gives them sufficient motive to amend their rules or take any other positive steps to restrain tertiary action.

Your Own Proposal

7. This is that immunity for individuals should apply only in action by or on behalf of workers against their own employer, except in defined circumstances (see paragraph 8 below).

This would go beyond Mr Prior's proposal in two ways: it would extend the protection of the law to first suppliers and customers, and to employers blacked by employees not their own. You have not proposed any changes to the immunities of the unions themselves.

8. But you have acknowledged two circumstances where secondary action is legitimate and should remain immune: where the secondary employer is giving material help to the primary one: and where the primary employer has sacked all his employees in a strike. (Your proposal is close to that on "extraneous parties" in S98 of the 1971 Industrial Relations Act.)

Returning to 1974

9. Until it was amended in 1976, the TULRA afforded immunity only in relation to breaches of contracts of employment, and not of commercial contracts. The Solicitor General has argued, and may argue again, that the 1974 position should be restored as a way of tackling all secondary action. Mr Prior seems right to oppose this: it would leave the law uncertain, but would probably not stop much secondary action, most of which entails breaches of contracts of employment and would thus retain immunity. But if it did affect such secondary action, it might affect primary action as well, since anything which induces a breach of contracts of employment is likely to interfere with the performance of commercial contracts also.

Arguments for Your Proposal

10. You mentioned in your letter that:-

i.) The manifesto commitment is to "ensure that the protection of the law is available to those not concerned in a dispute but who can suffer severely

from secondary action ... review of the law on immunities .... make any further changes that are necessary so that a citizen's right to work and go about his lawful business free from intimidation or obstruction is guaranteed". On any natural interpretation, 'those not concerned in a dispute' include first customers and suppliers, and employers who do not employ the workers taking action (or help the employer who does). Yet they will not receive the protection of the law under Mr Prior's proposal. Under yours they will.

ii.) On SLADE, the Government's consultative document has already said it considered it unacceptable that the law gave "no remedy for someone whose business or livelihood was threatened with destruction by the application of economic pressure through industrial action taken by the employees of another company", where the purpose is recruitment, and the Bill contains amendments to give the victims of such action the protection of the law. The same action for other purposes seems equally objectionable.

11. Additional wider arguments you could use in Committee are:-

iii.) The Government's entire economic strategy of bringing down inflation depends upon pay settlements being limited by what employers can afford in a climate of competition and monetary restraint. But so long as unions possess and exploit the power to drag an extraneous employer into a dispute against the wishes of his workers, eg on the ground that competition from him will limit the pay increases that other employers can

afford, this strategy cannot work save by forcing unemployment to appalling heights.

iv) The engineering and steel strikes have shown the unions' determination not to accept employers' ability to pay as a limiting factor: the immunity of secondary action gives them the power to widen and if possible politicise disputes so as to extend their attack beyond the commercial interest of employers to the wider interests of the community at large. If secondary picketing ceases to be available to them as a means to this end, blacking can be expected to become more systematic and vigorous.

v) Blacking is often used to cut out non-union firms to enforce a closed shop on those who do not want it. But an essential purpose of the Employment Bill is to ensure that closed shops are not imposed save at the wish of the employees concerned.

12. Arguments against your proposal will be that:-

(a) The CBI don't want it. The CBI are against "the commercial contracts" option (paragraph 9 above). They have not been consulted specifically on your proposal.

(b) It will push the TUC beyond mere opposition to the legislation and into encouraging defiance of the law. This risk, together with that of providing opportunities for martyrs to get themselves jailed for contempt of court in the cause of defending "basic trade union rights", is already present in the secondary

picketing proposals. It is a serious one which Ministers will want to weigh carefully. But as Mr Prior says (his paragraph 6) the battle is ultimately one for public support, and the Government will be on good ground in appealing for this in the cause of protecting those not involved in disputes (workers as well as employers) from being embroiled against their will and without legal remedy.

(c) It will withdraw immunity from legitimate action. You have conceded two exceptions, and could offer to consider others on their merits, (eg demarcation disputes - so long as both sides work for the same employer). But such cases do not suffice to justify a blanket immunity for action against first customers or suppliers, or against other workers' employers. Legal immunity, which is necessary in order to enable employees to combine against their own employer, is an unusual privilege whose other uses should be accepted only if they can be specifically justified.

(d) In particular it would make sympathetic strikes actionable, and thus limit workers' rights to withdraw their labour. This is obviously a serious point, but it is an objection to Mr Prior's proposal as well, which would withdraw immunity from sympathetic strikes except at first customers or suppliers. However if Ministers are concerned about this implication, which follows to some extent from all the proposals before them, they might want to consider some sort of exception for sympathetic strikes, which, unlike blacking, entail loss of pay.

a possibility
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(e) It is too late to work your proposal up into a water-tight amendment in time for the Committee stage. This may indeed be true. But officials should be given a remit to try. If they failed, Mr Prior's proposal would be a fall-back.

An Amendment Specifically for Shipping

13. Only if your colleagues reject your broader proposal will you want to broach a narrow one to deal with shipping alone. This could take the form of a limitation either of the scope of immunity or of the definition of "industrial dispute", so as to exclude action against international shipping, other than action by or on behalf of a present or former crew of the ship concerned.

14. The shipping policy arguments are set out in Mr Prior's paper (paragraphs 11-12 of the Annex). Briefly a failure to deal with the Nawala judgement could have serious effects on UK shipping. Our shipping interests are world-wide, not just to and from UK ports but in the cross trades, and currently earn approaching £1,000m per annum. To counter increasing protectionist trends, the UK is committed to the maintenance of a freely competitive shipping environment, in which the world's fleets can compete on equal terms in each other's ports. But under the Nawala judgement, even if there is no dispute between employer and crew, vessels can be effectively denied access to UK ports simply because they do not meet criteria established by the ITF. If this trend continues it could mean:-

i) Only high cost shipping could risk using UK ports, with consequences for the cost of our international trade;

ii) The risk of imitative or retalitory action which could directly damage our overseas shipping interests; and

iii) Severe prejudice to our defence in international fora, in UNCTAD and elsewhere, of the freedom of the seas, including freedom of registration and of competition for cargo.

15. These are matters of public concern and shipowners have made representations to the Government. The maritime unions will probably feel obliged to oppose publicly any remedial action, but they have no love for the ITF. If there is any valid objection to general action on secondary blacking, the potential damage to our shipping interests would warrant more limited action for shipping alone.

16. The Prime Minister has of course publicly linked the Nawala and Mc Shane Lords judgement as requiring action by the Government (Week-End World Interview, 6th January).

A-J LANE
General Division
Room 408
1 Victoria Street
215-3020

14 January 1980

Have spoken to Employment: they will provide an effort Mr Prior's Bill PRIME MINISTER under law on current dispute.

Brian Mountfield

Shall I try to get the clarifications suggested at X on page 2 in time for E Committee?

TL

P.M. 14/1.

"1/1

Mr. Prior's paper on trade union immunities is due to be discussed by E Committee on Tuesday. At our dinner last Thursday you agreed that the Employment Bill before the House was only the first phase in a series of measures to reform the trade unions. The minutes of E Committee's discussion on 27 September record Mr. Prior as saying:

> "The choice lay between limiting trade union immunity from suit to contracts of employment, or extending them to breaches of other contracts. This extension would have the effect of stopping all secondary action. There is no need for a decision on this point immediately. It would be wise to await the decision of the House of Lords in the MacShane case, and to see whether the CBI attitude developed further."

His latest paper argues that the main measure of reform should remain the restriction of immunities over picketing, contained in the Employment Bill. He recognises that immunity for other forms of action now needs some limitation and proposes to give statutory effect to the position as it was largely understood to be before the MacShane judgement - that the immunities should extend to action at the first customer, first supplier and the first provider of services, but not beyond.

This proposal is the minimum possible response to the MacShane judgement. It could be argued that the need to restrict the immunities in any case, coupled with the vivid reminder of their extent provided by the steel dispute, gives us an opportunity to take a bigger step now in what must be a long series of steps (not all of which will involve legal changes) in this whole field. We are not experts, but the most obvious alternative would be to give a right of action to anyone who is not party to a primary dispute. Mr. Prior finds three "compelling objections" to this (paragraph 5 of his paper). When reading those we must remember that the immunities enjoyed by British trade unions do not exist for their counterparts in any of our successful competitors. Against a sensible standard, none of these objections has real substance, though it is no doubt true that a proper reform would produce a howl of anguish. But is it really unreasonable that any employer* who is not party to a dispute should be able to seek some protection?

Mr Scott agrees similarly TL

Another approach would be to restrict the immunity to inducing breaches of contract of employment. For this to be effective in protecting employers against secondary action, it would need to be made clear that immunity did not extend to either direct or indirect measures to induce breach of commercial contract. I understand that this was a point of much confusion prior to 1971.

*Which would only "compel" a Trade Unionist or D of Emp. Official

/There are

*whether or not "contaminated" by contractual links.

There are many other possible approaches. The provisions in the Employment Bill on picketing and Mr. Prior's latest proposal are all directed towards restricting the immunities for individuals, not trade unions themselves. This means that employers will be able to seek injunctions, but are effectively prevented from seeking damages because individuals would be unable to pay costs or damages. Many of our supporters would argue that the immunities of the trade unions themselves need to be restricted if they are to be made more responsible for unofficial action. However you may feel that E Committee generally accepted the Secretary of State for Employment's view that it would be courting too great a confrontation to make this change.

It has also been suggested that the immunities could be linked to circumstances. For example, it would be possible to confer immunity only in cases where strike action was preceded by 60 days notice, or a secret ballot, or by a complete exhaustion of procedure agreements. This approach would have the effect of obliging trade unions to take responsibility for preventing unofficial disputes. Again, it may be best to make this kind of change later.

We suggest that unless you feel satisfied that last September's E Committee ruled out fuller reforms at this stage, Mr. Prior should be asked to enlarge upon some alternative approaches to the restriction of immunities so they can be properly discussed. Once the present changes have been made there will be strong pressure from some quarters to give them several years in which to be tested. How long can we afford to wait? At the very least a discussion now of the alternative approaches might be used to extract a clearer perception of the problem and a commitment from Cabinet doves to move again sooner rather than later.

X

We also feel that Mr. Prior's paper does not make sufficiently clear the impact of his proposals on recent cases. For example, participants in the present dispute would retain immunity to induce employees of a steel stockholder who is a first customer of BSC to refuse to handle steel from a private sector source. Immunities would remain for attempts to induce railwaymen* to black steel. The same would be true for drivers whose employer had a contractual relationship with BSC. We suggest you should ask the Attorney Solicitor General to provide examples of the effect of Mr. Prior's proposals in the steel dispute and one or two other prominent cases.

Finally, paragraph 14 of the annex to Mr. Prior's paper briefly considers changing the statutory definition of a trade dispute, thus withdrawing immunity from a wide range of recognition and demarcation disputes. We think colleagues should have a chance to consider the implications of this more fully.

John Hoskyns

11 January 1980

* assuming BR have contracts with B.S.C.

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0 ET
01-215 7877

cc Mr Wolfson

Seen by PS

PS/All Ministers
PS/Secretary
Mr Burgh
Mr Latchum
Mr Morris
Mr Simpson
Mr Lane

From the Secretary of State

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London, SW1N 9NA

11 January 1980

Dear Secretary of State,

TRADE UNION IMMUNITIES

I have read your paper for discussion at E Committee on 15 January. I hope it will be helpful to you and to colleagues if I let you know in advance the points I hope to make, not least in the light of the Nawala judgement.

I agree that our starting-point should be our manifesto commitment that:

> "the protection of the law should be available to those not concerned in a dispute."

I believe we should do our best to redeem this pledge in full. On picketing, this is what our measures are designed to do; but on blacking, although your proposal would restore the law to what it was understood to be before the Lords judgement in the MacShane case, it would still leave unprotected first suppliers and first cutomers who were innocent of any involvement in a dispute. And it would also leave unprotected employers and employees who, as in the Nawala case, had no dispute with one another, but who became the joint victims of blacking by a trade union intent on imposing its policies on them.

From the Secretary of State

I accept of course your argument that we must tread carefully, and strive to hold and improve our advantage over the TUC in the battle for public support. In seeking to protect the right of those not concerned in disputes to go about their lawful business in peace, I believe we shall do so.

I therefore suggest that we should consider allowing immunity to run only in the event of:-

(i) action by (or on behalf) of the employees of the employer against whom the action is taken;

(ii) or of past employees of that employer if the action is a protest against their sacking;

(iii) an employer involved himself in a dispute to which another employer is party by giving material support to the other employer.

This would ensure that immunity did not extend to assaults of the Nawala type, while avoiding the criticism that we were helping employers who gave material help to other employers in dispute, or removing immunity from secondary action against dismissals which made primary action impossible.

On the SLADE case our consultative document said we considered it unacceptable that the law provided "no remedy for someone whose business or livelihood was threatened with destruction by the application of economic pressure through industrial action taken by employees of another company" where the purpose was union recruitment. The same action for a different purpose seems equally unacceptable.

From the Secretary of State

I also hope we can ensure that, however far we extend the protection of the law, we can reduce the risk of such protection being nullified. I understand that officials have discussed possible devices, arising out of the present statutory definition of a "dispute", which unions might use to disguise secondary blacking as primary action so as to retain immunity in whatever areas we seek to remove it. I hope we can block such loopholes.

On the Nawala case itself, I want to stress the potentially serious consequences for our international shipping policy. These are set out in your paper and need not be repeated, but I must emphasise their importance. Our resistance to protectionist moves, highly damaging to our world-wide trading interests, is difficult enough as it is without having ground to cut from under our feet by our own domestic practices. If we conclude that it is impossible to adopt a general approach to immunities which would cover Nawala-type difficulties, then I feel that the shipping policy consequences of the Nawala judgement fully warrant an appropriate exclusion from immunity for shipping alone.

On points of detail, you will be aware that in the Nawala case at some stage a Norwegian crew had been discharged. As I have made clear above, I would be content to leave immunity where there was a dispute between the present employer and a dismissed workforce, for example if UK seamen lose their jobs in favour of lower-cost labour. But I should emphasise that this type of crew-change will affect only a small minority of the ships visiting our ports with crew paid below ITF rates. The shipping policy issues are therefore unaffected. I note Lord Denning's comment that blacking is the sole resort available to the ITF: this takes no account of the scope for legitimate primary action by the crew if they feel they have a grievance.

From the Secretary of State

The Prime Minister has already in her Weekend World interview on 6 January linked the Nawala case with the MacShane judgement as matters to be dealt with. There is unlikely ever to be a more appropriate time than now.

I therefore hope that you and colleagues will agree to legislative action, preferably in the general form I have suggested above but failing that, in a form specific to shipping.

I am sending copies of this letter to the Prime Minister, E Committee colleagues, the Lord Chancellor, the Attorney General and Sir Robert Armstrong.

Yours Sincerely,

Nicholas McInnes

JOHN NOTT

(Approved by the Secretary of State and signed in his absence.)

With the Compliments
of

The Lord Advocate

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10/1/80

SECRET

(2)

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The Rt. Hon. Sir Michael Havers, QC, MP.,
Attorney General,
Law Officers' Department,
Royal Courts of Justice,
London WC2A 2LL.

10 January 1980

12/1

PICKETING

Thank you for copying to me your minute of 9 January to the Prime Minister and the attached Note on the present law of picketing and blacking.

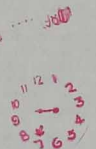
Although the range of criminal sanctions available in Scotland differs slightly, the conclusions which you reach would apply essentially to the situation under Scots law. I shall reserve any more detailed comments as I understand that the Secretary of State for Employment may be circulating a paper to colleagues soon on Trade Union immunities.

I am copying this to the Prime Minister and to those to whom you copied your minute.

Mackay of Clashfern

Approved by the Lord Advocate and signed in his absence.

SECRET



SECRET

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-405 7641 Extn 3201

PRIME MINISTER

1. I attach a Note on the present law on picketing and blacking. A complete survey was not possible in the space of a day, but I have outlined the main provisions of the law which are relevant to the items we discussed yesterday.

2. I am afraid that this gives us little comfort. The position in respect of the civil law is worse than last winter when the Court of Appeal was prepared to restrict the words "in contemplation or furtherance of a trade dispute" (in s.13(1) of TULRA 1974) with the result that the courts were able to grant injunctions to restrain some forms of secondary action (including secondary picketing). But now the House of Lords in McShane has stopped all that; their judgment largely rules out the prospect of obtaining injunctions.

3. At the meeting yesterday we discussed the concept of "lawful intimidation". This was an unfortunate phrase which was used by my predecessor (Hansard, 25 January 1979, Col 712). In doing so he appears to have been referring to s.13(1) of TULRA 1974, which inter alia means that certain threats - which earlier had amounted to intimidation at common law - are made lawful.

4. Whether particular threats are protected by s.13(1) and hence are "lawful intimidation" in this sense is a question which depends on the particular facts and cannot be dealt with satisfactorily in the abstract. But in the case we discussed, that of threats of future blacking made to a private employer not involved in the main dispute, the immunity now given by s.13(1) could well be available. However, this immunity will not be available in respect of action to implement such threats once the main action is over.

5. Apart from s.13(1)(which deals solely in respect of threats with those which relate to breach of or interference with contract), the general principle is that intimidation is not unlawful unless the threat itself is unlawful; clearly this would be the case where physical violence is threatened, because physical violence is itself unlawful. But in the case of, say, a picket who threatens the loss of a union card, the threat might well be held to be unlawful if (but only if) the picket has no authority to make it and (in accordance with union rules) there is no prospect of the threat being carried out. But a warning in good faith that breach of a union rule may lead to loss of membership is not, of course, unlawful.

6. This minute and the attached Note are copied to all members of Cabinet, the Chief Whip, the Minister of Transport, the Minister of State (MAFF) and Sir Robert Armstrong.

LAW OFFICERS' DEPARTMENT
9 January 1980

SECRET

THE PRESENT LAW ON PICKETING AND BLACKING

Note by the Attorney General for Cabinet

1. This Note outlines the present law on picketing and blacking. The relevant Acts are the Trade Union and Labour Relations Act 1974 (TULRA 1974) as amended by the Trade Union and Labour Relations (Amendment) Act 1976 (TULRA 1976). This Note does not deal with the changes in this area in the Employment Bill 1979 now before Parliament nor with any future amendments to that Bill which may affect the position.

Picketing

2. Picketing may be broadly defined as action taken by strikers to procure others to support them in their dispute, whether those others are fellow workers, substitute labour, customers or suppliers or their employees. Section 15 of TULRA 1974 provides that such action is not illegal if it:-

(a) is in contemplation or furtherance of a trade dispute (for the meaning of this see 9-10 below);

(b) is not at, or near, another person's home unless his home is also his place of work or business; and

(c) is solely for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

This means in effect that no legal proceedings can be brought in respect of picketing unless in the course of that action some crime or independent tort is committed. Relevant crimes would include obstruction of the highway (both a statutory and a common law offence), unlawful assembly, assault, obstruction of a police officer in the execution of his duty, causing damage to property, carrying an offensive weapon and causing a breach of the peace. Relevant torts would include trespass to the highway and private nuisance. But it follows from the wording of section 15 that where the picketing is entirely peaceful no action would lie under any of these heads. In the case of criminal offences this is qualified by the overriding duty of the police to uphold the law, which would enable them eg to require pickets to disperse where it is anticipated that they would otherwise cause a breach of the peace. In practice criminal sanctions are often available under the above heads.

3. Apart from section 15, section 13 of TULRA 1974 as amended gives immunity in tort in respect of picketing which results in or is aimed at breaches of or interference with contracts. This section relates to all forms of industrial action and is dealt with in 5 and following below.

/Blacking

Blacking

4. This form of industrial action may be broadly defined as action intended not to promote the withdrawal of labour but to interfere with the business of the employer, eg refusal by employees of a supplier to handle goods or provide service intended for the employer in dispute. Such action is not covered by section 15 of TULRA 1974 but section 13 as amended is relevant to it as it is to picketing.

Immunity in Tort

5. Section 13(1) as amended gives immunity in tort to any person who acts "in contemplation or furtherance of a trade dispute" and that act -

(a) induces a breach of contract by another person or interferes or induces him to interfere with its performance; or

(b) consists in his threatening that a contract will be broken (whether he is a party to it or not) or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.

6. Section 13(1) was originally confined to contracts of employment but by section 3(2) of TULRA 1976 was widened to cover all contracts and hence gave substantial further protection in respect of direct inducement to an employer to break his commercial contracts.

7. To take advantage of the immunity the defendant must first show that there is a "trade dispute" as defined in section 29(1) of TULRA 1974 and secondly that the action taken was in "contemplation or furtherance" of it. The definition of trade dispute is extremely wide and actions rarely succeed on the basis that the definition is not satisfied.

8. Prior to the judgment of the House of Lords in Express Newspapers v McShane (December 1979) the courts, and in particular the Court of Appeal, had favoured a narrow construction of the words "in contemplation or furtherance of a trade dispute", thus attempting to limit the immunity in relation to action that could be said to be far removed from the main dispute. The Courts had held, inter alia, that the immunity was not available if the action was not reasonably capable, on an objective view, of advancing the interests of those in dispute.

9. But the House of Lords in McShane has now clearly removed this limitation. By a majority of four to one the judges favoured a subjective test, so that any defendant can claim the immunity if he can show that he honestly believed that the action taken was likely to advance those interests; there was some difference of view as to whether the court can enquire into the reasonableness of the belief, and grant an injunction in cases where it is not satisfied of this,

/but

but the clear feeling of the court (Lord Wilberforce dissenting) was that the courts should be reluctant to substitute their own judgment for that of experienced trade union witnesses where the latter gave evidence that in their view the action taken was likely to further the dispute.

10. In practical terms the result of the McShane judgment is that all kinds of picketing and blacking will be protected from successful proceedings in tort where the existence of a trade dispute can be proved and the defendant can show honesty of purpose in relation to the action he took. The importance of the distinction between "primary" and more remote forms of industrial action, both picketing and blacking, is much reduced and the likelihood of injunctions being granted (under section 17 of TULRA 1974 as amended) is correspondingly less. This applies equally to the grant of interlocutory relief, having regard to section 17 (2) of TULRA 1974 inserted in 1975.

Law Officers Department
9 January 1980

ORIGINAL
-9-

SECRETARY OF STATE FOR EMPLOYMENT

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Ind Pol

PL 17/12

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Industry
Department of Industry
Ashdown House
123 Victoria Street
LONDON SW1

17 December 1979

Dear Keith

You wrote to me on 10 December about the effect of the Fair Wages Resolution on British Shipbuilders.

We agreed in Cabinet on 22 November that we should press ahead with repealing Schedule 11 of the Employment Protection Act but that the Fair Wages Resolution should be considered separately at a later stage. A major consideration here, as you indicate, is the existence of ILO Convention 94. I understand that, if a decision were to be taken to abandon or radically amend the Resolution this would require us to denounce the Convention; and such a decision (which incidentally the CBI has deliberately fallen short of urging on us) could not be implemented, in conformity with our obligations under the Convention, until 1983.

I agree it would be helpful however if some general indication were to be given during the Second Reading Debate for the Employment Bill of our intentions with regard to the Resolution. I have therefore asked Patrick Mayhew in winding up to say that we propose to review the Resolution in the light of debate on the Bill.

It would be wrong at this stage to seek to anticipate the outcome of this review. Although the Resolution has been used in a similar way to Schedule 11, it raises also issues of Government contracting policy which need to be carefully considered. I assume that the scope for further awards against British Shipbuilders will be limited by their recent national agreement with the Confederation of Shipbuilding and Engineering Unions laying down minimum earnings levels. But in any case I see no way in which the risk can be altogether removed in the next round of pay negotiations.

I am copying this letter to Geoffrey Howe, other members of E Committee and Sir Robert Armstrong.

Yours

17 DEC 1979

Ind PD

Extract from the "TIMES" of 14 December 1979

Law Report December 13 1979

Scope of immunity for acts done 'in furtherance of trade dispute

Express Newspapers Ltd v McShane and Another

Before Lord Wilberforce, Lord Diplock, Lord Salmon, Lord Keith of Kinkel and Lord Scarman

The act of officers of the National Union of Journalists engaged in a dispute over journalists' pay on provincial newspapers in calling on union members employed by the Press Association to assist the dispute by ceasing to put out copy—which would also affect national newspapers and other media with whom there was no dispute—was "an act in furtherance of a trade dispute" and so immune from actions in tort under section 13(1) of the Trade Union and Labour Relations Act, 1974, as amended.

The majority of the House of Lords, Lord Wilberforce dissenting, held that the test whether an act was done by a person in furtherance of a trade dispute was purely subjective. It referred only to the state of mind of the person who did the act; and it meant "with the purpose of helping one of the parties to a trade dispute to achieve their objectives in it".

The House allowed an interlocutory appeal by Mr Denis McShane and Mr Kenneth Ashton, president and general secretary of the NUJ (sued personally and as representing the members of the national executive committee) from the Court of Appeal (the Master of the Rolls, Lord Justice Lawton and Lord Justice Brandon) ([1979] 1 WLR 390) which had affirmed Mr Justice Lawson and granted to Express Newspapers Ltd an interlocutory injunction restraining the defendants from procuring any of their employees who were members of the NUJ from breaking their contracts of employment by refusing to handle or use material provided to Express Newspapers by the Press Association.

Section 13(1) provides: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance. . . ."

Mr J. Melville Williams, QC, and Mr John Hendy for the union; Mr D. R. M. Henry, QC, and Mr T. R. A. Morison, QC, for Express Newspapers.

LORD WILBERFORCE said that the appeal was concerned with how far the immunity from suit granted to trade unions and others extended in respect of acts done "in furtherance of a trade dispute"—words which had appeared in legislation since 1875 and were now contained in section 13(1) of the 1974 Act as amended. Was it sufficient for those claiming the immunity to have a genuine intention to further an existing trade dispute? Or was it necessary to show, in addition, that the act done was in fact reasonably capable of furthering the trade dispute, or gave practical support to it? Those broad questions had got, so far, scant if any for decision in that form in the House.

The trade dispute, a normal one between employers and employees, arose between the NUJ, a trade union with about 30,000 members, and the Newspaper Society, which represented the proprietors of provincial newspapers. On December 1, 1978 the union NEC voted in favour of a recommendation for an all-out provincial newspaper strike from 12 noon on December 4.

Provincial newspapers, like national newspapers, derived much of their supply of news from the Press Association (PA), a company owned by provincial daily and Sunday newspapers. It provided a news agency service to its shareholders and also to subscribers who included national newspapers, some radio and TV networks, and overseas agencies. PA employed some 250 journalists, not all NUJ members.

At the December 1 meeting the NEC decided to call a strike of NUJ members employed by the PA so as to stop it from supplying copy to provincial newspapers, also to take effect from noon on December 4. Its purpose was, by pressure on the PA, with which, as such, the NUJ had no dispute, to reduce or cut off supplies of news to provincial papers. That type of action—against a supplier of a party to a trade dispute—was sometimes called "secondary" action.

Further action was taken by the NEC when by letter on December 3 it instructed NUJ members employed on national newspapers, including the *Daily Express*, to "black" all copy emanating from the PA after noon on the 4th. The NUJ had at that time no dispute with the national newspapers. There was no doubt that that instruction constituted what, apart from any immunity conferred by statute, would be an actionable wrong—wrongfully procuring the journalists employed by national newspapers to break their contracts of employment.

After that instruction a meeting of the NUJ chapel at the PA voted 46 to 76 not to obey the strike instruction. The chairman told the meeting that they were instructed to strike and that any copy produced by them would be regarded as "black". The 76 went on strike and were soon afterwards joined by 32 others. PA's service to its subscribers, including national newspapers, was cut by about half.

In affidavit evidence Mr McShane said that the sole reason for the instructions was to make the strike with the provincial newspapers more effective. He believed that the NUJ members in the PA would be discouraged

from joining or continuing on strike if they knew that the copy sent out by "strike breakers" was being handled and used by other NUJ members. The factor of morale was very important in a strike. Similar evidence was given by Mr Ashton and Mr Dennis, acting father of the PA NUJ Chapel.

On December 11 Express Newspapers issued a writ against the two defendants, and successfully applied for an interlocutory injunction. Mr Justice Lawson ordered the defendants to withdraw the blacking of PA copy instructions. His order was upheld by the Court of Appeal.

Though the injunctions had ceased to be operative since the provincial journalists' claims had been settled, an Appeal Committee of the House gave leave to appeal on the ground that an important point of principle arose—namely, the scope of section 13, and in particular the meaning of "acts done in furtherance of a trade dispute"—which might well affect other cases. In fact the Court of Appeal decision had already been followed at first instance.

The issue to be resolved arose out of the great extension of industrial action in recent years. When trade disputes were confined to disputes between employees and their employers or between employees in an undertaking, it was not difficult to decide whether industrial action was in contemplation or furtherance of a trade dispute.

The definition of "trade dispute", however, had been extended; it had further been enlarged by the 1974 Act and the amendment Act of 1976. The wide definition now included a dispute between employers and workers, or between workers and workers which "is connected with" one or more of a list of seven matters

be? The Master of the Rolls settled on practical effect. His Lordship thought that went too far. Lord Justice Lawton and Lord Justice Brandon considered that the acts done, pursuant to the genuine intention, must be reasonably capable of achieving the objective — not necessarily that what was done would achieve the objective.

That test was in line with sound accepted principle and his Lordship could accept it. It was the clearest statement now prevailing. If his Lordship applied it in the present case, he could reach a conclusion, but it was not that of the Court of Appeal. That court had discounted the evidence of and for the defendants on the ground that it only bore on the morale of the NUJ members at the PA and so was insufficiently concrete; but his Lordship disagreed on both points.

Morale was a vital factor in all confrontations, whether at Alamein or in Fleet Street; but here the evidence went beyond morale well into the capability of practical effect. It showed that to persuade the PA journalists to join the PA strike could well further both that strike and the initial strike against the Newspaper Society: to discourage such journalists from doing so could effect the opposite. The evidence as to reasonable capability was all one way, and persuasive. It was not possible for the courts to reject it on a view of their own. The injunctions should not have been granted.

In his Lordship's opinion there was an objective element in "furtherance" which the court must appraise. It should do so in the light of the evidence, giving due weight but not conclusive force to the genuine belief of those who initiated the action in question. On the present facts and the evidence available, the action taken

might know full well that it could not have more than a minor effect in bringing the trade dispute to the successful outcome he favoured, but nevertheless was bound to cause disastrous loss to the victim, who might be a stranger to the dispute with no interest in its outcome. The act was none the less entitled to immunity under the section.

It was those consequences of applying the subjective test that, not surprisingly, had tended to stick in judicial gorges: that so great damage might be caused to innocent and disinterested third parties in order to obtain for one of the parties to a trade dispute tactical advantages which in the court's view were highly speculative and, if obtained, could be no more than minor. That had led the Court of Appeal to seek to add some objective element to the subjective test of the bona fide purpose of the person who did the act.

In the reported cases, cited by Lord Wilberforce, three somewhat different tests had been suggested—the test based on remoteness; the test that the act done must have some "practical" effect in bringing pressure on the opposite side to the dispote and that acts done to assist morale were not protected—Lord Denning's test in the present case; and the test favoured by Lord Justice Lawton and Lord Justice Brandon.

Those tests had the effect of enabling the court to substitute its own opinion for the bona fide opinion held by the trade union or its officers, as to whether action proposed to be taken or continued to help one side or bring pressure on the other was likely to have the desired effect. Granted bona fides on the part of the trade union or its officer, that was to convert the test from a purely subjective to a purely objective test; and his

against action by enthusiasts, extremists and fanatics, so long as the action was accompanied by a statement that those taking it had the necessary belief.

The choice was a bleak one between a purely subjective test—as the defendants claimed—and some objective test, based on an impartial assessment by the court.

His Lordship did not find the objective test, excluded by the words of the section. First, "in contemplation of" were not words exclusively subjective; and "in furtherance" similarly might well include, as well as an intention to further, an actual furtherance (help or encouragement) or the capability of furtherance. Secondly, so to construe the phrase was not to impose on it a limitation.

There was much in the decided cases about giving the words some limitation: and the defendants objected to that. The words, they said, and his Lordship agreed, must be given their natural meaning and the courts must not approach them with a disposition to cut them down. But it was always open to the courts — indeed their duty — with open-ended expressions such as those involving cause, or effect, or remoteness, or as here, connexion with, to draw a line beyond which the expression ceased to operate. That was simply the common law in action. It did not involve the judges in cutting down what Parliament had given: it did involve them in interpretation to ascertain how far Parliament intended to go.

What should an objective test

And on their plain and ordinary meaning that was what section 13 did. In the light of the express reference to the "person" by whom the act was done and the association of "furtherance" with "contemplation" (which could not refer to anything but the state of mind of the doer of the act) it was clear that "in furtherance" too could only refer to the state of mind of the person who did the act, and meant: with the purpose of helping one of the parties to a trade dispute to achieve their objectives in it.

Given the existence of a trade dispute (the test of which, though broad, was nevertheless objective: the *NWL* case (*The Times*, November 13 [1979] 1 WLR 1294), that made the test of whether an act was done "in furtherance of" it a purely subjective one. If the party who did the act honestly thought at the time he did it that it might help one of the parties to the trade dispute to achieve their objectives and did it for that reason, he was protected by the section. His Lordship said "may" rather than "will" help, for it was in the nature of industrial action that success in achieving its objectives could not be confidently predicted.

There was also nothing in the section that required any proportionality between the extent to which the act was likely to, or be capable of, increasing the "industrial muscle" of one side to the dispute and the damage caused to the victim of the act which, but for the section, would have been tortious. The doer of the act

doing the act must honestly and reasonably believe that it might further the trade dispute.

His Lordship agreed that the courts were not the appropriate places in which trade disputes should be decided; but where matters under section 13(1) had to be decided by the courts his Lordship had no doubt that they would be slow to hold that an act was wholly unreasonable if those of great experience in the trade gave evidence that the act had a reasonable prospect of furthering the trade dispute in question.

On the other hand, there had been cases in which tortious acts had been done which constituted inhuman conduct causing the most grievous harm. For instance, quite recently patients in Charing Cross Hospital being treated for cancer were brought near to death because industrial action had been taken to prevent fuel oil from being brought into the hospital. No doubt some of those responsible for preventing the fuel from entering the hospital firmly, but certainly not reasonably, believed that they were doing an act "in furtherance of a trade dispute" within the meaning of those words in section 13(1) and were therefore immune. They might have been: but if that was the law, surely the time had come for it to be altered.

Lord Keith and Lord Scarman delivered concurring judgments.

Solicitors: Vizards; Lovell, White & King.

c.c. Mr. Hoskyns
Mr. Wolfson

Original on Ind Pol : CBI mtgs Ind Pol -

10 DOWNING STREET

From the Private Secretary

14 December 1979

Dear Tom.

Sir John Methven called on the Prime Minister this morning. The following points which came up in discussion are worth recording.

The Business Climate and Publicity

Sir John said that the business community was still supporting the Government's strategy to a remarkable degree, notwithstanding the financial pressure particularly on smaller firms - caused by the increase in MLR. The vast majority of businessmen felt that "this was the last chance". It was all the more noteworthy that business support was continuing at a time when short-term expectations were becoming increasingly gloomy.

However, he was concerned that not enough was being done to put the Government's policies over. He accepted that the Prime Minister and the Chancellor were doing a good deal on this front, but he felt bound to say that more was needed. The CBI were themselves doing a great deal to put over the Government's message. He would find it easier to hold his members' support when the business climate got tougher in the coming months if senior Ministers could speak out more. He was not so much concerned about projecting the message to the community as a whole, but rather with providing moral support to employers to enable them to see out the recession.

Public Expenditure

Sir John said that the CBI Council would be considering a draft letter on public expenditure at their next meeting. This would argue the need for further public expenditure cuts, and he hoped to send it to the Prime Minister in early January.

Employment Bill

Sir John said that the CBI completely supported the current Bill, but they thought it would be wise to include an amendment

/at Committee

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at Committee stage to restore the legal position to what it was before the McShane judgement. He felt it would be a mistake to include amendments aimed at removing the immunities in respect of commercial contracts. Although it might be desirable in principle to remove these immunities, there was a real risk that this would be going too fast. The legislation would be useless unless employers could be persuaded to enforce it. If too big a step was taken, it was all too likely that they would not support it. There was also the danger that to remove the commercial contract immunities would bring a real breach between employers and Government on the one hand, and the unions on the other.

The Prime Minister said that the Government would certainly include an amendment at Committee stage of the Bill to deal with the McShane judgement. She noted what Sir John had said about immunities in respect of commercial contracts but commented that in her view these immunties must at some stage be removed.

Pay

Sir John said that the CBI Data Bank showed that big variations in pay settlements were emerging - ranging from as little as 5 per cent to over 25 per cent. This was all for the good, since it indicated that pay bargaining was beginning to take into account the ability of firms to pay. None the less, the average rate of settlement was still running too high. The main factor behind this was the continuing influence which the RPI had on union claims. But opposite factors were beginning to have an effect: these were the immediate threat of redundancies, and the realisation that excessive pay can jeopardise employment in the future.

CBI Surveys

The Prime Minister said that recent CBI industrial trends surveys had provided the Government's critics with a lot of ammunition. She wondered whether the presentation of the survey results could not be more balanced. Sir John replied that he would look into this, and in any case he would ensure that Ministers were given greater warning when the survey results were likely to cause particular difficulty.

I am sending copies of this letter to Ian Ellison (Department of Industry), Ian Fair (Department of Employment), Richard Prescott (Paymaster General's Office) and Martin Vile (Cabinet Office).

Yours ever.

T. Lankester.

A. M. W. Battishill, Esq.,
H.M. Treasury.

SW

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PM said she thinks Mr. Prior is mistaken, but will leave it at the end to his judgement. Spoken to D/Employment (Fair).

TL 14/12

Tim Lankester Esq
Private Secretary to the
Prime Minister
10 Downing Street
LONDON SW1

14 December 1979

Dear Tim

EMPLOYMENT BILL

Thank you for today's letter about what my Secretary of State intends to say at Second Reading on Monday in the light of the MacShane judgement.

Mr Prior thinks that it would be a great mistake to depart on Monday from the line hitherto agreed with the Prime Minister. Cabinet agreed on 22 November that further provision on immunities should be prepared so that, in the light of the House of Lords judgement, action could be taken to restore the position and make other required changes in immunities either by amendment to the Bill in Committee, or in a later separate Bill. That work is in hand and raises serious matters of policy and strategy which Mr Prior intends to put before colleagues in January in good time for any amendment to be put into this Bill if that is the final decision. Until Cabinet have had a chance to consider the matter, he proposes to rest publicly on the statement that the Government are considering the Lords judgement and will take what action seems necessary in the light of that consideration.

I am sending copies of this letter to the private secretaries to members of the Cabinet, the Chief Whip, the Attorney General and Sir Robert Armstrong.

Yours sincerely

Ian Fair

I A W FAIR
Private Secretary

14 DEC 1979

10 DOWNING STREET

From the Private Secretary

14 December 1979

Dear Ian,

EMPLOYMENT BILL

We spoke this morning about the Employment Bill and what your Secretary of State intends to say at Second Reading on Monday in the light of the McShane judgement.

My earlier letter of 3 December recorded that the Prime Minister had suggested that Mr. Prior should say that the Government will take whatever action as seems necessary in the light of the House of Lords' judgement. The Prime Minister has now asked me to clarify this to the extent that she wishes Mr. Prior to make clear that he will be introducing amendments to the Bill in Committee. The Prime Minister understands that Mr. Prior will be bringing forward proposals for dealing with McShane as soon as possible; she is quite clear that action must be taken in the current Bill and should not await separate legislation. If Ministers were to decide merely to restore the legal position to what it was prior to the House of Lords' judgement, this would still leave open the possibility of taking action on immunities in respect of commercial contracts in later legislation.

I am sending copies of this letter to the Private Secretaries to member of the Cabinet, the Chief Whip, the Attorney General and Sir Robert Armstrong.

Yours ever,

Tim Lankester.

I.A. Fair, Esq.,
Department of Employment.

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Secretary of State for Industry

10 December 1979

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London SW1

Dear Jim.

Not copied to No. 10. 12-19/12

You will recall that I sent you on 28 November a letter from Sir Terence Beckett about Schedule 11 of the Employment Protection Act and the Fair Wages Resolution. I am also concerned about the position of British Shipbuilders in the next round of pay negotiations. As you know, they have been particularly susceptible to awards by reference to the Fair Wages Resolution and in current circumstances they just cannot afford any more such awards.

Were it not for the complication of the ILO Convention, I assume that we would have decided to deal with the Fair Wages Resolution in the same way as Schedule 11 since it raises the same problems.

I wonder therefore whether it will be possible to indicate the Government's intentions, obviously only in general terms, vis-a-vis the Fair Wages Resolution during the Second Reading Debate on the Employment Bill. This would help flush out reactions, and enable the review of options to take place speedily. The legislative process will mean that Schedule 11 will remain on the statute book longer than we would want and I would hope that we can at least deal with the Fair Wages Resolution much more quickly.

I am copying this letter to Geoffrey Howe, to other members of E Committee, and to Sir Robert Armstrong.

Yours.

Keith.

17 DEC 1979

BACKGROUND NOTE

THE EMPLOYMENT BILL

Ind Pol

Limited changes to deal with specific abuses

1 These are limited but vital changes. They tackle a number of specific abuses by changing the law in specific areas (eg secondary picketing and the closed shop) where it is not working properly. They do not seek to create a wholly new framework for industrial relations in this country. There is no comparison with the 1971 Industrial Relations Act. Nor can the proposals in the Bill be compared with the massive amount of industrial relations legislation enacted by the last Labour Government.

No attack on trade union rights

2 There is no question of mounting an attack on the basic rights of trade unions. Where is such an attack in the provision of public funds for ballots? On the contrary a strong and responsible trade union movement has a vital part to play in our economic recovery. Trade unions will be more firmly based and will recover the confidence of the public if the law checks practices and abuses of industrial power which have attracted general condemnation.

The balance of legal rights and obligations

3 The Government's proposals are about getting the right balance between legal rights and obligations:

- between the need for effective trade unions and the right of an individual to work free from obstruction and intimidation;
- between the essential protection for an employee in employment and the need for business initiative to create new jobs.

The statutory and voluntary approach go together

4 The Bill does not remove the need for continuing voluntary efforts to improve industrial relations. There is no stark choice between a statutory and a voluntary approach to industrial relations (as the TUC like to suggest). Both are needed.

Good industrial relations also depend on the voluntary observance of good practice, but the law is needed for protection when this is flouted. The Government envisage a central role for voluntary procedures and codes of good practice.

The responsibility of management and unions

5 In the Government's view the people best qualified to improve industrial relations are those who work in industry:

- management wants to get on with the job of running its businesses effectively and profitably;
- unions want to get on with their job of improving the real living standards of their members.

But the Government's role is to create the right economic climate and to ensure a fair and balanced legal framework within which managements and unions can approach one another on a reasonably equal footing to bargain their own arrangements (and live with the consequences). No one but the Government can do this.

Consultations

7 The Bill is based on proposals put forward for public discussion over the last five months. It reflects the outcome of an extensive period of consultation with (over 100) organisations and individuals - not just the CBI and TUC. The Government has not listened only to one side of the argument. It has taken account of all the views expressed in preparing its proposals.

Finance for Secret Ballots

8. The aim is to encourage more people to vote in trade unions, by removing the financial constraints on unions holding postal ballots. There is no question of forcing trade unions to hold ballots against their will or of interfering in the internal organisation of trade unions: the Chartists wanted secret ballots and they were right: public voting frightens people. We simply want to remove the obstacle of expense.

Secondary picketing

9. The events of last winter - particularly during the road haulage dispute - demonstrated the need for greater statutory protection for employers and employees who had no involvement in any dispute but whose businesses and jobs were put at risk by secondary picketing. The Bill seeks to provide such protection. It will enable an employer to seek an injunction to restrain secondary picketing which is damaging his business. It does not change the criminal law or make secondary picketing a criminal offence.

The Closed Shop

10. The Bill does not outlaw the closed shop or prevent management and unions from concluding union membership agreements. That would only drive the closed shop underground and make it harder to help those who are damaged by it. The Bill seeks to provide greater protection for the individual employee who may face dismissal when a closed shop is set up if he refuses to join a trade union. In addition the Bill deters employers from setting

up any new closed shop except in accordance with best practice and with the overwhelming support of the employees involved expressed in a secret ballot. Otherwise they become liable for substantial compensation to any worker they dismiss.

Unreasonable exclusion or expulsion from a union

11. Much of the sting of the closed shop lies in the fear that a torn up union card can mean a torn up right to work. Our proposal to give a right of appeal where exclusion or expulsion from a union is claimed to be unreasonable. We are dealing, after all, with action which can stop someone following the only trade he knows. It is right that workers should have the reassurance that this proposal will give.

Coercive trade union recruitment tactics

12. The Bill provides protection against secondary industrial action where the purpose is to compel people in another company to join a particular trade union against their will. The Leggatt Report criticised the use of such tactics by SLADE in attempting to extend its membership into art work.

Amendments to the Employment Protection Acts

13. The Bill seeks to make a number of adjustments to the employment protection legislation where experience has shown that it is not working properly and where its effect is to discourage employers, particularly small employers, from creating new jobs. There is no question of removing the essential statutory protection for employees in employment, much of which (eg the protection against unfair dismissal) was first provided by a Conservative

Government. But statutory protection is counter productive if, as the evidence suggests, it acts as a disincentive to small firms to expand. The Bill also proposes the repeal of the recognition provisions which have given rise to such difficulty in practice and which have impeded ACAS in its role as an independent conciliation agency. Finally, the Bill proposes the repeal of Schedule 11 of the 1975 Act which has not been used as intended to deal with pockets of low pay but in many cases has been used to meet comparability claims by higher paid workers.

A detailed clause by clause analysis of the Bill is available from the Department of Employment Press Office.

Paymaster General's Office
Privy Council Office
68 Whitehall
SW1

7 December 1979

JD

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had PM

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T P Lankester Esq
10 Downing Street
LONDON SW1

7 December 1979

Dear Tim

EMPLOYMENT BILL

Thank you for your letter of 3 December in which you conveyed the Prime Minister's comments on my Secretary of State's proposed form of words at Second Reading should the House of Lords overturn the Court of Appeal's judgement in the MacShane case.

Mr Prior will be happy to use the wider formulation, as proposed by the Prime Minister, which more accurately reflects the intention.

I am sending copies of this letter to the recipients of your letter.

Yours sincerely

Ian Fair

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10 DOWNING STREET

From the Private Secretary

3 December 1979

EMPLOYMENT BILL

The Prime Minister has read your Secretary of State's paper - L(79)95 - to Legislation Committee.

She has one comment on paragraph 8 which she would be grateful if your Secretary of State would consider. The last sentence of that paragraph says Mr. Prior proposes to say at Second Reading that the Government "will take whatever action seems necessary to restore the legal position either by amending the Bill in Committee or in separate legislation later" (if the House of Lords over-turn the Court of Appeal's judgement in the McShane case). Although the Prime Minister is of course aware that Cabinet took the view that action should be taken to restore the legal position, she wonders on reflection whether this is not an excessively restrictive formulation. As was made clear in the discussion which she had with your Ministers and officials when she visited the Department recently, restoring the position to what it is now (i.e. after the Court of Appeal's judgement) might not provide a satisfactory solution; rather than confirming the Court of Appeal's judgement, the Government might for example want to move on immunities in respect of commercial contracts. To take account of this point, the Prime Minister has suggested that Mr. Prior might simply say at Second Reading that the Government will take whatever action as seems necessary in the light of the House of Lords' judgement.

I am sending copies of this letter to the Private Secretaries to members of the Cabinet, the Chief Whip, the Attorney General and to Martin Vile (Cabinet Office).

T. P. LANKESTER

I. A. W. Fair, Esq.,
Department of Employment.

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cc Emp DSG

Original in C/R.

10 DOWNING STREET

THE PRIME MINISTER

3 December 1979

Dear Mr Hopper

Thank you for your letter of 5 November giving me further details of men and women who had refused to take disruptive industrial action and who had suffered greatly in consequence. You mentioned as examples the case of the seven firemen of Rhyl and the seventeen distillery workers at Brentford.

We do, as you surmise, know about these cases which have resulted in a real loss for the people concerned. We are also aware that in recent years many individuals have suffered from union actions and policies and may have found it difficult to oppose these because of the closed shop. The reforms we have announced are intended to help such people. We believe that if protection similar to the proposed reforms detailed in our working paper published in July (a copy of which I enclose) had been in operation last winter, the excesses of that time would not have occurred. Once our reforms have been enacted people in similar circumstances will have a legal remedy.

There are, I agree with you, some very strong arguments for outlawing the closed shop altogether. Certainly, if it was not for the closed shop, many of our industrial troubles would disappear. But we decided that to make it illegal would simply

/not be practicabl

not be practicable, and that we would run into the kinds of difficulties which we experienced following the 1971 Act. It is for this reason that we are concentrating at present on removing the opportunities for abuse that currently exist and on restoring individual freedom and integrity.

This is the approach we put forward in our Manifesto and adopted in the working paper. Recent opinion polls have shown strong public support for our approach.

I do not believe that we could now establish a temporary fund, to look after the present victims of the closed shop. We have no accurate knowledge of the number of potential claimants nor any mechanism for testing their complaints. In addition, action taken against such victims, however regrettable, was probably quite lawful and it would not be practicable, nor in accordance with out traditions, to try to act retrospectively in this respect. In future individuals in similar circumstances will be adequately protected and if dismissed will be entitled to appeal to an industrial tribunal and receive compensation. I am sorry that this protection was not available to the individuals who have already suffered.

signed

MT

W.J. Hopper, Esq., M.E.P.

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November 29, 1979

CHANGED NATURE OF THE CLOSED SHOP

A major change in the nature of the closed shop in Britain has occurred over the last ten years. A special article in this month's issue of Employment Gazette* reports on the preliminary findings of the first comprehensive study of closed shop agreements - now commonly called union membership agreements (UMAs) - since 1964.

The study, sponsored by the Department of Employment and carried out by the Industrial Relations Department of the London School of Economics, has found that traditional one-clause or unwritten agreements have been replaced by three- or four-page documents complete with schedules, guidelines and minutes of the negotiations for "clarification".

Since April 1978, when the study started, 136 closed shop agreements covering 1.7 million workers (an estimated third of the total closed shop population) have been collected for study. The current article covers some preliminary findings, but work is continuing on the operation and effects of the closed shop.

Increasingly sophisticated post-entry closed shops have been negotiated to define precisely the rights and obligations of workers. And despite enormous variations in detail, there appears to be increasing standardisation of broad content matter. For example, in new closed shops it has increasingly become the norm to exclude non-unionists from compulsion to join the union (63 per cent of the sampled agreements). Procedures designed to handle difficulties arising from the operation of the UMA and incroporating provision for independent arbitration have become a regular feature.

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* Employment Gazette, November 1979; HMSO; £1.35

In a feature entitled Education and training in the eighties, Dr Ron Johnson, Director of Training at the Manpower Services Commission, takes a personal look at the various forces at work in this field and how they will shape the systems and methods used over the next decade.

Other features in the November Employment Gazette:

- The pattern of household spending in 1978, main findings of the Family Expenditure Survey;
- details of the new arrangements proposed for work permits;
- the working paper on trade union recruitment activities, which followed the publication of the Leggatt report; and
- The development of special employment measures, a review of the schemes run by the Department of Employment from April 1978 to June 1979 to alleviate the worst effects of unemployment

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with compliments

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PRIVY COUNCIL OFFICE
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Chancellor of the Duchy of Lancaster

29 November 1979

Dear James.

EMPLOYMENT BILL

Thank you for your letter of 23 November about the timing of the Second Reading of the Employment Bill.

I fully accept the importance of finding time for this Bill before the Christmas Recess, and the Chief Whip and I will do what we can to arrange business accordingly. We can consider the handling of the debate when the Bill comes to Legislation Committee next week.

I am copying this letter to the Prime Minister and to Sir Robert Armstrong.

Yours ever
Norman

The Rt Hon James Prior, MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London
SW1

29 NOV 1979

Original on PM, Visit to Depts, Pt 2.

Ind Pol

PRIME MINISTER

c.c. Mr. Wolfson
Mr. Pattison

Industrial Relations Legislation

This is just to remind you of the two points which Leon Brittan raised this afternoon, and which you said you would take up with the Department of Employment on Monday.

Trade Union Immunities

The House of Lords are likely to overturn the Court of Appeal judgement in the Express Newspapers v. McShane case. (The Court of Appeal took the view that the immunity for industrial action given in the 1974 and 1976 Trade Union and Labour Relations Acts does not go beyond the first customer and supplier.) Cabinet decided last Thursday that draft provisions on immunities should now be prepared so that, if the Court of Appeal decision is overturned, the earlier position can be restored by amendment to the bill in committee, or in a later separate bill.

Mr. Brittan suggested, however, that we should include in the published bill a declaratory provision which would simply give effect to the Court of Appeal's judgement in the McShane case. It would be much better to include such a provision before the House of Lords judgement which was almost certainly now going to be adverse. And it would be easy to defend politically in view of Mr. Silkin's explanation last winter - that the critics of the 1974 and 1976 legislation had nothing to worry about because of the development of the remoteness test by the Courts in the McShane and other cases.

Copy attached

Closed Shop - Exclusion or Expulsion from a Trade Union

Mr. Brittan said that he could not understand why Cabinet had decided that the right of appeal against exclusion or explusion should be confined to the circumstances of a closed shop

/ situation.

situation. It ought to be a general right of appeal. For if someone is expelled from a union when he is working at company A which does not have a closed shop, he will almost certainly find it impossible to get a job at company B which does operate a closed shop.

The paper for Cabinet said that "there is much less justification for examining the trade union's internal procedures in this respect where people's jobs are not at stake". But as you and Leon Brittan pointed out, a man's employment in the future will be at stake if he has been expelled.

Subject to your agreement, David Wolfson intends to tell Mr. Prior on Monday morning that you are going to raise these two points so that we can - hopefully - get a good response.

Yes - the points only - not the details of the meeting itself.

Could we also get Sam Silkin's statement to the House last year in which he made this point. I remember it well.

M

TL.

Copy in folder

TL.

23 November, 1979.

MR SILKIN'S STATEMENT

PICKETING

The Attorney-General (Mr. S. C. Silkin): With permission, Mr. Speaker, I will make a statement on the law relating to picketing.

It is necessary to deal separately with the criminal and the civil law. It is for the police to take action to enforce the criminal law. It is for those who suffer damage in consequence of civil wrongs to bring civil proceedings in the courts to restrain the commission of those civil wrongs or to recover damages.

Section 15 of the Trade Union and Labour Relations Act 1974 applies both to the criminal and to the civil law. Its ancestry now goes back over 100 years. Its effect is that peaceful picketing as defined in the section is not unlawful. Peaceful picketing is the attendance of one or more persons at or near somebody's place of work or business or anywhere else where he is except his home. The protection of section 15 is given if the attendance is in contemplation or furtherance of a trade dispute, if its sole purpose is to give or receive information or to persuade somebody to work or not to work, and if it is peaceful.

The criminal law makes no distinction between so-called "primary" and "secondary" picketing. But it does not permit acts which, apart from section 15, are breaches of the criminal law. It follows that, whether or not in the course of picketing, the criminal law is broken by violence, extortion, obstructing the highway, or obstructing the police in the reasonable execution of their duty.

Pickets may lawfully indicate to a driver their wish peacefully to communicate with him, but no law requires him to stop. If a picket obstructs the highway in order to cause him to stop, that is a breach of the criminal law and section 15 is no defence. A driver who wishes to drive past a picket line is in law entirely free to do so, so long as he drives in a lawful manner. If a driver or anyone else, including a picket, is unlawfully obstructed, intimidated or assaulted he should report the matter to the police. Extortion of money as the price for letting a vehicle through would, of course, be a most serious offence and indeed a quite intolerable act, and anybody who is the victim of it has a duty to report it.

Picketing as such is not a civil wrong. But its primary purpose is to persuade those who are under a contract of employment not to perform it. If that persuasion is in contemplation or furtherance of a trade dispute, and is the only actionable wrong, section 13 of the 1974 Act gave to the persuader protection from civil action by the employer. This protection went back to the 1906 Act. Section 3 of the 1976 Act added protection from an action based on direct interference with a commercial contract. If in either case the persuasion is not in contemplation or furtherance of a trade dispute, there is no protection and the injured party can obtain an injunction or damages.

The protection from civil action therefore depends on whether the persuasion which is the object of the picketing is in contemplation or furtherance of a trade dispute. This cannot be determined by the very loose terms "primary" and "secondary" picketing. But under recent decisions of the courts the test applied seems to have been whether the industrial action complained of has been so remote from the original trade dispute as to be not reasonably likely to further it. One can lawfully seek to ensure that one's employer's supplier does not supply him. But if he continues to do so, and one then seeks to ensure that the supplier to that supplier does not supply him, the decisions of the court suggest that one is entering the area of potential remoteness, where the section 13 protection runs out. In both cases the term "secondary picketing" would be apt, but the legal consequences could be quite different.

Finally, it has been suggested that the repeal of the 1976 amendment would make a substantial difference to the balance of strength between employers and unions. I disagree. In my view, its effect on that balance would be insignificant in the light of the remoteness test, which seems to me to be a far greater potential limitation on the protection provided by section 13. The repeal of the 1976 amendment would merely restore a host of anomalies to which the Donovan report rightly drew attention.

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Rt Hon Norman St John Stevas MP
Chancellor of the Duchy of Lancaster
Privy Council Office
68 Whitehall Place
LONDON SW1

23 November 1979

Dear Norman

EMPLOYMENT BILL

As you know from yesterday's Cabinet, the Prime Minister and I attach considerable political importance to the Employment Bill receiving its Second Reading before the Christmas recess. Cabinet agreed that the Bill should be given a high priority. I trust you can confirm that a day will be found for this. If there was any doubt about it, which I trust there will not be, it would affect the handling of the Bill for introduction. The timetable is very tight.

I would therefore be grateful for your early assurance that a day can be found for the Second Reading in the week beginning 17 December.

I am copying this letter to the Prime Minister and Sir Robert Armstrong.

Yours
Jim

From: THE PRIVATE SECRETARY

COVERING CONFIDENTIAL

HOME OFFICE
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LONDON SWIH 9AT

23 November 1979

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Mr Lankester - No.10.

Dear Martin,

The Prime Minister asked the Home Secretary at Cabinet yesterday morning to take over the discussion of industrial relations legislation. I enclose Sir Robert Armstrong's brief to the Prime Minister, which she handed to the Home Secretary to help him deal with this item. (21.11.79)

Yours,

J. A. CHILCOT

Martin Vile, Esq.

JD Original filed PM (Visit to Dept) PT3.

cc Mr Lankester

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M A Pattison Esq
Private Secretary
10 Downing Street
Whitehall

21 November 1979

Dear Mike

PRIME MINISTER'S VISIT TO DE - 26 NOVEMBER

1 You asked to have an advance short notes from us on the broad topics which the Prime Minister has approved for the discussion sessions. The topics are as set out below and I attach notes on each of them.-

1 The industrial relations scene

2 Pay

3 The unemployment problem

4 Organisation of the DE Group

5 Labour market problems

6 The Unemployment Benefit Service.

2 I also attach a list of the people the PM will be seeing at the morning discussion session and over the working lunch and brief details of what they do. The PM will be meeting the Departments remaining Under Secretaries and certain other Senior Officials over drinks before lunch.

Yours sincerely,

Ian Fair

I A W FAIR
Private Secretary

THE INDUSTRIAL RELATIONS SCENE

The Annex identifies the main current features.

2. The Department's role is:-

(a) to inform Government's decisions generally from its knowledge and judgements of industrial relations;

(b) to carry through agreed changes in the statutory framework; and to continue to assess the possible need for further changes;

(c) to ensure that the means for the avoidance and resolution of disputes are acceptable to employers and unions and, where appropriate, to encourage their use;

(d) to encourage the improvement of the conduct of industrial relations in its widest sense and a better understanding of the objectives.

3. The legislation this Session will have only very limited direct effect on the potential power of unions. The vast majority of disputes take the direct form of employees striking against their own employer; only rarely do they need to contemplate secondary action. But legislation will establish civil remedy for some unacceptable forms of secondary action, loosen the threats to the individual the closed shop can impose and encourage involvement of members in union decision making. The effects can be cumulative.

4. Is it right to be sceptical that in our society changes in the law cannot go much further in diminishing the power of trade unions, even though the use of that power can be damaging to society as a whole? Might not the greater task be to educate opinion among union members to the gravity of the economic realities? This cannot be easy: high inflation and rising unemployment strengthen individuals resolve to maintain real earnings and preserve jobs, whatever the longer term consequences. But it must help if companies can develop means of employee involvement to identify employees' interests with the fortunes of the company.

5. The responsibility for direct intervention in disputes was transferred to ACAS in 1974. Government was freed from what was often an evident conflict of roles. ACAS's acceptability became shaded (but no more) by its statutory duty to process claims for union recognition and it has been accused of prompting unwelcome settlements on other issues. But it cannot enforce its views or provide

for conciliation or arbitration without the express agreement of the parties. It is the Department's view that it needs to continue to fulfil its essential role of providing wholly independent third-party assistance, acceptable to employers and unions alike, and that disputes may well arise in which the Government should be ready to commend the acceptance of that assistance.

5. The Manifesto said that an attempt would be made to conclude "no-strike agreements" in a few essential services. The Department has taken the lead in reviewing the possibilities. It has so far not been possible to identify any group from which an effective pledge could be bought at an acceptable price. It has also been concluded that it would not be tolerable to bargain with unions about what services should be maintained in a dispute; this would be to accept that industrial action and the loss of other services would be tolerable.

6. Restrictive labour practices undoubtedly impede efficiency, although there are other factors. Except where the Government is itself the employer changes cannot be directly enforced. Exposure and education, eg through references to the Monopolies and Mergers Commission, can help, but finally only managements can initiate action to tackle the problems. They need to be stimulated to do so.

7. The multiplicity of unions in the same industry or company compound industrial relations problems. There is a continuing trend for smaller unions to amalgamate with larger and the proposed balloting arrangements will help the process. But there is little likelihood of major unions merging and no direct way in which the Government could stimulate such mergers. The better course is to encourage the establishment of more effective bargaining arrangements, including joint union bodies at company level.

8. In the Civil Service industrial relations problems have intensified with a readier disposition by unions to take industrial action, particularly against selected targets. The needs are to develop contingency planning to protect services where possible, to equip and support management with adequate means of response, to breed skills and experience in management and to be ready to use publicity. Improved communications directly with staff are crucial.

ANNEX

THE INDUSTRIAL RELATIONS SCENE

The main current features are:-

(a) clear evidence that public opinion favours the Government's commitment to secure some shift in the balance of power in industry, notably by tackling the problem of secondary picketing, protecting individuals against the closed shop and by assisting the wider use of ballots; the TUC remaining wholly opposed to such changes;

(b) union membership at a record level (13 million), with closed shop arrangements covering about 5 million employees;

(c) a union movement without effective leadership at national level and unsure of its role and purpose other than on immediate issues, but broadly united in opposition to the Government's economic and industrial policies with the more responsible leadership fearful of the issues on which militancy could breed and pressure for more direct action against their effect;

(d) employers readier to question national association for bargaining and to explore other means of mutual assistance;

(e) great uncertainty, shared by managements and unions, about the outturn of the return to free collective bargaining on pay;

(f) proclaimed union resistance to job cuts and productivity improvements, tempered by individuals' willingness to accept compensation for job loss and not infrequent union acceptance of the inevitability of some redundancies;

(g) greater resistance by some employers to strikes (not always successful in outcome) and uncertainty in unions whether to mount them; any general perception whether strikes or sustained resistance to them "pay" has still to develop in the new circumstances.

PAY

The Department:-

(a) monitors pay and prices and is responsible for the established indices, as well as reporting monthly to E(EA) on pay settlements and prospects;

(b) together with the Treasury, as appropriate, advises on public sector pay issues and where necessary seeks to develop a co-ordinated approach;

(c) is responsible for the Clegg Commission, Wages Councils, the Fair Wages Resolution and the present operation of Schedule 11 of the Employment Protection Act 1976.

2. The year on year figures are:-

(a) average earnings up 15-16% (the published figure of 14½% is depressed);

(b) the Retail Price Index (RPI) up 17%; the Tax and Price Index (TPI) up 14½%.

3. The current experience is:-

(a) the weighted average level of settlements since the end of July has risen to just over 19% (21% in the private sector and 15½%, depressed by a 13½% indexed settlement for the police, in the public sector), and has been increasing; actual earnings may prove to be higher,

(b) lower settlements are still being reached, but many major employers now seem reluctant to court the risk of industrial action by offers less than the RPI increase and claim that increases of this order are necessary to recruit and retain labour; the TPI does not appear to be of influence in negotiations;

(c) a number of settlements are being reached before the terminal date of existing agreements, partly reflecting the removal of pay policy restraint and partly to help maintain the real value of earnings; agreements for less than 12 months are not uncommon;

(d) some agreements also provide for the re-opening of negotiations if increases in the RPI exceed expectation; indexation is rare.

4. In keeping with the Government's decided policy, the Department does not seek to influence directly the level of any settlement. Responsibility rests with the negotiating parties. It must be concluded that general exhortation has so far been of no great influence. The full effects of the Government's monetary, fiscal

and industrial policies have yet to bite. The central difficulty is for employers and unions to accept that some significant reduction in real earnings is necessary in many areas of employment.

5. It is against this background, that the instruments of wage determination for which the Department is responsible need to be reviewed.

6. The Clegg Commission will report on nurses and teachers' pay in the next few months. It is determined to improve its working methods and provide rigorous analysis. Ministers have agreed in principle that the major manual groups of employees of Local Authorities and the National Health Service could be referred to the Commission on a longer term basis. For these groups the Commission's findings would then provide a basis for negotiations.

7. Ministers will have decided on a course of action for Schedule 11 and the Fair Wages Resolution before the Prime Minister's visit.

8. On the instructions of Ministers, the Department is reviewing the case for the retention of Wages Councils. The system affords protection against exploitation for employees in industries in which collective bargaining has not developed.

Course of Unemployment

1. Ten years ago the normal level of unemployment was around 5-600,000. This was interrupted by a short recession in 1971/72 when unemployment rose above 900,000. The present recession started at the end of 1974.

2. During 1975 unemployment rose by 500,000 getting well above 1 million. It rose more slowly during the next two years when a further 300,000 were added to the total. During 1978 and 1979 the level has fallen by 150,000. Ignoring school-leavers it was 1.3 million at the last count in October.

3. Next year all commentators seem agreed that unemployment will rise sharply and the Chief Secretary has said that he expects it to go up to 1.65 million. There was some sign of this starting at the October count. when the seasonally corrected figure went up by 18,000, but there was no further change at the November count. It would mitigate any future rise if activity rates for the elderly, the young and women turned out to be lower than we are presently expecting, ie labour supply turned out to be less. There are some signs that this may happen.

DE's Role

4. The main ways in which Government can influence the level of employment and, therefore, of unemployment eg through the central management of the economy and through regional policy and industrial policy, are not the responsibility of DE. The DE (and MSC) do, however, operate "employment measures" outside the mainstream of economic policies which have the purpose of reducing the level of unemployment and of improving the prospects of obtaining productive work for individual unemployed workers.

5. The DE and MSC are also responsible for the smooth functioning of the labour market, eg through the placing and training services of the MSC and for the provision of information about the labour market.

6. Most of the decisions and policies of Government have employment implications and the DE advises other Departments on those implications. For example, in the event of major closures, the DE will advise on the indirect employment effects, eg in supplying firms, on the PSBR costs of moves from employment into unemployment, on the prospects for the re-absorption into employment of redundant workers and on the industrial relations aspects of a redundancy situation.

Employment Measures

7. When it is not possible to promote employment through fiscal or monetary measures or through an increase in public expenditure, the level of unemployment can be reduced in some degree by so-called "employment measures". These do not in generalaspire to create additional jobs in the production process. Their aim is partly social, ie to enhance the chances for individual unemployed workers of

obtaining real work or at least to maintain their incentive to work and partly political, ie to reduce the level of registered unemployment. Without the present programme of employment measures, registered unemployment would be some 220,000 higher than it is.

8. The gross cost of employment measures in public expenditure terms per individual taken off the unemployment register (£2500 a year) is much less than the cost of creating a job through reflationary measures (getting on for £20,000 a year). The net cost after allowing for savings of unemployment pay is much less again (£1000 a year). But each employment measure is limited in scope and there could be no question of solving the unemployment problem through a programme of employment measures.

9. The last Government had plans to expand the programme of employment measures in 1979. The expenditure cuts of the present Government for the financial year 1979-80 had the effect of stabilising the programme at the level it had then reached. The programme runs for a year at a time and the question of whether there should be any measures in 1980-81 and if so, on what scale, is still to be decided by Ministers. Because the programme has been extended a year at a time the practice has grown up of financing it in part from the contingency fund - and this would be true of 1980-81 when an extension of the programme in full would necessitate the provision of about £70 million from the contingency fund.

10. In the past the programme leaned heavily on employment subsidies but apart from the tiny Small Firms Employment Subsidy these have now been phased out. The main schemes in the present programme are:

i. The Job Release Scheme under which workers are encouraged to retire before the age of 65 (before 60 for women). It is a condition of the scheme that the employer should replace the retiring worker from the unemployment register. Some 50,000 workers are being supported under the Scheme.

ii. The Temporary Short-Time Working Scheme under which employers and workers are encouraged to introduce short-time as an alternative to declaring redundancies. 25,000 redundancies are being prevented under the Scheme.

iii. The Youth Opportunities Programme under which young people are provided with work experience on employers' premises or specially mounted work projects. There are 100,000 filled places under the Programme.

iv. The Special Temporary Employment Programme under which long term unemployed adults are provided with work experience on specially mounted projects. There are nearly 20,000 filled places under the Programme.

v. The Training for Skills Programme under which some 25,000 apprentices and other trainees are being supported in industry.

In addition nearly 40,000 people are being trained at any one time under the Training Opportunities Programme.

ORGANISATION OF THE DE GROUP

1. Between 1974 and 1976 some of the functions for which the Department of Employment had previously been responsible were hived off to three Commissions comprising representatives of the TUC and CBI and other representatives - the Manpower Services Commission (MSC), the Health and Safety Commission (HSC) and the Advisory, Conciliation and Arbitration Service (ACAS). The main reasons for setting up the separate organisations were to hive off large blocks of executive work into accountable units for the purpose of management in the running of the organisations. More than half of the staff in the DE Group now work for the Commissions - about 26,000 for the MSC, 4000 for HSC and 800 for ACAS, compared with 23,000, including 17,000 in the unemployment benefit service, in the Department of Employment.

2. This note outlines the roles of the three Commissions and examines briefly their performance against the original expectations.

Manpower Services Commission

3. The MSC was established on 1 January 1974 with the responsibility for operating the employment and training services. In addition, from 1975 onwards it has operated a number of special programmes for unemployed people. The Commission is required to put proposals for the development of its policies and programmes to the Secretary of State who may approve or modify them, and the Secretary of State has a power of direction in respect of any of the Commission's functions. Finance is provided by grant in aid borne on the DE vote.

4. The MSC's programmes have developed rapidly on all fronts since 1974 with the rapid expansion of the Training Opportunities Scheme and of expenditure to promote training in industry, the modernisation of the jobcentre programme, and the introduction and fast development of special programmes for the unemployed. Expenditure on MSC programmes in 1974-75 at out-turn figures was £215 million and the estimate for 1979-80 is £631 million. Staff increased from 19,500 in January 1975 to 26,000 in October 1979.

5. The two main issues about the Commission are concern about the rapid increase in expenditure and staff and the question of the extent to which the objectives in setting up a semi-independent Commission to run manpower programmes have been met. The main point about the incessant growth of expenditure on manpower programmes is that it has not arisen from the form of organisations but from policy decisions

of both the Government of 1970-74 and the succeeding Government to give priority to the rapid development of manpower programmes. When the MSC was set up it inherited existing plans already approved by the then Government to modernise the employment service, to double training opportunities, and to switch the financing of Industrial Training Board operating costs to the Exchequer. On top of this, as unemployment increased in 1975 and beyond, the Commission was asked by the Labour Government to operate and rapidly develop new programmes for the unemployed. There has been constant pressure on the MSC until recently to expand their programmes and no lack of resources for the purpose so there has been little need for the Commission to consider priorities or make hard choices within or between programmes. This position has already been changed by the large reductions in staff and in planned expenditure which the MSC will have to find on its programmes in the years ahead.

6. On the second question, it cannot be claimed that great progress has been made as a result of the direct involvement of the CBI and TUC in tackling some of the more intractable manpower problems such as local union resistance to TOPS trainees. But some progress has been made and it is helpful to have, for example, the commitment of the TUC and CBI to the training for skills programme which is designed to improve the flexibility of training arrangements. And on some other programmes, for example work experience for unemployed young people, the direct involvement of the TUC and CBI has been a definite advantage in launching and promoting them.

7. Our view is that while the benefits can be exaggarated, there is advantage in having an independent body with direct involvement of the TUC and CBI operating the manpower services in which they have such a close interest and where their co-operation is often essential. There is, however, now need for a period of consolidation and assessment of priorities within the MSC's field which the expenditure and staff reductions on the Commission's programmes will require.

Health and Safety Commission (HSC)

8. The Health and Safety at Work Act, and the Health and Safety Commission and Executive were the Government's response to the three fundamental concepts of the Robens Committee on Safety and Health at Work which were that the statutory provisions scattered amongst some 30 separate Acts should be brought within the unifying ambit of a single comprehensive statute, that a separate, self-contained and autonomous organisation in which the 'user interests' were fully involved

should be the authoritative body responsible for safety and health at work, and that the hitherto separate and specialised safety inspectorates should be integrated into a single all-embracing safety inspectorate.

9. The present organisation meets those objectives. Government also has the benefit of an independent view on health and safety matters, which can be valuable to Ministers (c.f. Moss Moran in Scotland, where the Secretary of State for Scotland was able to rely upon the independent advice of the Health and Safety Executive in reaching his decision on a crucial petro-chemical planning application).

10. HSE staff number 4200 - 1550 in its Inspectorates, 2400 in administration, research, statistics, and laboratory services, and 250 in the Employment Medical Advisory Service. This is an increase of 2200 since inception, but half of this results from Inspectorates being transferred from other Departments. HSE's current cost is £56m p.a. The resource costs to the economy of industrial accidents were estimated in 1976 at £900m. Moreover DHSS pay out some £275m p.a. in industrial injury and death benefits. Since inception there has been an 8% improvement in the incidence of reported industrial accidents.

11. Although there have been and still are complaints about the impact of the modern health and safety legislation upon industry, surveys of firms' attitudes towards employment protection legislation have shown that the health and safety element is not a major source of complaint.

12. Although Ministers are no longer in direct control of the work of the Commission and Executive they can exert influence through budgetary control, by approval of the Commission's programme of work, by departmental contributions during the Commission's consultative process, by the fact that the Commission's proposals for regulations are subject to Ministerial approval, and, in the final analysis by the Ministerial power of direction.

Advisory Conciliation and Arbitration Service (ACAS)

13. ACAS was established in 1975 as an independent statutory body (not subject to Ministerial power of direction) under the direction of a Council constituted on a similar pattern to the MSC and HSC. It has an HQ and regional organisation with some 800 staff. Within its general duty of promoting the improvement of industrial relations it provides conciliation, arbitration, inquiry and advisory services on an essentially voluntary basis.

14. It is a fact of industrial relations experience that such impartial services are in frequent demand; and also that their direct provision by Government involves the inherent difficulty of combining industrial peacekeeping with other

Government policies. The establishment of an independent ACAS, with the support of the CBI and TUC, has enabled Government more readily to resist parliamentary and media pressures for direct Ministerial intervention in particular negotiations and disputes.

15. In 1978 ACAS dealt with over 3,000 requests for conciliation in industrial disputes, of which 40% were made by employers or by employers and unions jointly; as well as substantial volumes of inquiry and advisory work. These are much higher levels of activity than when DE provided similar services, and represent a significant contribution towards resolving disputes and improving industrial relations.

Item 5. Labour Market Problems - especially Labour Shortages

1. The extent of the complaints of labour shortage at a time when for every notified vacancy there are almost five people registered as unemployed and following a rapid increase in public expenditure on training is prima facie puzzling. Another problem is the impact of new technology.

2. The CBI regularly report about 20% of firms as expecting output to be held up by shortages of skilled labour; many studies show shortages of electronic, production and design engineers, draughtsmen and computer staff; the Employment Services report difficulty in filling vacancies in most skilled engineering trades; British Rail, the Post Office and Fords are some reporting shortages of semi- and unskilled staff.

3. This paradoxical and worrying situation must be seen in the context of other facts, eg

   - The proportion of firms reporting potential skill shortages as a constraint on output is much lower now (20%) with unemployment at 5.2% than the 50% reached in October 1973 when unemployment was 3.2%.

   - Many alleged shortages disappear on closer examination. In 25 a survey of notified vacancies suggests that the number of manufacturing establishments showing persistent shortages is equivalent to less than 5 per cent of all such establishments employing more than 100 people.

   - While most of the unemployed register only about a third of all vacancies are notified. Moreover nearly half the registered unemployed are in regions with high unemployment but only one-third of the vacancies are in those regions.

   - More than two-thirds of all vacancies notified to employment offices are filled by them; the proportion of craft vacancies filled is only slightly lower. Most of the rest are cancelled by employers.

   - 90% of vacancies for general labourers filled by ESD are filled within 6 working days. For skilled workers 90% of vacancies filled are filled within 13 working days.

   - With some of the lesser skilled vacancies the problem is not filling them but keeping them filled given very high staff turnover.

   - Many of the unemployed are only on the register for a short time. Others may be unsuitable for the available vacancies on grounds of age or health.

4. Some shortages are both persistent and worrying. Causes and cures of these vary. For graduates the problems are persuading bright young people to take engineering courses, then to enter industry and to stay there (over 40 per cent of engineering and technology graduates in 1970 who entered the mechanical engineering industry had left it by 1977). Attitudes in society, pay, status and career progression in industry are all important. The Finniston report will provide a background for action here by Government, Education and Industry.

5. For skilled manual workers - especially in engineering and some construction trades - there is a shortage of trained workers willing to use their skill. Reasons include the low level of apprentice training in the early 1970s; wastage into other occupations because of dissatisfaction with pay, prospects or conditions or following redundancies; and the restrictions on adult entry to skilled work. Shortages could be alleviated by making better use of existing skilled labour eg on maintenance work. Government policy on freeing collective bargaining, facilitating labour mobility and concentrating MSC's training efforts on industrially important skills can help but most remedies are in the hands of industry. Several NEDC Sector Working Parties are helping companies.

6. It is often suggested that at the less skilled level there is a reluctance by some of the unemployed to take such vacancies because of the relative attractions of unemployment benefits. Up to 5% of the unemployed are better off on benefit than in work. We estimate that up to 10 per cent of employees in work are no more than £5 a week better off than if on benefit. Other important factors in keeping such vacancies filled relate to difficulties of low pay, poor working conditions and awkward hours. Some firms also operate hiring standards often unrelated to the requirements of the job. Again remedies lie mainly with industry.

7. The impact of new technology on employment is the subject of a forthcoming report from a DE study group. It will say that failure to adopt new methods will have a more serious impact on employment than adapting to them. It will not attempt to quantify employment consequences but will outline developments in particular industrial sectors and express views on ways of smoothing the introduction of new technologies.

THE UNEMPLOYMENT BENEFIT SERVICE (UBS)

I WHY IS THE UBS LOCATED IN DE ?

1 Until the 1946 National Insurance Act came into operation in 1948 the Ministry of Labour (now the Department of Employment) was responsible for policy and administration of the unemployment insurance scheme. Both the employment and benefit functions of the Ministry of Labour were carried out through its network of Employment Exchanges.

2 The 1946 Act implemented the proposal in the Beveridge Report for a comprehensive national insurance scheme covering retirement, sickness and unemployment to be administered by a new Department, the Ministry of National Insurance (now DHSS). The latter took policy responsibility for unemployment benefit, but the Ministry of Labour remained responsible for day-to-day administration, through the existing employment exchange network on an agency basis.

3 During the 1960s there were attempts to improve the Employment Service and make it more effective. Little advance was achieved and a number of studies, including one by an OECD team, concluded that the integration of the employment and benefit services was a fundamental obstacle although the need to retain strong links between the benefit and employment services was recognised.

4 The final decision was taken in late 1971 to set up an employment service physically and organisationally separate from the benefit service. The question of the future departmental responsibility for unemployment benefit administration was left open. The DE considered that a transfer of responsibility to the DHSS would be damaging to staff morale at a time when consultations were going forward on the 'hiving off' of the employment and training services to the MSC (under the Employment and Training Act 1973). The DHSS was in the process of integrating its supplementary benefit and contributory benefit local office network and was also heavily engaged with implementation of a new pensions scheme. They were not enthusiastic about wedging a further reorganisation into their programme of work during the 1970s. It was finally agreed that departmental responsibilities should be left as they were for at least five years and to look at them again at the end of the 1970s. The two departments are now proposing to set a review in hand of all the arrangements for administering unemployment benefits.

IS THE UBS AN EFFECTIVE SERVICE?

5 The Unemployment Benefit Service has no control over its basic workload. Whatever the level of unemployment and however the number of claims fluctuate during the year it must process its claims and get payments out. If it does not the applications for help will overburden the DHSS Local Offices adding to their problems. Apart from local and sporadic difficulties with postal services and occasional industrial action, it has not failed in its objective over the past five years when the claims load has more than doubled.

6 The number of payments made weekly has risen from 480,000 in 1974/5 to 1,080,000 in 1978/9 - an increase of 125%. The staff numbers in UBOs rose however only by 73%, from 11,000 to 19,000 (the number currently in post is 17,000). DE administration costs as a percentage of benefit paid have fallen from 8.4% in 1974/5 to 6.0% in 1978/9.

7 The UBS at local office level is manned through a staffing basis scheme negotiated with the unions, which relates staffing requirements directly to volumes of work over about 60% of the work load. This staffing basis has been adjusted to take account of the extension of computer processing of claims office by office since 1974, and computerisation has given a saving over manual processing of 15% - 16%. Further savings of about 5% are being achieved from the introduction of fortnightly (as against weekly) attendance and payment of claimants this September. This change was carried through in the teeth of opposition from the Civil and Public Services Association (80% of UBS local office staff are in the clerical grades).

8 The UBS does not only have to cope with year on year changes in the trend of unemployment. A particular and difficult feature of its operation is the extent to which the claims load fluctuates through the year peaking sharply in the summer months when school leavers (approximately 250,000) and adult students make their claims (150,000).

III CHECKING FRAUD AND ABUSE

Fraud

9 Policy on unemployment benefit fraud investigation and prosecution rests with DHSS. DE investigates UB fraud through fraud staff based in UBOs and Special Investigators, who look into more difficult and complex cases. DE fraud investigation is concentrated mainly on cases where a claimant (or his wife) is suspected of working while drawing benefit.

10 Staff engaged on fraud investigation in DE have risen as follows:

	UBO fraud man years	Special Investigators complement at end year	Total
1975	170	45	215
1978	305 (+ 79%)	79 (+ 76%)	384 (+ 79%)

The number of cases investigated and prosecuted has risen as follows.

	Investigated	Prosecuted
1975	11,583	1,947
1978	24,695 (+ 113%)	3,942 (+ 102%).

The UBO fraud complement is being increased by a further 80 to allow for more checks on fraud now that we are paying benefits fortnightly. This 80 was found from the savings flowing from the fortnightly system of payment.

11 Although the number of cases prosecuted has risen so sharply we are still obtaining a conviction in 98% of cases. Penalties imposed by the courts however tend to be small - usually a fine plus costs of less than £100.

12 Over the past four years we have completely revised our instructions to staff on fraud work; improved staff training; improved control of the fraud effort from both HQ and regional offices. We have also made all girocheques we issue payable only at a nominated Post Office. This has cut girocheque fraud by two-thirds and enabled staff resources to be used to investigate the more serious offence of working and drawing.

Abuse

13 Abuse of the benefit system which falls short of a prosecutable offence is much more difficult to control.

14 Every claimant signs a declaration on each attendance that on the days he claims for as unemployed he was able and willing to do any suitable work but was unable to get any. The only satisfactory way to test this declaration is to offer him a job. If such a job is offered and refused there are procedures for imposing benefit sanctions. The fall over recent years in the number of cases where this has happened is a cause for concern:-

	Referrals for refusal of employment
1974	11,822
1975	6,144
1978	6,845

15 The majority of such referrals come from the Employment Service. In the light of the Conservative Party Manifesto commitment that "the rules about the unemployed accepting available jobs will be reinforced", the Department of Employment and the Manpower Services Commission have agreed to set up a small Working Group of officials chaired by Mr Lester (Joint PUSS) with the following terms of reference:-

> "To consider what could be done, within the existing statutory framework, to improve liaison between the Manpower Services Commission and the Unemployment Benefit Service in the application of the rules about the unemployed accepting jobs which are suitable and available".

It is hoped that the Working Group will complete its discussions in the New Year.

DE OFFICIALS ETC WHOM THE PRIME MINISTER WILL MEET ON 26 NOVEMBER

1. Morning Discussion Session (with Secretary of State)

Lord Gowrie	-	Minister of State
Mr Lester	-	Parliamentary Under Secretary
Mr Mayhew	-	Parliamentary Under Secretary
Sir K Barnes	-	Permanent Secretary
Mr I Hudson	-	Deputy Secretary: Manpower and Employment Policy
Mr D B Smith	-	Deputy Secretary: Pay and Industrial Relations (incl. ACAS & CAC)
Mr D Derx	-	Deputy Secretary: Industrial Relations (General Policy and Legislation)
Mr G Penrice	-	Deputy Secretary: Statistics and Research
Mr A Larsen	-	Under Secretary: Economic Policy (Manpower) Division - Employment Policy; Special Employment Measures;
Mr R Dawe	-	Assistant Secretary: Relations with MSC
Mr R Shepherd	-	Special Adviser to Mr Prior
Mr I Fair	-	Principal Private Secretary to Mr Prior

2. WORKING LUNCH

(in addition to some of the above)

Mrs D Kent	-	Under Secretary: Manpower General Division (Equal Pay/ Discrimination Legislation/Careers Service/ Youth Employment/ Unemployment Benefit Service)
Miss M Green	-	Assistant Secretary: Unemployment Benefit Service
Mr E Whybrew	-	Assistant Secretary: Skillshortages/Mobility of Labour/Youth Employment

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Ref. A0711

PRIME MINISTER

Industrial Relations Legislation

(C(79) 58)

BACKGROUND

This paper is a tidying-up operation. None of the material is completely new: it has all been considered either in Cabinet, in E or in E(EA). Some of the proposals have since been modified, in the light of consultation, but the general line is familiar.

2. The timetable is now very tight indeed. Consultations with the CBI have been completed. Those with the TUC will not be formally wound up until after the TUC's Employment Policy Committee meeting, on Thursday (the same day as Cabinet). But the Secretary of State for Employment already knows the TUC line sufficiently well to predict their reactions. Cabinet must, if at all possible, take final decisions at this meeting. The complete draft Bill will then go to the Legislation Committee on 4th December, for introduction on 6th December. Unless the business of the House is further delayed, there will be a Second Reading before Christmas.

HANDLING

3. You might ask the Secretary of State for Employment to introduce the paper very briefly, but we have agreed with his office that what matters is that the Cabinet should then be taken through the paper step by step. Individual Departments have been consulted as necessary at each stage. Ministerial attitudes are generally well known, and there should not be too much trouble in getting agreement.

(a) Individual Employee Rights: Maternity Benefits. In this case, Mr. Prior proposes a concession in favour of the mother (agreed with the employers) and proposes to drop the exemption for small firms. The original proposal came from the Secretary of State for Industry, and you will want him to confirm that he is content, albeit reluctantly, to see it drop.

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(b) Individual Employee Rights (Others). These are listed in the Annex to the paper. They are all in line with the decisions taken in E(EA) and (in the case of the Tribunal procedures) have been agreed with the Lord Chancellor's Department.

(c) Union Recognition Disputes. Attempts by successive Governments to rationalise the law in this area have failed, and ACAS finds the present law unworkable. The Secretary of State for Employment has abandoned the attempt to find an alternative formulation and proposes to repeal the provisions altogether. This means that there will be no law on union recognition: the whole thing is left to ordinary collective bargaining (i.e. the Grunwick case could never recur). Of all the proposals in the Bill, this will be the most unpopular with the TUC.

(d) Statutory Extension of Terms and Conditions of Employment. This means the abolition of "Schedule 11" (of the Employment Protection Act 1975). The Secretary of State for Employment proposes to abolish the whole schedule, thereby reducing the opportunity for "leapfrogging". The BBC unions are trying to exploit it again this year, following the settlement of the ITV strike. Repeal of Schedule 11 will not, however, be complete in time to help in that case. Additionally, the Secretary of State proposes to leave the House of Commons Fair Wages Resolution until later on the grounds that it might be well to avoid stirring up this particular problem, at a time when Government Departments are proposing to contract out to the private sector a lot of work hitherto done by civil servants. Abolition of the Fair Wages Resolution at the same time might provoke unnecessary union opposition. In any case the Fair Wages Resolution is not a matter of legislation.

(e) SLADE. At the time of the last Cabinet discussion, the Secretary of State for Employment had not formulated proposals about the SLADE-type problem (he had only just received the Leggatt Report). He now proposes to deal by legislation with cases where unions impose secondary "blacking" on firms who refuse to recognise them or

introduce closed shops. Although the problem was most acute in the printing industry, the legislation would be general. TUC opposition will focus on this proposal, particularly since all the other "immunities" provisions have been postponed (see below). But there is a pretty clear case for legislation, and Mr. Prior is prepared to ride out the TUC storm.

(f) Trade Union Immunities. The Secretary of State for Employment had always proposed to defer a final decision about legislation on immunities until the House of Lords decision in the "MacShane" case. The decision has now been postponed until December. He therefore wants to leave any new legislative proposals until Committee Stage, with the fall-back of a separate Bill later. The Chancellor of the Duchy of Lancaster will say that there is no prospect of such a Bill in the present Session: but he will not rule out the chances of a Bill in the following Session. You will, I think, be reluctant to drop the idea of legislating on immunity in this Session. It would be too late, by the time Royal Assent is received, to make much difference to the outcome of the present wage round. But the Government is heavily committed to curtailing trade union immunities, and you will want to be seen to make some progress. Moreover, the Solicitor General (who has been involved throughout) still believes it should be possible to proceed quickly. The Lord Chancellor, I understand, disagrees with him, and although he will be reluctant to overrule the Government's Legal Adviser, he will probably suggest that it would be better to wait for the House of Lords. I think you will have to support him on this. In that case you might ask the Secretary of State to bring forward fresh proposals, to E or to Cabinet, as soon as possible after the House of Lords judgment (he promises this in paragraph 13).

(g) Closed Shop - Conscience. You will recall the protracted and inconclusive discussion in Cabinet on 18th October. Parliamentary Draftsman has now performed a miracle of compression, by proposing that no-one should be excluded from his job who refuses to join a trade union "on grounds of conscience". The Lord Chancellor may still wish to

decorate this very clear formula: if so, you might invite him to do so urgently, in agreement with the Secretary of State for Employment; otherwise the formula proposed by the Draftsman should stand.

(h) Closed Shop - Exclusion or Expulsion. The issue here is whether people should have a right of appeal against exclusion in every case, or only where it results in loss of a job. The Secretary of State for Employment now proposes to leave the ordinary civil law to operate, except where a man loses his job. This seems reasonable: it conforms to the original Manifesto proposal.

CONCLUSIONS

4. Subject to the course of discussion, I think you should be able to record the Cabinet's approval of each of the five conclusions set out in paragraph 16 of the Secretary of State for Employment's paper.

M.F.V.
pp
ROBERT ARMSTRONG

21st November, 1979

CONFIDENTIAL

Lord PS

QUEEN ANNE'S GATE LONDON SW1H 9AT

19 November 1979

Dear Jim

SCHEDULE 11 OF THE EMPLOYMENT PROTECTION ACT

I am also very concerned about the possibility of a BBC claim under Schedule 11 to which Geoffrey Howe drew attention in his letter of 9 November. I share his view that this could lead to very serious consequences for the service provided by the BBC, and like him I was looking to an early repeal of the whole of Schedule 11.

I have now also seen your letter of 15 November. I note what you have said about the BBC's attitude and approach this year and I will make clear to the Corporation the consequences of the outcome of any parity claim by its Unions.

I am copying this letter to members of E Committee and to Sir Robert Armstrong.

Yours

Willie

The Rt. Hon. James Prior, M.P.

CONFIDENTIAL

VE

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400

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R 14

Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
Treasury
Great George Street
LONDON SW1P 3AG

15 November 1979

Dear Geoffrey

SCHEDULE 11 OF THE EMPLOYMENT PROTECTION ACT

You wrote on 9 November about Schedule 11 and the pay claim by BBC staff unions.

I am about to circulate a paper for discussion at E Committee next week seeking final policy decisions on our industrial relations legislation, which we have already agreed should deal with Schedule 11. As for the Fair Wages Resolution, I agree that our international obligations cannot be lightly set aside and that we should explore all possible options rather than reach a rushed decision.

On timing. I am as you know aiming to introduce a Bill early next month. I would hope that we might get it on to the statute book a couple of months earlier than you suggest, but in any event it is clear that it is unlikely to be in time to help with the current BBC problem. Schedule 11 is of course contained in primary legislation and I know of no practical possibility of amending it other than in my forthcoming Bill.

I would hope that the BBC's attitude and approach will be very different this year. Last year they joined with their unions in pressing the CAC for an urgent Schedule 11 hearing and award, and BBC management were widely reported in the press at the time as greeting the award with acclaim and relief. No doubt Willie Whitelaw will be making it clear to the BBC that this time round, whether the parity claim is pressed by industrial action or under Schedule 11, they and their unions will have to face the consequences of the outcome. It will be up to them to get the message over in their negotiations.

I would add that Schedule 11 provides for comparisons of like circumstances and if a Schedule 11 claim is made I would expect the BBC strenuously to oppose comparison with the ITV settlement which we are told, includes significant productivity elements.

I am copying this letter to members of E Committee, and to Sir Robert Armstrong.

D. TELE
27.7.79
SHIPPING
VESSELS
NAWALA

LORDS DISMISS SHIPOWNER'S BLACKING MOVE

An appeal by the shipowner N W L Ltd., aimed at preventing a union blacking its bulk carrier Nawala, 64,077 tons, was dismissed by the House of Lords today.

N W L, a Hongkong based corporation, has sought temporary court orders against three officials of the International Transport Workers' Federation to stop them taking action against the ship, which flies a flag of convenience.

Lord Diplock, sitting with Lord Fraser of Tullybelton and Lord Scarman, said they were all of the opinion that the appeal should be dismissed. They will give their reasons at a later date.

D. TELE
22.6.79
SHIPPING
VESSELS
NAWALA

BLACKING BAN ON HONGKONG SHIP LIFTED

The International Transport Workers' Federation, which is fighting to improve conditions for crews on board ships flying "flags of convenience," yesterday won its appeal to lift a High Court injunction granted on Tuesday banning the blacking of a Hongkong-registered cargo ship.

Appeal Court judges in London held that even if the crew of the bulk carrier, Nawala, docked at Redcar, Cleveland, carrying iron ore for the British Steel Corporation, were not members of any trade union, the ITF's action was part of a valid dispute within the Trade Union Labour Relations Act.

Lord Salmon said: "However idiotic it may be, if a trade union has a dispute with employers, even if the workers are entirely satisfied, it is still a trade dispute." The Chinese workers in this case were said to have not complained about their conditions.

N W L LTD v. NELSON & WOODS

C O R R I G E N D A

Page 12, line 40: delete "interim interdict" and insert "interlocutory injunction"

15, line 31: delete "failure" and insert "practice"

———:o:———

HOUSE OF LORDS

N. W. L. LIMITED (APPELLANTS)

v.

NELSON & ANOTHER (RESPONDENTS)

N. W. L. LIMITED (APPELLANTS)

v.

WOODS (RESPONDENT)
(Consolidated Appeals)

Lord Diplock

MY LORDS,

Lord Diplock
Lord Fraser of Tullybelton
Lord Scarman

In these consolidated appeals the plaintiffs ("the shipowners"), a Hong Kong company, all of whose shares are beneficially owned in Sweden, seek to prevent officials of the International Transport Workers' Federation ("ITF") from inducing port workers in England and elsewhere to "black" their vessel, the Nawala.

In an endeavour to stop the blacking before the damage had been done, they applied in each of the actions for interlocutory injunctions. In the first action, against the defendant, Woods, Donaldson J. granted an interlocutory injunction, thinking that the judgment of the Court of Appeal in *The "Camilla M."* [1979] 1 Lloyd's Rep. 26 compelled him to do so. This injunction was discharged by a Court of Appeal consisting of Lord Salmon and Stephenson L.J. In the subsequent action against the defendants Nelson and Laughton, Donaldson J. refused the shipowners' application and his refusal was upheld by a Court of Appeal consisting of Lord Denning M.R. and Waller and Eveleigh L.JJ. Against these two decisions of the Court of Appeal that the shipowners are not entitled to interlocutory injunctions, these appeals (now consolidated) have been brought to your Lordships' House by leave of the Court of Appeal.

The cases arises out of the threat by ITF that industrial action will be taken against the Nawala unless the shipowners conform to ITF's requirements as to the wages and conditions of employment of the members of its crew. ITF, which has its headquarters in London, is an international federation of national trade unions, in 85 different countries, representing transport workers of all kinds including seamen. As is well known in shipping circles and to the commercial judges, it has a policy as respects vessels which sail under what it describes as "flags of convenience"—an expression which it uses with a much extended meaning as covering all vessels that are registered in a country which is not the domicile of the beneficial owner of the vessel. That policy is described in detail in the judgment of the Court of Appeal in the action against Woods, and is placed in its worldwide perspective in the judgment of Donaldson J. in the action against Nelson and Laughton. It may be summarised as follows.

ITF endeavours to exert such "industrial muscle" as its affiliated national unions are prepared to exercise at its behest in order to compel the owners of vessels sailing under flags of convenience (in this extended sense) to employ their officers and seamen on terms of standard articles prepared by ITF and providing for wages at rates said to be the middle rates paid to ships' crews under

collective agreements negotiated by national trade unions for ships on their national registries in European countries outside the communist bloc. An alternative way of buying off industrial action inspired by ITF is to change the vessel's flag by transferring its registry to that of the country of domicile of its beneficial owner, whereupon he will be obliged to negotiate terms of employment and wages of crews with the national seamen's union affiliated to the ITF. The ultimate aim is to abolish throughout the world the use by shipowners of flags of convenience as ITF defines them.

Your Lordships are in no way concerned with the economic wisdom or the moral justification of this policy. The evidence in the instant appeals confirms what the evidence in *The "Camilla M."* suggested, that the policy does not command the approbation of seamen and their national trade unions in those countries of Asia which have traditionally formed the recruiting grounds for many thousands of seamen eager to serve under articles that provide for wages which, although much lower than those demanded by their European, North American and Australasian counterparts, are, nevertheless, much higher than anything that they could hope to earn in land-based work in their own countries. Their competitiveness as candidates for manning the merchant navies of the world depends upon their cheapness. Their natural fear, as indicated by the evidence, is that if their competitiveness is reduced by forcing shipowners who employ them to pay to them wages at the middle rate paid to European seamen, their chances of sea-faring employment will be very much reduced. This readily accounts for the attitude taken up by the Indian crew in *The "Camilla M."* and by the Hong Kong crew in the instant case.

The history of the Nawala which led to her selection as a target of ITF's campaign against flags of convenience and the way in which that campaign has been carried on against her up to 3rd July 1979, are set out in such vivid detail in the judgment of the Master of the Rolls delivered on that date, that rather than repeat it in less readable style, I recommend reference to it direct and will restrict myself to stating in summary form such facts as are essential in order to identify the questions of law which fall to be decided by your Lordships. The Nawala did not, however, remain stationary while the lawyers were arguing about her; nor has she done so between 3rd July 1979 and the hearing in the Appellate Committee of the shipowners' appeal to this House. A further chapter to Lord Denning's saga of the Nawala must also be recounted briefly.

The Nawala is a large bulk-carrier with a capacity of more than 120,000 tonnes dwt. She was built in Germany in 1974 for Scandinavian shipowners and entered on the Norwegian registry. She was manned by a Norwegian crew at rates of wages that had been negotiated by their national trade union and are among the highest current in European countries. When the slump in the freight market came she was trading under the Norwegian flag but at a loss. Her owners were unable to meet the mortgage payments and sold her to buyers based in Sweden, who for the purpose of transferring her to Hong Kong registry formed a Hong Kong company of whose shares a Swedish company was beneficial owner. The Hong Kong company became the nominal owner of the vessel, and a Hong Kong crew was engaged at very much lower wages to take the place of the Norwegian crew. It was not necessary for the Nawala to visit Hong Kong in order to effect the change of flag or to engage the Hong Kong crew. The crew was engaged there by an agency that was officially licensed in the colony to do so. The crew signed their articles there and were flown to Hamburg where they joined the vessel.

The Nawala, under her new flag and manned by her new and much lower paid crew, was engaged by her new owners upon chartered voyages world-wide. Early in 1979 she had berthed at Redcar with a cargo of Australian iron ore for British Steel. A representative of ITF boarded her and demanded of the master that he sign on behalf of the shipowners an agreement with ITF that they would enter into articles with the crew on standard ITF terms. The demand was refused. When she arrived at Redcar on her next consecutive voyage with a similar cargo on 15th June 1979, Mr. Woods, who was an official of both ITF and the English National Seamen's Union, repeated the demand and said that

if it were not complied with the Nawala would be "blacked" by the port workers. He and later Mr. Nelson and Mr. Laughton attempted to persuade port workers who belonged to other unions affiliated to ITF to refuse to allow her to enter her berth, to unload her if she got there or to let her leave it. In the result these attempts, when they were resumed after the interlocutory injunction granted by Donaldson J. had been lifted by Lord Salmon and Stephenson L.J. on 21st June 1979, were unsuccessful because they were resisted by the trade unions to which the port workers belonged. So the Nawala succeeded in unloading her cargo and sailed away from Redcar to Narvik to load a cargo of Norwegian iron ore for carriage to the Netherlands.

She was off Narvik waiting for a berth when the shipowners' appeal against the refusal of Donaldson J. of an interlocutory injunction against the defendants Nelson and Laughton was heard by the Court of Appeal, and ITF had by telegrams despatched from London and a personal visit by the defendant Nelson persuaded the national trade union there, the Scandinavian Transport Workers' Federation, to black her. On that very day, 3rd July 1979, a judge of the appropriate court of first instance in Narvik stayed the shipowners' application to prevent the Norwegian blacking, apparently to await the final determination of the English litigation; but on 12th July the stay was removed by an appellate court and the case remitted to the judge at Narvik for further consideration. On 19th July 1979 he granted the shipowners a temporary injunction against the blacking of the Nawala at Narvik. She proceeded to her loading berth, loaded a full cargo and left on 22nd July bound for Ijmuiden in the Netherlands. The stop press news, received on 26th July, the last day of the hearing before this House, was that the Dutch trade unions of which port workers at Ijmuiden were members were threatening to black the Nawala there. If she is not prevented from carrying out the future voyages for which she is already fixed she will be returning to discharge a cargo of iron ore at a port in England, but not until the autumn of this year.

The interlocutory injunction which the shipowners seek against all three defendants is in the terms of that granted by Donaldson J. against the defendant Woods, but discharged by the Court of Appeal, viz. an injunction against:

> "Issuing instructions to and/or encouraging stevedores and/or tug operators "and/or their employees and/or pilots or others concerned with the "discharge and/or free passage and operation of the M.V. Nawala to break "their contracts of employment or otherwise howsoever interfere with such "discharge, free passage or operation".

My Lords, these words are not restricted to prohibiting instructions or encouragement given within the jurisdiction to parties to contracts of employment made and to be performed within the jurisdiction. Questions of great nicety in private international law might arise if it were sought to enforce this injunction in respect of instructions or encouragement of port workers employed in Narvik to "black" the Nawala there or of port workers anywhere else outside the jurisdiction of the English court. The possible significance of such jurisdictional problems appears to have been overlooked by the Court of Appeal in *The "Camilla M."* where the port at which the blacking of the vessel was enjoined was Glasgow, a place outside the jurisdiction of the English courts.

However, I do not think it necessary for your Lordships to enter upon a consideration of these questions now. The jurisdiction of an English court to entertain against a defendant upon whom its process can be served within the jurisdiction, an action for an allegedly wrongful act committed *outside* the jurisdiction is dependent upon the act being not only unlawful in the place where it was committed but also being one which, had it been committed in England, would have amounted to a tort in English law. So, if what the defendants in the instant case did at Redcar had succeeded in procuring the blacking of the Nawala there, but even then would not have constituted a tortious act in English law, an English court would have no jurisdiction to entertain an action based on similar conduct by the defendants at Narvik, and *a fortiori* would have no jurisdiction to entertain a *quia timet* action to restrain it.

I understand your Lordships to be of the opinion, which I also share, that even if the defendants had succeeded in inducing port workers at Redcar to break their contracts of employment and to black the Nawala, they would not have committed any tort in English law, because their conduct was excused by section 13 of the Trade Union and Labour Relations Act 1974 as amended by the Amendment Act of 1976. So any similar conduct outside England cannot be the subject matter of any action, *quia timet* or otherwise, which English courts have jurisdiction to entertain.

I turn then to the crucial question in this appeal which, since it relates to an application for an interlocutory injunction, not a final one, I take it to be this: Have the defendants shown upon the evidence such a likelihood of establishing that what they did or threatened to do at Redcar was done or threatened in contemplation or furtherance of a trade dispute, as would justify the court in exercising its discretion in favour of refusing the injunction sought?

The relevant sections of the Act are section 13 which confers the immunity for acts done in contemplation or furtherance of trade disputes, section 29 which says what is meant by a trade dispute, section 17 which imposes restrictions on the grant of interlocutory injunctions and section 28 which makes it clear that a federation of trade unions such as ITF is itself a trade union within the meaning of the Act. The first three of these sections deserve to be reproduced in full:

"(1) An act done by a person in contemplation or furtherance of a trade "dispute shall not be actionable in tort on the ground only—

"(a) that it induces another person to break a contract or interferes or "induces any other person to interfere with its performance; or

"(b) that it consists in his threatening that a contract (whether one to "which he is a party or not) will be broken or its performance inter- "fered with, or that he will induce another person to break a contract "or to interfere with its performance.

"(2) For the avoidance of doubt it is hereby declared that an act done by a "person in contemplation or furtherance of a trade dispute is not actionable "in tort on the ground only that it is an interference with the trade, business "or employment of another person, or with the right of another person to "dispose of his capital or his labour as he wills.

"(3) For the avoidance of doubt it is hereby declared that—

"(a) an act which by reason of subsection (1) or (2) above is itself not "actionable;

"(b) a breach of contract in contemplation or furtherance of a trade "dispute; shall not be regarded as the doing of an unlawful act or as "the use of unlawful means for the purposes of establishing liability "in tort.

"(4) An agreement or combination by two or more persons to do or "procure the doing of any act in contemplation or furtherance of a trade "dispute shall not be actionable in tort if the act is one which, if done "without any such agreement or combination, would not be actionable in "tort."

"29. Meaning of trade dispute

"(1) In this Act 'trade dispute' means a dispute between employers and "workers, or between workers and workers, which is connected with one or "more of the following, that is to say—

"(a) terms and conditions of employment, or the physical conditions "in which any workers are required to work;

"(b) engagement or non-engagement, or termination or suspension of "employment or the duties of employment, of one or more workers;

"(c) allocation of work or the duties of employment as between "workers or groups of workers;

"(d) matters of discipline;

"(e) the membership or non-membership of a trade union on the part "of a worker;

"(f) facilities for officials of trade unions; and

"(g) machinery for negotiation or consultation, and other procedures, "relating to any of the foregoing matters, including the recognition by "employers or employers' associations of the right of a trade union to "represent workers in any such negotiation or consultation or in the "carrying out of such procedures.

"(2) A dispute between a Minister of the Crown and any workers shall, "notwithstanding that he is not the employer of those workers, be treated "for the purposes of this Act as a dispute between an employer and those "workers if the dispute relates—

"(a) to matters which have been referred for consideration by a joint body on which, by virtue of any provision made by or under any enactment, that Minister is represented; or

"(b) to matters which cannot be settled without the Minister exercising "a power conferred on him by or under an enactment.

"(3) There is a trade dispute for the purposes of this Act even though it "related to matters occurring outside Great Britain . . .

"(4) A dispute to which a trade union or employer's association is a "party shall be treated for the purposes of this Act as a dispute to which "workers or, as the case may be, employers are parties.

"(5) An act, threat or demand done or made by one person or organisation "against another which, if resisted, would have led to a trade dispute with "that other, shall, notwithstanding that because that other submits to the "act or threat or accedes to the demand no dispute arises, be treated for the "purposes of this Act as being done or made in contemplation of a trade "dispute with that other.

"(6) In this section—

" 'employment' includes any relationship whereby one person personally "does work or performs services for another;

" 'worker' in relation to a dispute to which an employer is a party, includes "any worker even if not employed by that employer.

"(7) In the Conspiracy and Protection of Property Act 1875, 'trade "dispute' has the same meaning as in this Act.

"17. Restriction on grant of ex parte injunctions and interdicts

"(1) Where an application for an injunction or interdict is made to a court "in the absence of the party against whom the injunction or interdict is "sought or any representative of his and that party claims, or in the "opinion of the court would be likely to claim, that he acted in con-"templation or furtherance of a trade dispute, the court shall not grant the "injunction or interdict unless satisfied that all steps which in the circum-"stances were reasonable have been taken with a view to securing that "notice of the application and an opportunity of being heard with respect "to the application have been given to that party.

"(2) It is hereby declared for the avoidance of doubt that where an "application is made to a court, pending the trial of an action, for an "interlocutory injunction and the party against whom the injunction is "sought claims that he acted in contemplation or furtherance of a trade "dispute, the court shall, in exercising its discretion whether or not to "grant the injunction, have regard to the likelihood of that party's "succeeding at the trial of the action in establishing the matter or matters "which would, under any provision of section 13, 14(2) or (15) above, "afford a defence to the action.

"(3) Subsection (2) above shall not extend to Scotland."

A "trade dispute" is defined in section 29(1) by reference (a) to the parties to it and (b) to the subject-matter with which it is connected. That in the instant case there was a dispute between ITF and the shipowners at the time that the threats of blacking the Nawala at Redcar were made is too plain for argument and subsection (4) makes it clear that ITF qualifies as "workers" for the purpose of making it a "dispute between employers and workers" within the meaning of subsection (1). What ITF were demanding and the shipowners were resisting was that the crew employed on the Nawala should be employed at ITF rates of wages under articles in ITF standard terms. That this is not a dispute in connection with terms and conditions of employment seems to me to be simply unarguable. The fact that the Hong Kong crew were content with their existing articles and were not in dispute with the shipowners as to their own terms or conditions of employment is not, in my view, material. To the extent that they supported the shipowners in their resistance to ITF's demand the dispute may also have qualified as a dispute "between workers and workers" within the meaning of subsection (1).

The next question is whether the threats of blacking and the attempts by the defendants to induce port workers at Redcar to adopt this course were "acts "done in contemplation or furtherance of that dispute" within the meaning of section 13(1). Here again, but for the judgments in *The "Camilla M."*, I should have thought the contrary to be unarguable. It is accepted by both sides that ITF would have withdrawn its threat to have the Nawala blacked, and its attempts to persuade port workers to break their contracts with their employers by doing so, if the shipowners had signed on either the existing crew or a fresh crew under articles in ITF's standard form at ITF rates of wages and had agreed to pay the existing crew the difference between their actual wages and wages at ITF rates from the date of their engagement to the date of signing their new articles. So in any sensible meaning of the words, the making and maintenance of the threats and the attempts was done "in furtherance" of a dispute between ITF and the shipowners that was connected with the terms and conditions of employment of existing and future crews of the Nawala. Such was the view of all five members of the Court of Appeal by whom the appeals in these two cases have been heard; but in order to give effect to that view it was necessary for them to distinguish the case from that of *The "Camilla M."*—an embarrassment by which your Lordships are not affected.

It was submitted on behalf of the shipowners in the instant cases, as it had been in *The "Camilla M."*, that the real object of the ITF is to drive "flags of convenience" (as they define them) off the seas, so that every vessel is entered on the registry of the nation to which its beneficial owner belongs; and that, it is suggested, is a political and not what Lord Denning M.R. in *The "Camilla M."* described as "a legitimate trade object". It may well be that this is indeed the ultimate object of ITF's campaign of blacking vessels sailing under flags of convenience unless their crews are engaged on ITF standard articles at ITF rates of wages; but this, in my view, would not prevent the immediate dispute between ITF and the shipowners in which the interlocutory injunctions are sought, from being a dispute connected with the terms and conditions of employment of those workers who were or might become members of the Nawala's crew. Furthermore in a case originating in the commercial court it would be carrying judicial anchoritism too far if this House were to feign ignorance of the fact that, apart from fiscal advantages, one of the main commercial attractions of registering vessels under flags of convenience is that it facilitates the use of cheap labour to man them. So even the ultimate object of ITF's campaign is connected with the terms and conditions of employment of seamen.

The facts in *The "Camilla M."* differed from those in the instant case only to the extent that the owners of the vessel, which sailed under the Liberian flag but was beneficially owned by Greek nationals, had taken some unsuccessful steps to buy off the blacking by the time the case reached the Court of Appeal. When the blacking had started she had an Indian crew signed on under articles approved by the National Union of Seafarers of India (NUSI)

of which the crew were members. NUSI was at that time affiliated to ITF. Under the threat of continued blacking, the owners of the Camilla M. agreed with ITF that the crew of the vessel should be engaged on new articles in ITF's standard form at ITF rates of wages and that the members of the existing crew, whether re-engaged or not, should be paid the difference between the actual wages paid to them and ITF rates of wages from the commencement of their existing articles. The Indian crew of the Camilla M. with the backing of NUSI refused to enter into new articles—fearing, no doubt, that when their current engagement finished they would have little chance of re-employment in competition with European seamen at the greatly increased rates of pay. The owners discharged the Indian crew. To replace them they recruited in the Piraeus a Greek crew upon the terms of standard Greek articles, the terms of which differed from the ITF standard terms but were not, it was said, substantially less advantageous to the crew members. ITF refused to accept this as sufficient compliance with what the owners had agreed to do; they insisted that any new crew should be engaged on ITF standard terms. The newly-recruited Greek crew preferred the Greek articles on which they had been engaged and refused to substitute ITF standard terms for them. So to comply with ITF's requirements and thus obtain a lifting of the blacking, the owners, if the newly-engaged Greek crew had persisted in their refusal to change to the ITF standard form of articles, would have had to discharge that crew and to recruit yet another crew of seamen willing to sail under ITF standard articles.

The Court of Appeal (Lord Denning M.R., Stephenson and Brandon L.JJ), thought this to be an unreasonable demand which was not made with the interests of those who were actually members of the crew of the Camilla M. in ming but was motivated exclusively or, at least, predominantly by ITF's dislike of flags of convenience. Lord Denning M.R. based his decision on his interpretation of the expression "in contemplation or furtherance" of a trade dispute in Section 13. He took the view that, having regard to the attitudes adopted first by the Indian and later by the Greek crew, what ITF persisted in demanding was virtually impossible of performance by the owners, and that it could be inferred from this that ITF was acting "for some extraneous motive and not "for any legitimate trade object". This in his view prevented what they were doing from being acts done in furtherance of a trade dispute. Brandon L.J was of opinion that where there could be said to be two subject matters of a dispute one of which did, and the other did not, fall within one of the descriptions in paragraphs (a) to (g) of section 29(1), the dispute was not a trade dispute unless the predominant subject matter fell within those paragraphs; and similar considerations as to what was the predominant object sought to be attained, applied in deciding whether acts that were done with more than one object in mind were done in furtherance of a trade dispute or not.

As authority for these propositions reliance was placed upon the decision of this House in *Conway* v. *Wade* [1909] A.C. 506, a case decided shortly after the passing of the Trade Disputes Act 1906. The definition of a trade dispute in that Act was much less extensive than in the Act of 1974 and in particular a trade union itself could not be a party to one. The defendant Wade was a trade union official and not a workman, and the jury, by whom such cases were then tried, found that the only dispute was between Wade and the plaintiff Conway whom Wade was trying to get sacked from his employment to punish him for non-payment of a union fine, and that there was no dispute existing or contemplated between Conway and his fellow workers at the factory. Upon these findings it is not surprising that it was held that what Wade had done was not in contemplation of a trade dispute but in furtherance of his own dispute with Conway about the unpaid fine, a dispute in which, incidentally, he did not even have the support of the trade union of which he was only a subordinate official. It is not surprising either that in the course of the speeches Wade should have been referred to as an intermeddler and as a mischief-maker. But since the amendments to the definition of trade disputes, trade unions acting through their officials can with impunity intermeddle with relationships between employers and workers and may initiate their own dispute with an employer as to the terms and conditions of employment even where, to use Lord Atkinson's phrase "perfect peace prevailed in the factory or establishment". It would,

in my view, be unwise to treat what was said 70 years ago by members of this House in *Conway* v. *Wade* as still authoritative. The modern legislation reflects the change of parliamentary attitude towards trade unions whether one likes the change or not; in interpreting the legislation the judges must take account of it.

My Lords, I would accept that there may be cases where strikes are called or refusals to perform contracts of employment in some particular respect are ordered by trade unions for political reasons that are unconnected with any of the subject-matters described in section 13(1). *B.B.C.* v. *Hearn* [1977] 1 W.L.R. 1004 provides an example of this. Union officials threatened that their members would refuse to allow the B.B.C. to televise the cup final in such a way that it could be seen by viewers in South Africa. This was not a dispute connected with the terms and conditions of employment; but it could readily have been turned into one by a demand by the union that the contracts of employment of employees of the B.B.C. should be amended to incorporate a term that they should not be obliged to take any part in the transmission of sporting events to South Africa.

My Lords, if a demand on an employer by the union is about terms and conditions of employment the fact that it appears to the court to be unreasonable because compliance with it is so difficult as to be commercially impracticable or will bankrupt the employer or drive him out of business, does not prevent its being a dispute connected with terms and conditions of employment. Immunity under section 13 is not forfeited by being stubborn or pig-headed. Neither, in my view, does it matter that the demand is made and the dispute pursued with more than one object in mind and that of those objects the predominant one is not the improvement of the terms and conditions of employment of those workers to whom the demand relates. Even if the predominant object were to bring down the fabric of the present economic system by raising wages to unrealistic levels, or to drive Asian seamen from the seas except when they serve in ships beneficially owned by nationals of their own countries, this would not, in my view, make it any less a dispute connected with terms and conditions of employment and thus a trade dispute, if the actual demand that is resisted by the employer is as to the terms and conditions on which his workers are to be employed. The threat of industrial action if the demand is not met is nonetheless an act done in furtherance of that trade dispute. I do not regard *The "Camilla M"* as distinguishable from the instant case. In my view it should be treated as overruled.

I turn next to the effect of section 17 (2) upon applications for interlocutory injunctions in cases of this kind. The nature and goals of industrial action, the virtual immunity from liability for tort conferred upon trade unions by section 14, and the immunity from liability for the tort of wrongfully inducing breaches of contract conferred upon all persons by section 13 where this is done in connection with a trade dispute, are three factors which, in combination would make the balance of convenience come down heavily in favour of granting an interlocutory injunction if the usual criteria were alone applied.

In the normal case of threatened industrial action against an employer, the damage that he will sustain if the action is carried out is likely to be large, difficult to assess in money and may well be irreparable. Furthermore damage is likely to be caused to customers of the employer's business who are not parties to the action, and to the public at large. On the other hand the defendant is not the trade union but an individual officer of the union who, although he is acting on its behalf, can be sued in his personal capacity only. In that personal capacity he will suffer virtuallly no damage if the injunction is granted, whereas if it is not granted and the action against him ultimately succeeds it is most improbable that damages on the scale that are likely to be awarded against him will prove to be recoverable from him. Again, to grant the injunction will maintain the *status quo* until the trial; and this too is a factor which in evenly-balanced cases generally operates in favour of granting an interlocutory injunction. So on the face of the proceedings in an action of this kind the balance

of convenience as to the grant of an interlocutory injunction would appear to be heavily weighted in favour of the employer.

To take this view, however, would be to blind oneself to the practical realities: (1) that the real dispute is not between the employer and the nominal defendant but between the employer and the trade union that is threatening industrial action; (2) that the threat of "blacking" or other industrial action is being used as a bargaining counter in negotiations either existing or anticipated to obtain agreement by the employer to do whatever it is the union requires of him; (3) that it is the nature of industrial action that it can be promoted effectively only so long as it is possible to strike while the iron is still hot; once postponed it is unlikely that it can be revived; (4) that, in consequence of these three characteristics, the grant or refusal of an interlocutory injunction generally disposes finally of the action; in practice actions of this type seldom if ever come to actual trial.

Subsection (2) of section 17 which is said to be passed "for the avoidance of "doubt" and does not apply to Scotland, appears to me to be intended as a reminder addressed by Parliament to English judges, that where industrial action is threatened that is *prima facie* tortious because it induces a breach of contract they should, in exercising their discretion whether or not to grant an interlocutory injunction, put into the balance of convenience in favour of the defendant those countervailing practical realities and, in particular, that the grant of an injunction is tantamount to giving final judgment against the defendant.

The subsection, it is to be noted, does not expressly enjoin the judge to have regard to the likelihood of success in establishing any other defence than a statutory immunity created by the Act although there may well be other defences to alleged wrongful inducement of breach of contract, such as denial of inducement or that what was sought to be induced would not constitute a breach, or justification of the inducement on other grounds than the existence of a trade dispute. So the subsection is selective; it applies to one only out of several possible defences and, consequently, only to those actions which, since they are connected with trade disputes, involve the practical realities which I have mentioned.

My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co.* v. *Ethicon Ltd* [1975] A.C. 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid* v. *Ethicon* which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. By the time the trial came on the industrial dispute, if there were one, in furtherance of which the acts sought to be restrained were threatened or done, would be likely to have been settled and it would not be in the employer's interest to exacerbate relations with his workmen by continuing the proceedings against the individual defendants none of whom would be capable financially of meeting a substantial claim for damages. Nor, if an interlocutory injunction had been granted against them, would it be worthwhile for the individual defendants to take steps to obtain a final judgment in their favour, since any damages that they could claim in respect of personal pecuniary loss caused to them by the grant of the injunction and which they could recover under the employer's undertaking on damages, would be very small.

Cases of this kind are exceptional, but when they do occur they bring into the balance of convenience an important additional element. In assessing whether what is compendiously called the balance of convenience lies in granting or

refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. On the one hand there is the risk that if the interlocutory injunction is refused but the plaintiff succeeds in establishing at the trial his legal right for the protection of which the injunction had been sought he may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense. On the other hand there is the risk that if the interlocutory injunction is granted but the plaintiff fails at the trial, the defendant may in the meantime have suffered harm and inconvenience which is similarly irrecompensable. The nature and degree of harm and inconvenience that are likely to be sustained in these two events by the defendant and the plaintiff respectively in consequence of the grant or the refusal of the injunction are generally sufficiently disproportionate to bring down, by themselves, the balance on one side or the other; and this is what I understand to be the thrust of the decision of this House in *American Cyanamid* v. *Ethicon*. Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

The characteristics of the type of action to which section 17 applies have already been discussed. They are unique; and, whether it was strictly necessary to do so or not, it was clearly prudent of the draftsman of the section to state expressly that in considering whether or not to grant an interlocutory injunction the court should have regard to the likelihood of the defendant's succeeding in establishing that what he did or threatened was done or threatened in contemplation or furtherance of a trade dispute.

My Lords, counsel for the respondents have invited this House to say that because it is singled out for special mention it is an "over-riding" or a "para-"mount" factor against granting the injunction once it appears to the judge that the defence of statutory immunity is more likely to succeed than not. I do not think that your Lordships should give your approval to the use of either of these or any other adjective to define the weight to be given to this factor by the judge, particularly as the sub-section does not apply to Scotland where, as my noble and learned friend Lord Fraser of Tullybelton explains, it would be but one of several factors to be taken into consideration whose relative weight might vary with the circumstances of the case. Parliament cannot be taken to have intended that radically different criteria should be applied by English and Scots courts. The degree of likelihood of success of the special defence under section 13 beyond its being slightly more probable than not is clearly relevant; so is the degree of irrecoverable damage likely to be sustained by the employer, his customers and the general public if the injunction is refused and the defence ultimately fails. Judges would, I think, be respecting the intention of Parliament in making this change in the law in 1975, if in the normal way the injunction were refused in cases where the defendant had shown that it was more likely than not that he would succeed in his defence of statutory immunity; but this does not mean that there may not be cases where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought to be refused, unless there is a high degree of probability that the defence will succeed.

My Lords, the instant case presents no problem. On the evidence before the court at each stage of these proceedings, the defendants have a virtual certainty of establishing their defence of statutory immunity.

I would dismiss these appeals.

Lord Fraser of Tullybelton

MY LORDS,

I agree with my noble and learned friend Lord Diplock, whose speech I have had the advantage of reading in draft, that the defendants would almost certainly succeed in showing that the dispute between the parties to this appeal is a "trade dispute", and that the threatened action of blacking the Nawala at Redcar would have been "in contemplation or furtherance of that dispute". I agree with him also that *The "Camilla M"* was wrongly decided and should be overruled.

I turn to consider the effect to be given to section 17(2) of the Trade Union and Labour Relations Act 1974. Subsection (2) was inserted into section 17 of the 1974 Act by the Employment Protection Act 1975. Section 17 as a whole is concerned with interlocutory injunctions in cases that may or do come within the 1974 Act. I note in passing that the marginal note to section 17 ("Restriction "on grant of ex parte injunctions and interdicts") which was apt when the section contained only what is now subsection (1), is inappropriate or at least inadequate for the section as expanded by subsection (2). It could not therefore throw any light on the meaning of subsection (2) even if it were permissible to refer to it as an aid to construction.

Subsection (1) is relevant to the construction of subsection (2) only to this extent that it demonstrates the importance attached by Parliament to giving the respondent an opportunity of putting forward the defence that he was acting in contemplation or furtherance of a trade dispute. The court is therefore charged that it "shall not" grant an ex parte injunction against a party who claims, or would be likely to claim, that he was so acting, unless the court is satisfied that all reasonable steps have been taken to give him an opportunity of being heard. No doubt the reason why such a provision was considered necessary is that in nearly every case to which the subsection applies the balance of convenience (apart from this defence) will be in favour of granting an interim injunction. The dispute will generally be causing disruption of the employer's business with consequent loss to him and probably also to other persons (employers and workers) who have no direct connection with the dispute. It will also in some cases cause inconvenience to the public as a whole. But the grant or refusal of an interlocutory injunction is almost always decisive in such cases because the dispute is usually settled one way or another before there is time for the action to proceed to trial. It might therefore be thought to be unfair to the parties (in practice trade unions) who would be likely to claim that they were acting in contemplation or furtherance of a trade dispute if interlocutory injunctions were granted purely by reference to the balance of convenience without regard to that defence, as they might be in England on one view of the decision in *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396; in practice there would hardly ever be an opportunity for putting forward the defence. It is probably significant that subsection (2) was inserted by the 1975 Act which received the Royal Assent on 12 November 1975, a few months after the *American Cyanamid* decision (given on 5 February 1975) —see the opinion of Lord Denning M.R. in *The "Camilla M"* [1979] 1 Lloyd's Rep. 26, 31.

Considerations of that sort explain the reason for adding subsection (2) to section 17. But Mr. Newman relied on these considerations for the further purpose of supporting an argument as to the effect of the subsection. The argument as I understood it was that if the court, in exercising its discretion whether or not to grant an interlocutory injunction, reached the view that the respondent was more likely than not to succeed at the trial of the action in establishing a defence that he was acting in contemplation or furtherance of a trade dispute, it should regard that as being for practical purposes a conclusive reason for not granting an interlocutory injunction. That reason was to be accorded over-riding or paramount importance, except perhaps if there was some exceptionally powerful reason of public safety in favour of granting an interlocutory injunction. The argument went so far as to say that, provided the court was satisfied that the trade dispute defence was more likely than not to be

established, the degree of likelihood was irrelevant. So it would make no difference whether the court considered the defence was almost certain to be established or that the balance was narrowly in favour of its being established.

My Lords, I reject that contention. What subsection (2) of section 17 provides is that the court in exercising its discretion is to "have regard to" the likelihood of this defence being established at the trial. It does not provide that the court is to have regard to that matter to the exclusion of other matters, nor that it is to be treated as of over-riding or paramount importance or given any other special legal status. No doubt the likelihood of successfully establishing the defence would be treated by the court as a matter of importance, and in a case where the court considered that the respondent would probably be entitled to rely on the defence, it might be slow to grant an interlocutory injunction which would in practice exclude the defence. But that would be a matter for the court to decide in the circumstances of each particular case. The word "likelihood" is a word of degree and the weight to be given to the likelihood of establishing the defence will vary according to the degree of the likelihood. If the court considers that the respondent is virtually certain to establish the trade dispute defence, it will naturally give more weight to this factor than if it considers the prospect of successfully establishing the defence is doubtful. In my opinion therefore the effect of subsection (2) of section 17 is that the court, in exercising its discretion, should have regard to the balance of convenience including the likelihood (and the degree of likelihood) of the respondent's succeeding in establishing the defence of trade dispute, and then come to a decision on the whole matter.

I have reached that opinion on the words of subsection (2) itself, but my opinion is fortified by subsection (3) which provides that "subsection (2) above "shall not extend to Scotland." No explanation was suggested by counsel on either side as to why Parliament should have enacted that subsection (2) was not to apply to Scotland, and at first sight it seems surprising. The policy to which the Act gives effect would seem to be equally applicable to Scotland and England. The Act as a whole applies to both countries, and presumably for that reason subsection (1) refers expressly to "injunction or interdict". The reason why subsection (2) is declared not to apply to Scotland must be, I think, that Parliament regarded it as unnecessary for Scotland because it would merely give effect to the existing Scots law. The relevant difference between English law on interlocutory injunctions and Scots law on the very similar remedy of interim interdict can be appreciated by reference to the decision of this House in *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396, a decision which does not apply to Scotland. In that case this House laid down that the court in exercising its discretion as to granting or refusing interim interdict ought not to weigh up the relative strengths of the parties' cases on the evidence (necessarily incomplete) available at the interlocutory stage. Lord Diplock, with whose speech the other four noble and learned Lords agreed, said this at page 407:—

> "The court no doubt must be satisfied that the claim is not frivolous or "vexatious; in other words, that there is a serious question to be tried. "It is no part of the court's function at this stage of the litigation to try to "resolve conflicts of evidence on affidavit as to facts on which the claims of "either party may ultimately depend nor to decide difficult questions of "law which call for detailed argument and mature considerations. These "are matters to be dealt with at the trial."

In Scotland the practice is otherwise, and the court is in use to have regard to the relative strength of the cases put forward in averment and argument by each party at the interlocutory stage as one of the many factors that may go to make up the balance of convenience. That is certainly in accordance with my own experience as a Lord Ordinary, and I believe the practice of other judges in the Court of Session was the same. Whether the likelihood of success should be regarded as one of the elements of the balance of convenience, or as a separate matter, seems to me an academic question of no real importance, but my inclination is in favour of the former alternative. It seems to make good

sense; if the pursuer or petitioner appears very likely to succeed at the end of the day, it will tend to be convenient to grant interim interdict and thus prevent the defender or respondent from infringing his rights, but if the defender or respondent appears very likely to succeed at the end of the day it will tend to be convenient to refuse interim interdict because an interim interdict would probably only delay the exercise of the defender's legal activities. Reported cases on this matter are not easy to find, because applications for interim interdict are usually disposed of quickly without full opinions being given, but the view of the law that I have expressed is I think vouched by some authority. In *General Assembly of the Free Church of Scotland* v. *Johnston* (1905) 7 F: 517, at page 522 the Lord Ordinary (Lord Pearson), whose opinion was approved by the Second Division on appeal, said this:—

> "Of course on this question of interim interdict, I can only deal with the "matter provisionally; but it is certainly according to the practice of the "court in such cases to consider how the rights of parties appear on a "*prima facie* aspect."

In *Magistrates of Edinburgh* v. *Edinburgh, Etc. Railway Company* (1847) 19 Scottish Jurist 421 at 426 Lord Justice-Clerk Hope said that, in a case where the respondent relied on an asserted right,

> "there surely can be no better ground for an interim interdict than that "the court, which is itself to decide the question of right, think that ques- "tion so difficult, and the onus of establishing the power claimed *so* "*weighty against the respondent*, that, in their opinion, until he obtains "judgment he ought not to be allowed to interfere with the interests, or "rights and privileges of others, although in regard to property to which "he has a title." (my italics)

As an example of the modern practice, though without any full statement of principle, I refer to *Chill Foods (Scotland) Ltd.* v. *Cool Foods Ltd.* 1977 S.L.T. 38, 39, where in the first petition the Lord Ordinary (Lord Maxwell) refused interim interdict because the petitioners' case was based upon averments that there was a contract between the parties, but he was unable to produce any document setting out the contract, and the existence of the contract was denied by the respondent.

While the courts in Scotland would have regard to the likelihood of the respondent's succeeding in establishing the trade dispute defence, I would not expect them to accord any special priority to the defence beyond what it might seem to deserve in the circumstances of a particular case. That is exactly the effect that subsection (2) of section 17 is, in my opinion, intended to produce and does produce in England.

In the present case, having regard to the likelihood that the defendants would succeed in establishing a defence under section 13 of the 1974 Act I would dismiss the appeals.

Lord Scarman

MY LORDS,

It cannot be doubted that a dispute exists between the appellant shipowner, who is plaintiff in the two suits, and the International Transport Workers' Federation, the union of which the respondents are officers. Nor is it open to doubt that the threat to "black" the plaintiff's ship Nawala at Redcar and later at Narvik and the efforts made by the union to persuade workers at the two ports to implement the threat were acts done in furtherance of the dispute.

These two appeals raise two questions upon the interpretation of the Trade Union and Labour Relations Act 1974 ("the Act") as amended by the Employment Protection Act 1975. The first question arises under section 29(1) of the Act. When and in what circumstances is a dispute between an employer and a

trade union not a "trade dispute"? The answer seems simple and conclusive – when it falls outside the definition contained in the subsection. But, if Mr. Buckley Q.C., for the appellants, is correct, the subsection is not conclusive. He relies on the case law for the proposition that a dispute, which on the face of it appears to be within the subsection, may prove on investigation to be outside it. The second question arises on subsection 17(2) of the Act. Upon an application for an interlocutory injunction against a party who claims to have a defence that he acted in contemplation or furtherance of a trade dispute, what measure of regard are the courts to have to "the likelihood" of his establishing the defence at the trial? The answer to this question is not to be found in the subsection which, by its silence, leaves it to the courts.

My Lords, in construing these two subsections I consider it to be of vital importance to determine the correct judicial approach to the two Acts. As Viscount Simonds said in *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436 at p.461:

> ". . . words, and particularly general words, cannot be read in isolation: "their colour and content are derived from their context. So it is that I "conceive it to be my right and duty to examine every word of a statute "in its context, and I use 'context' in its widest sense, which I have already "indicated as including not only other enacting provisions of the same "statute, but its preamble, the existing state of the law, other statutes in "*pari materia*, and the mischief which I can, by those and other legitimate "means, discern the statute was intended to remedy."

It is wrong to attempt to construe any section or subsection of these Acts without reference to their legislative purpose. And it is also necessary to have regard to the history of the statute law and the case law since 1906 for a full understanding of them. This history I would summarise as a shifting pattern of Parliamentary assertions and judicial responses – a legal point counter-point which has been more productive of excitement than of harmony. The judges have been, understandably, reluctant to abandon common law and equitable principles, unless unambiguously told to do so by statute. Parliament has created ambiguity not through any lack of drafting skill but by its own changes of mind. So far as the Act of 1974 is concerned, the legislative purpose is clear:– to sweep away not only the structure of industrial relations created by the Industrial Relations Act 1971, which it was passed to repeal, but also the restraints of judicial review which the courts have been fashioning one way or another since the enactment of the Trade Disputes Act 1906. The Court of Inquiry into the Grunwick affair (of which I was chairman) put it correctly, I continue to think, when it said (paragraph 58, Cmnd. 6922):—

> "The policy [of the statutes] is to exclude 'trade disputes' . . . from "judicial review by the courts . . . There is substituted for judicial review "of trade disputes an advisory, conciliation and arbitration process with "ACAS as the statutory body to operate it."

This policy (or legislative purpose, a phrase which causes fewer judicial tremors) is achieved by those sections of the Act which impose restrictions on legal liability and legal proceedings (sections 13 to 17); by the wide meaning given to "trade dispute" by section 29; and by the establishment of the advisory, conciliation and arbitration service in Part I of the 1975 Act (now consolidated into the Employment Protection Act 1978). Briefly put, the law now is back to what Parliament had intended when it enacted the 1906 Act – but stronger and clearer than it was then. An act done in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only that it induces a breach of contract or interferes with the performance of a contract or with another person's trade, business, or employment: section 13. Trade unions and employers' associations are not liable in tort for acts done in contemplation or furtherance of a trade dispute: section 14. And restrictions are placed by section 17 on the grant of interlocutory injunctions against parties claiming, or likely to claim, that they were acting in contemplation or furtherance of a trade dispute.

Against that background I look first to the meaning given to "trade dispute" by section 29 of the Act. It is, basically, the meaning given by the 1906 Act but widened and clarified to undo the effect of some intervening judicial decisions, doubts and dicta. Subsection (1) retains the basic structure of section 5(3) of the 1906 Act: "trade dispute" means "a dispute between employers and workers, "or between workers and workers, which is connected with one or more of the" seven matters specified in the subsection. In its specification, the subsection amplifies and clarifies the provisions of the 1906 Act, and in particular makes express, what might well be thought to have been implicit in the 1906 Act, that disputes over trade union matters (e.g., membership, negotiation and consultation procedures and recognition) are trade disputes. Subsection (3) provides that "there is a trade dispute . . . even though it relates to matters occurring "outside Great Britain", and subsection (4) makes clear that a dispute to which a trade union or employers' association is a party is to be treated as a dispute to which workers or, as the case may be, employers are parties. Subsection (5) makes sure that instant submission by one party or the other does not enable one to claim that the act or threat causing him to submit is not something done in contemplation of a trade dispute, and subsection (7) provides that the term "worker" in relation to a dispute with an employer includes "any worker even "if not employed by that employer".

In the present case, therefore, it is of no moment that the union, of whom the respondents are officials, is an international federation of trade unions (the I.T.F.), or that, since the Nawala left Redcar, the dispute relates to matters occurring outside Great Britain, or that none (if that be so) of the crew is a member of any union affiliated to the I.T.F. The dispute is within the subsection if it is between the shipowner and the union or between the members of the crew of the ship and the union, provided only that it is connected with one or more of the matters set forth in the subsection.

The dispute is, upon its face, connected with the terms and conditions of employment not only of the crew of the Nawala but of all seafarers, many of whom are members by affiliation of the union. The union objects to the failure of shipowners making use of "flags of convenience" to secure cheap labour on their ships. The evidence certainly suggests that the union also has other objections to "flag of convenience" ships. But, unless one gives words whatever meaning one chooses (and judges, unlike Humpty-Dumpty, are not permitted this freedom), the dispute is connected with the terms and conditions of the employment of workers (including the crew of the Nawala) in the shipping industry. It is, therefore, apparently covered by sub-paragraph (a) of the subsection. The appellants concede this much. Their case is, however, that the dispute is not really about the terms and conditions of employment of this particular crew at all but part and parcel of a campaign being waged all over the world by the ITF against "flags of convenience". The "predominant motive" of the union, it is said, is political, not industrial. They rely upon *Conway* v. *Wade* [1909] A.C. 506 and *The "Camilla M."* [1979] 1 Lloyd's Rep. 26 for the proposition that an extraneous motive, if it be the predominant motive, will prevent a dispute from being a trade dispute even though it appears to fall within the subsection.

I totally reject the legal foundation of this case. If there be a conflict between the decision of this House in *Conway* v. *Wade* and the language of the subsection construed in the light of the purpose (or policy) of the legislation, I have no doubt that it would be the duty of this House to reject *Conway* v. *Wade*. If the decision of the Court of Appeal in *The "Camilla M."* is (as I believe) inconsistent with the subsection, it is wrong and must be over-ruled.

All that the subsection requires is that the dispute be connected with one or more of the matters it mentions. If it be connected, it is a trade dispute, and it is immaterial whether the dispute also relates to other matters or has an extraneous, e.g., political or personal, motive. The connection is all that has to be shown.

Does it follow that *Conway* v. *Wade* must now be treated as wrongly decided? I confess that I find it a difficult case to understand. Section 5(3) of the 1906 Act

was basically the same as section 29(1) of the 1974: all it required was that a dispute be connected with one or more of the matters it mentioned. On the face of it, the dispute in the case was so connected. But the facts were very special. The jury found as a fact that it was a case of personal animosity or grudge, and nothing else, as also was *Huntley* v. *Thornton* decided by Harman J. and reported in [1957] 1 W.L.R. 321. No connection was, therefore, proved in either case.

The continuing importance of *Conway* v. *Wade* is that it remains good authority for the proposition that the connection required by the subsection must be a genuine one, and not a sham. The mere pretext, or "specious cover," of a trade dispute will not do: see *J. T. Stratford & Son, Ltd.* v. *Lindley* [1965] A.C. 269 per Lord Pearce at p. 335.

But *The "Camilla M."* was, in my view, wrongly decided. My noble and learned friend Lord Diplock has analysed the decision: and I agree with the analysis. The basic error, which is to be found in all three judgments of the Court of Appeal, is in the proposition, which the court accepted, (conveniently summarised in the headnote at p. 26) that "not every dispute connected with "terms or conditions of employment . . . was necessarily a trade dispute" and that "some limitation of those statutory words was necessary". The legislative purpose of the Act is such that no limitation upon the ordinary meaning of the simple English words used by the statute is permissible. The fallacy of the Court of Appeal is clearly exposed by one passage in the judgment of Brandon L. J. He said, at p. 35:—

> "As regards the subject matter of the dispute, there are two possibilities. "There may be a case where a dispute is ostensibly connected with a subject "matter which would make it a trade dispute but is in fact and in reality "connected with some wholly different subject matter. The other possi- "bility is that the dispute is connected with both subject matters, but the "predominant subject matter with which the dispute is connected is the "second rather than the first. Neither of those cases, as I understand the "authorities, is one of a trade dispute."

Ostensible connection is, as the Lord Justice says, not enough to make a dispute a trade dispute: *Conway* v. *Wade* supra. If the connection is only "ostensible", there is no connection. But predominance of subject-matter is an irrelevance, provided always there is a real connection between the dispute and one or other of the matters mentioned in the subsection. A dispute may be political or personal in character and yet be connected with – for example – the terms and conditions of employment of workers: such a dispute would be within the subsection. It is only if the alleged connection is a pretext or cover for another dispute which is in no way connected with any of the matters mentioned in the subsection that it is possible to hold that the dispute is not a trade dispute. The facts in *B.B.C.* v. *Hearn*, infra, illustrate the sort of case in which there may be no connection – an objection by workers to "apartheid" leading to a decision to "black" the transmission to South Africa of the television showing of the Cup Final.

A study of the case law is, however, only of secondary importance. Judicial decision cannot impose limitations upon the language of Parliament where it is clear from the words, context, and policy of the statute that no limitation was intended. The Court of Appeal erred in *The "Camilla M."* in holding that it was necessary to place "some limitation" upon the words of section 29(1). None is needed: none was intended by Parliament.

I turn now to consider section 17(2) of the Act. The subsection was not part of the Act when it became law in 1974. In 1975 your Lordships' House decided *American Cyanimid Co.* v. *Ethicon Ltd.* [1975] A.C. 396. The effect of the decision was that, provided a plaintiff could show that there was a serious question to be tried, he could obtain an interim injunction if he could show that the balance of convenience tilted his way. The decision had a fateful significance for trade unions engaged in trade disputes. An employer would in most cases

have no difficulty in showing that action to disrupt his business contemplated or undertaken by members of the union with which he was in dispute would cause him serious, even catastrophic, loss. Upon a balance of convenience, he would ordinarily have little difficulty in showing that the "status quo" should be preserved until full investigation at trial. Yet if this argument should prevail, the trade union's bargaining counter would disappear. Its power to bring instant and real pressure upon the employer would be denied. Section 17(2) was introduced by the Act of 1975 after the *Cyanimid* decision. As Lord Denning M.R observed in *The "Camilla M."* at p.31, it restores the old law, so far as the defence of acts done in contemplation or furtherance of a trade dispute are concerned. The court must under the subsection have regard to the likelihood of this defence being established before deciding whether or not to grant an interlocutory injunction.

The measure of the regard is the critical question. Before answering it, I think it is necessary to analyse what the law now requires of a court before it grants an interim injunction in the case of an alleged trade dispute.

My view of the law continues to be that which I expressed in *B.B.C. v. Hearn* [1977] 1 W.L.R. 1004. There are three stages. First, has the plaintiff shown "a serious question to be tried"? I will assume that in the present case, the shipowner has shown that there is. Certainly, but for section 13 of the Act, he would have a good cause of action in tort against the respondents. Secondly, has he shown that the balance of convenience lies with him? Almost invariably, it will lie with the employer. Bearing in mind the immense losses a shipowner will suffer if his ship is "blacked", I do not doubt that in the present case this balance tilts strongly in favour of the plaintiff appellant. Thirdly, is there a likelihood of the union establishing a defence under section 13 (the relevant section in these appeals), or section 14(2) or section 15 of the Act?

Both of my noble and learned friends treat the likelihood as an element to be weighed in the balance of convenience. Though the difference may be no more than semantic, I do not. I see it as a separate factor to which regard is to be had. Mr. Newman for the union submitted that it must be treated as an over-riding or paramount factor: in other words, if established (even on no more than a balance of probabilities), it precludes the issue of an injunction. But the subsection does not say so: and I would not fetter the residual discretion left to the courts by an epithet which Parliament could have used, but did not. Nevertheless the question remains: if the likelihood is no more than a probability, is the court to pay the regard to it that it would if it were a practical certainty? The legislative purpose, or policy, of the Act provides the answer. If there is a trade dispute, the policy of the legislation is immunity, or (as the case may be) restriction of civil liability, for acts done in contemplation or furtherance of the dispute. There is to be—outside the criminal courts—no judicial review of such acts. The existence of so sweeping a legislative purpose leads me to conclude that, if there is a likelihood as distinct from a mere possibility of a party showing that he acted in contemplation or furtherance of a trade dispute, no interlocutory injunction should ordinarily be issued. A balance of probabilities will suffice in most cases for the court to refuse it. I do not rule out the possibility that the consequences to the plaintiff (or others) may be so serious that the court feels it necessary to grant the injunction; for the subsection does leave a residual discretion with the court. But it would, indeed, be a rare case in which a court, having concluded that there was a real likelihood of the defence succeeding, granted the injunction.

In the instant two appeals, however, these difficulties do not arise. I consider it a practical certainty, on the evidence made available to the House, that, whatever be the other reasons for its campaign against flags of convenience, the union is engaged in a dispute with this shipowner which is connected with the terms and conditions of employment of workers on his ship and in the shipping industry generally. It is very unlikely that this connection is a sham. I would, therefore, dismiss in each case the shipowner's appeal against the refusal of the Court of Appeal to allow the issue of an interlocutory injunction.

CONFIDENTIAL

Prime Minister 2

cc: Mr Ingaid

To note -

PL 9/11

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

9 November, 1979

SCHEDULE 11 OF THE EMPLOYMENT PROTECTION ACT

I was concerned to see that, following the recent pay settlement by the independent television companies, the BBC has been presented with a claim for parity in respect of their own staff, with the threat of a claim under Schedule 11 if it is not conceded. This follows the precedent set by the award to BBC staff by the Central Arbitration Committee last December following a claim under Schedule 11. One must expect the CAC to take a similar line this year, and accordingly the BBC would be faced with a legally binding pay settlement which, given our likely decisions on the licence fee, it will be unable to meet in full. If therefore Schedule 11 remains in existence and the union press their claim, there will be no alternative to substantial redundancies, with very serious consequences for the service provided by the BBC.

This has led me to look at the current state of progress on reviewing Schedule 11. You have of course sent out a consultation paper with a view to incorporating provisions about Schedule 11 in your forthcoming Industrial Relations Bill. I understand that, so far, the response has been sparse and that, given the time pressures, your officials are already working provisionally on legislative changes. Unless there are really strong arguments to the contrary (and I have not as yet seen any such arguments), I think that the objections of principle should lead us to abolish the whole of the schedule, and not simply the general level provision. Longevity of the provisions is surely in itself no valid reason for continuing them. The same applies to the Fair Wages Resolution, though here there is the added problem of ILO Convention 94 (1949). Since the FWR can be changed or abolished without legislation, there is less urgency than with Schedule 11, and I suggest that we explore all the possible options rather than reaching a rushed and possibly premature decision.

X

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X this gives public sector workers parity with private sector workers.

The Rt. Hon. James Prior, M.P.

PL

I am also concerned about the timescale. Embodying the repeal of Schedule 11 in your Industrial Relations Bill will presumably mean it cannot take effect before next July at the earliest. This is of no help in dealing with the BBC problem, and indeed with any similar problems that might arise before July. I am not sure whether there is any way to expedite the repeal, or otherwise to render Schedule 11 ineffective, but I hope you will consider this and inform colleagues of the result. This really needs to be done on a matter of urgency in view of the BBC problem.

I am copying this letter to members of E Committee, and to Sir Robert Armstrong.

(GEOFFREY HOWE)

9 NOV 19

Ld Mr. Duguid.

DG 57 79

STRICTLY CONFIDENTIAL

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IMMUNITIES, ENFORCEABILITY AND SECONDARY ACTION:

DECISIONS FOR THE FUTURE

CONTENTS

DG 57 79

IMMUNITIES, ENFORCEABILITY AND SECONDARY ACTION: DECISIONS FOR THE FUTURE.

I INTRODUCTION

1 The background to this paper is fully set out in paragraph 33 of the interim report. Broadly, its purpose is two-fold; first, to consider what forms of industrial action may reasonably be regarded as legitimate and to what extent the law should protect those who instigate and take part in them, and secondly to examine the present law and the options for change. In doing so, the paper will refer to comparable law and practice in other industrialised countries (a fuller account of these matters will be found in the Appendix.) It will conclude by outlining the decisions which have to be made.

2 Employers' concern with the legal protection afforded to trade unions and their members in respect of industrial action is not new. However, the amendment of the Trade Union and Labour Relations Act in 1976, together with the increasing use of secondary action as a weapon in industrial disputes, have brought this to a head.

3 This paper examines three subjects in particular:

i) legal immunity in respect of industrial action;

ii) the legal immunity afforded to trade unions;

iii) the enforceability of procedure agreements.

4 Before going on to consider these matters individually, it is necessary to ascertain whether and to what extent industrial action should be regarded as justifiable. Expressed in its most fundamental terms, the relationship between an employer and his employees is founded on a bargain the parties to which exchange work and wages on the one side and labour on the other. The employer can enforce his side of the bargain by withdrawing work or wages; the employees can enforce theirs by withdrawing their labour. English law has never positively recognised a legal right to strike, but it gives strike action extensive

legal protection; one might say that, if there is not an explicit right to strike, then there is certainly freedom under the law to do so.

5 This freedom to take industrial action against one's own employer is an established feature both of the law and of the industrial relations system in this country which has not been generally contested. The fact that it may result in disruption of commercial arrangements between that employer and those with whom he has contracted is a necessary consequence which should not in itself lead to legal liability on the part of those taking the action. To do so would effectively remove the freedom to strike. It is in the case of action directed against third parties in order to bring pressure to bear on the employer in dispute that the difficulties arise.

6 Accordingly, this paper does not propose any restriction on the freedom of employees to take direct industrial action against their own employer. It does however examine ways in which the damaging effects of secondary action could be curtailed by the law and the means by which the law could be effectively enforced.

II IMMUNITIES FROM LEGAL ACTION

The present law

7 The law currently provides two main immunities from legal action under the Trade Union and Labour Relations Act 1974, as amended in 1976. Section 13 confers an immunity in tort in respect of an act done by any person which induces another person to break a contract or which consists in his threatening that a contract will be broken or that he will induce another person to break it. To obtain the immunity, however, and this is perhaps the key phrase in the law relating to industrial action, the act must be done 'in contemplation or furtherance of a trade dispute'.

8 Section 14, unlike the preceding section, relates only to trade unions and employers' associations. It provides that trade unions and employers' associations may not be sued in tort in respect of any act done in contemplation or furtherance of a trade dispute, or in respect of any act done in other circumstances unless it is in connection with the ownership or control of property or results in personal injury.

9 Part I of this paper will deal with the immunity under section 13, and part II with the section 14 immunity. First, however, it is necessary to consider the statutory definition of 'trade dispute' because the concept is essential to an understanding of immunities in general.

10 The current definition of 'trade dispute' is contained in section 29 of the Trade Union and Labour Relations Act 1974 as amended. It provides that "a trade dispute means a dispute between employers and workers or between workers and workers connected with one or more of the following:-

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment as between workers or group of workers;

(d) matters of discipline;

(e) the membership or non-membership of a trade union on the part of a worker;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers and employers' association of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures."

The section goes on the define 'worker' in relation to a dispute to which an employer is a party as including any worker even if not employed by that employer.

11 It will be seen that this definition of a trade dispute is very wide and effectively confers protection on workers who may be unconnected with the employer in dispute but whose action might affect him. Such acts may also affect their own employer even though they may have no dispute with him. Sympathetic and secondary action is thus clearly within the scope of the definition.

Section 13

12 The origins of S.13 are in the 1906 Trade Disputes Act which, at S.3, provided immunity solely for acts which in contemplation or furtherance of a trade dispute induced breach of the contract of employment or interfered with the trade, business or employment of another person.

13 The immunity was felt to be necessary in order to protect people, in particular the leaders of organised labour, from the common law consequences of organising industrial action. After criminal liability for conspiracy to cause breach of contract had been removed by the Conspiracy and Protection of Property Act 1875, a tendency arose to try to found civil liability in tort for such action. Successful civil actions were brought against trade unions who claimed that so long as they and their members could be penalised in this way, the freedom to withdraw their labour was worthless. As a result, the Liberal Government enacted in 1906 the Trades Disputes Act which among other things provided the immunity under S.3 described above and an immunity in tort (S.4) for trade unions in respect of any acts committed in contemplation or furtherance of a trade dispute.

14 The immunity conferred by the 1906 Act for interfering with the trade, business or employment of another person appears at first sight fairly comprehensive. In addition the definition of trade dispute in that Act was broadly similar to the modern definition in S.29 TULRA. It is clear therefore that secondary and sympathetic action were prima facie immune under the 1906 Act though whether this was indeed the intention of the legislature of the day is a matter for conjecture. The courts however took the view that where an immunity was conferred in respect of acts which would otherwise be actionable, it should be interpreted restrictively. It was through this restrictive interpretation that the doubtful legality of secondary action was expounded.

15 Three variations of tortious secondary action tort were identified in the leading case of Thomson v Deakin:-

i direct inducement of breach of commercial contract between a third party and the employer in dispute, for example by persuading the third party not to supply goods to the employer in dispute;

ii direct procurement of breach of commercial contract by the commission of an act wrongful in itself preventing a third party from performing it; e.g. by blockading supplies to the third party himself so that he in turn was unable to supply the employer in dispute;

iii indirect procurement of breach of contract by persuading employees of a third party to do something in itself wrongful preventing him from performing it, e.g. to black supplies for the employer in dispute, or to go on strike so that the supplier could not deliver to the employer in dispute.

16 Trade unions obviously were anxious to be able to bring commercial pressures to bear on employers in dispute and to be able to use the secondary action tactic, but the common law interpretation of the immunity made this difficult. Accordingly, when TULRA came to be amended in 1976, Parliament endeavoured, using the framework of the 1906 Act, to make the legal position clear.

17 The immunity was granted for inducing breach of any contract, not merely the contract of employment. It was made clear that the immunity covered acts which merely interfered with the performance of a contract without proceeding as far as breach, e.g. a refusal to work with non-union employees. Most significantly of all perhaps, it was declared in S.13(3) that acts covered by the immunity, and also breach of contract itself, in contemplation or furtherance of a trade dispute were not unlawful. Thus the tort of indirectly procuring breach of contract by unlawful means was abolished. For example, a breach of commercial contract brought about because the third party's own employees broke their contracts of employment with him, thus preventing him from performing his contract with the employer in dispute, would have been an actionable tort under the 1906 Act as interpreted by the Courts. Section 13(3) gave it immunity.

18 Even after this attempt statutorily to provide comprehensive immunity recent decisions have indicated that the judicial horse may not so readily be prevented from bolting. These decisions have concentrated on whether action can properly be regarded as being in 'furtherance' of a trade dispute. In the case of Express Newspapers V Mcshane it

has been held that an action which is too remote in its effect to be in furtherance of the dispute will be outside the immunity. In the same case the view was expressed that to be in furtherance an act must be genuinely intended to achieve the objective of the trade dispute and must on an objective test be reasonably capable of achieving it. A further constraint on furtherance was put forward in the interlocutory judgement of United Biscuits v Fall, where it was held that action taken contrary to the instructions of a trade union could not be said to further the dispute and was therefore outside the immunity. This interpretation will shortly be tested in the House of Lords when the McShane case is heard.

Amendment of the law on picketing

19 To trace the historical progress of the law is not worthwhile in the present exercise. It is sufficient to say that the modern law is contained in section 15 of TULRA which says that 'it shall be lawful for one or more persons in contemplation or furtherance of a trade dispute' to attend at or near a place where another works or happens to be, other than his home, 'for the purpose only of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working'.

20 The law is therefore simply declaratory; it states that picketing in contemplation or furtherance of a trade dispute is lawful, but does not positively confer a right to picket. If something is done in the course of picketing which puts it outside the boundaries set out in S.15, e.g. a act of violence or obstruction of the highway, that act should attract the usual consequences of the criminal law. If a non-criminal act is done but one which is nonetheless prima facie tortious, e.g. an act of neligence, then it will be immune under S.13.

21 There is at present no limitation on the places which may be picketed or the category of persons who may lawfully picket. Nor indeed is there any restriction on the numbers of pickets or the conduct of picketing, provided that it is peaceful. Recently, however, picketing has taken place at sites unconnected with the industrial dispute which occasioned the picketing, and by people unconnected with it, and threats have been made if not of physical violence, then unmistakably of loss of livelihood.

22 It is to curb the first of these abuses in particular that the Government has put forward in its Working Paper on picketing the suggestion that lawful picketing should be restricted to parties to the dispute which occasions the picketing and to the premises of the employer concerned. These proposals, which of course CBI supports, are at present restricted to picketing as distinct from other forms of industrial action. The principle, however, could be used to limit industrial action in general, and is therefore one of the options for change.

23 It has been suggested that the worst excesses of last winter's road haulage strike took the form of secondary picketing, and that if this gap in the law is closed no further legislative measures will be needed on industrial action in general. Although this view may prove to be justified, it is submitted that for reasons of public policy no less than for practical industrial relations reasons, the subject of immunities should be examined as broadly as possible. The Government is committed to a review of immunities, which CBI has welcomed.

Options for change in the law on industrial action

24 There are a number of options for change in the law on industrial action, some of which will be examined below. They are not of course mutually exclusive.

i) Development of restrictive interpretation of furtherance

25 The restrictive interpretation of furtherance referred to above could be accepted into law either judicially, if it were to be approved by the House of Lords, or statutorily, if S.13 were to be amended by Parliament to provide for it.

26 The advantages of this approach are that the framework of the law is left substantially the same and in view of this it could present fewer political problems to the Government than a more radical change. In addition, it has proved in recent decisions to be helpful in limiting the legality of industrial action in certain circumstances.

27 As against that, however, it must be said that the House of Lords may yet not endorse the restrictive interpretation, and if they do not, not only will the usefulness of the interpretation in restricting secondary action be lost, but also the Government may feel inhibited from over-ruling their decision by statutory amendment. And of course the interpretation is limited in its scope; it does not affect the legality of secondary or sympathetic action which is sufficiently direct in its effect on the dispute which has occasioned it.

ii) Restoration of 'of employment'.

28 In their Working Paper on picketing, the Government has suggested that a means of preventing not only secondary picketing but also other forms of secondary action would be to restore the words 'of employment' to the S.13 formula of inducing breach of contract in contemplation or furtherance of a trade dispute.

29 This amendment, like that examined in (i) above, is superficially attractive in that it does not substantially interfere with the present legal framework - notwithstanding that the TUC has already claimed, erroneously, that it would withdraw 'the right to strike'. It would provide legal protection for the following forms of industrial action:-

a) inducement of employees to break their contracts of employment with their own employer, or threatening such inducement or breach;

b) inducing interference with the performance of a contract of employment between employees and their own employers, or threatening such inducement or breach;

c) inducing employees of a third party to break their contracts of employment or interfere with their performance in order to bring pressure to bear on the employer in dispute i.e. inducement of sympathetic action.

It should not therefore be thought that merely reverting to the wording of the 1974 Act by limiting S.13(1) to the contract of employment would totally eliminate secondary or sympathetic action. It would simply make it unlawful directly to induce breach of commercial contract between the employer in dispute and a third party. S.13(3) would have to be repealed if the law were to be returned to what it was under the 1906 Act, thus making unlawful indirect procurement of breach of contract by persuading employees to break their own contracts of employment. However, S13(3) has another, more useful aspect; it clarifies the legality of consequential breach of commercial contract.

31 Thus, although there is no reason why this sub-section should not be repealed, given that the political will exists to do it, it is likely that to do so would make the law uncertain. It could also be argued that if consequential breach of commercial contract were to become legally uncertain the legality of strike action itself would be called into question.

32 In summary, the main disadvantage of amending S.13(1) by adding the words 'of employment' is that it would be insufficient in itself to limit secondary action to the extent most employers would wish. To do that, S.13(3) would have to be repealed or substantially amended. And were this to be done the confusion and uncertainty of the pre-1971 law would be perpetuated and indeed compounded. In particular, the legality of strike action which resulted in any breach of commercial contract, even if only consequentially, would be affected.

iii) Requirement to give notice of strike action

33 The legal view of strike action is that it is a termination of the contract of employment. If, therefore, due notice is given an individual is behaving quite lawfully by going on strike. Similarly, if a group of employees, through their trade union, gives strike notice to an employer, no breach of contract has occurred.

34 The question therefore arises whether the law should be amended so that those acting in contemplation or furtherance of a trade dispute should have the benefit of immunity only on the condition that due notice was given by their trade union. In effect, only official disputes would be protected. The length of the notice period could be either the longest period owed contractually to the employer by any one of the striking employees, or, more satisfactorily perhaps, a fixed period of notice, as in the United States' law, where the period is sixty days.

35 The merit of this proposal is that it might discourage unofficial disputes, though as against that it must be said straight away that it could cause unions to declare disputes official more readily. Ideally, though, it would strengthen the union officials' hands in dealing with militant shop floor groups. And during the notice period, the parties might be able to reconcile their differences so that the strike action need not in fact be taken.

36 The concept of strike notice outlined above would not of course automatically make secondary or sympathetic action unlawful, unless it were specifically provided that it should be. This would be a double restriction on trade unions which they are scarcely likely to welcome. Nor would it affect action short of a strike, such as blacking. It was for these reasons among others that Donovan rejected the suggestion, though the Report did recommend that it be kept under review. It should be noted too that the precedents for the success of the notice period as a cooling off, both in this country under the Industrial Relations Act and in the U.S.A., are not good. In the USA, in any event, the notice requirement is frequently disregarded. Finally, consideration would have to be given to how any provision would affect the legality of a strike by non-unionised employees.

iv) Limitation of immunity to make unlawful action taken against extraneous parties

37 The law could be amended by making it unlawful to take industrial action against a third party unconnected with the dispute who has not contributed material support to it. This was the formula employed (though never tested) under S.98 of the Industrial Relations Act.

38 The purpose of the formula would be to protect pre-existing commercial contracts between the employer in dispute and third parties. It would confer a right of action only where there was a definite intention to induce an 'innocent' third party to break his contract with the employer in dispute. It would not, however, make unlawful strike action which resulted inevitably, consequentially or accidentally in the breaking of commercial contracts between the employer in dispute and third parties. Nor, if the 'material support' notion were to be incorporated, would it be unlawful to disrupt the commercial contracts of an employer who had contributed material support to the party in dispute, e.g. by contributing to a special indemnity fund set up to support him.

39 Such a provision could advantageously limit the extent of secondary action. However, consideration would have to be given to whether the inducement of a breach of contract of employment between the third party and his employees should be unlawful. The Industrial Relations Act specifically excluded inducement of the breach of the contract of employment from the definition of an unfair practice in section 98(3), and it did so in order to ensure that the inducement of sympathetic action would not, without more, be unlawful. In view of CBI's concern about the extent of sympathetic action, it may be considered necessary to omit from the proviso any exception in respect of contracts of employment, though it should be appreciated that this would be a very significant limitation on the freedom of trade unions to take such action.

40 Clearly, the more limitations that are put on extraneity the more difficult it would be to achieve amendment along these lines. Having said that, however, it is worthy of serious consideration. There are no obvious legal obstacles, but in many ways its main disadvantage from a political point of view is that it formed part of the IR Act.

v) Limited immunity differentiating strikes from other forms of industrial action

41 The view has occasionally been expressed that, damaging though strikes are, greater disruption and inconvenience is caused by other forms of industrial action short of a strike e.g. blockading, boycotts, work-to-rules etc. In France, the right to strike is guaranteed by the constitution and the law does not regard the contracts of striking employees as terminated; but other types of industrial action, e.g. the grève perlée (go-slow) and (probably) the grève du zèle (work-to-rule) are not protected by the law and are in fact breaches of contract which justify dismissal.

41a One of the options for amendment of the law in this country would be to retain immunity for strike action but to exclude from it other forms of industrial action. It would also have to be decided whether such action should be excluded even if taken by an employee against his own employer, or simply in the case of secondary action such as a boycott.

vi) Secondary boycotts as restraint of trade

42 At common law, an agreement which restrains trade or competition is void and unenforceable unless it was at the time of the contract reasonable as between the parties and reasonable in relation to the public interest. The effect of many trade union rules is prima facie in restraint of trade, but in order to enable unions to enforce their rights by means of collective withdrawal of labour, backed by the sanction of expulsion of members who do not obey instructions to do so, the purposes of trade unions are regarded by statute as not in restraint of trade.

43 Australia has approached the problem of secondary action by using restraint of trade legislation. The Trade Practices Amendment Act 1977 at section 45 prohibits two or more persons from engaging in conduct that hinders:-

a) the supply by a third person of goods or services to a company; or

b) the acquisition by a third person of goods or services from a company where the company is not an employer of the person prohibited and the conduct has the purpose or effect of either

i) Causing substantial loss or damage to the company's (or an associated company's) business; or

ii) Causing a substantial lessening of competition in any market in which the company or any related company operates.

44 The penalty for a proven breach is a fine of up to A$50,000 in the case of an individual and A$250,000 in the case of a union. In addition a company suffering loss or damage as the result of a breach of the Act can recover the full amount of the loss or damage from either the union or the individuals concerned. The remedy of an injunction is also available. A person has, however, a defence to an action taken by an employer under the Act, if he can show that the "dominant purpose" for which the industrial action was taken "substantially relates" to the "remuneration, conditions of employment, hours of work or working conditions" of either himself or of another person employed by the same employer. In other words, the defence will only be operative where primary action is taken by employees in dispute with their own employer.

45 The Act also specifies that where the persons engaging in the prescribed action are union members, the union itself will be a party to that conduct unless it establishes that it took reasonable steps to prevent the boycott.

46 Since the amendments to the original laws on restrictive trade practices were enacted, a considerable number of actions have been initiated by employers against unions organising and conducting secondary boycotts. Many actions have resulted in voluntary settlement and the lifting of boycotts. In other cases, injunctions have been issued pending a full trial. There appear to have been no reported instances of unions defying the court and continuing an unlawful boycott.

47 An amendment along these lines in U.K. would be a restriction on trade unions' present legal status, and its success, as with many other suggested new remedies against secondary action would depend an employers' willingness to use it. Nonetheless it appears to have had some effect in Australia.

vii) Re-definition of "trade dispute"

48 The definition of a trade dispute, presently contained in S.29 of TULRA could be narrowed in two ways. First, it could be amended to read "'trade dispute' means a dispute between workers and their employer ... ". It would also be necessary to make a consequential amendment of S.29(6) to redefine 'worker', so that that part of the sub-section would read "'worker' in relation to a dispute to which an employer is a party means a worker employed by that employer".

49 This limitation of the definition would certainly have the effect of limiting the immunity to action taken directly against the employer in dispute. Like other attempts to effect this limitation it would involve a fundamental change in the law and a considerable restriction on trade unions' existing freedom to take industrial action. It must therefore be subject to the usual caveats about the need for consensus before such a major change could be made successfully. And of course it would still be possible for unions to take what is in effect sympathetic action by creating a dispute with their own employer.

50 Indeed, it may be that by any standard the proposed definition would be too narrow. Consideration should be given to including within it disputes involving an associated employer of the employer in dispute. But if this were to be done, larger companies with a number of subsidiaries might still find the new definition too wide.

51 The second narrowing of the definition would be the deletion from it of disputes between workers and workers. Such disputes were in fact omitted from the Industrial Relations Act definition, thereby removing the immunity from demarcation and other inter-union disputes. It would be a logical consequence of CBI's policy to remove such disputes from the definition, though in practice there are few workers and worker disputes which do not involve the employer as well or which cannot fairly readily be made to do so. The question would therefore have to be faced of whether the political difficutly of making the change would be worthwhile having regard to the practical advantage likely to be obtained.

viii) A positive right to strike

52 The options for change examined thus far in this paper have been based on the existing framework of legal immunity, a framework which is unique to this country. It arose from the need to give statutory protection to trade unions and their members from the common law consequences of action taken by them to further their legitimate interests. There is thus no right to strike as such, as there is in most other European countries, frequently guaranteed in the constitution, but simply a freedom to strike, and that freedom itself is, as Professor Kahn-Freund has said, 'hidden in the interstices of procedural immunities and privileges'.

53 The question therefore arises whether the time may have come for a long-term examination of the law with a view to a fundamental change of approach. Rather than limiting immunities, it might be better to confer positive rights to take certain forms of industrial action. Admittedly, there would be considerable political difficulties involved in a fundamental change of this sort, but it is in many ways a more realistic approach than that of legally artificial immunities, and provided the law is sufficiently clear it may in the long run be less contentious.

54 It will be noted from the Appendix to this paper that although the right or freedom to strike is provided for much more explicity in other countries, it is considerably hedged around by constraints. In Germany and Sweden, for example, a strike cannot lawfully take place during the currency of a collective agreement, while in Norway a strike on a dispute of right is always unlawful. In those countries, however, secondary strikes are not automatically outside the law. The test of their legality is whether they were called constitutionally; the purpose for which they were called is irrelevant.

55 If English law were to confer a right to strike, consideration would have to be given to the limitation on it that would be needed. For example, it might be recommended that lawful strikes could only be taken by employees of the employer in dispute or only after procedure has been exhausted. A further option might be the requirement to give

strike notice. And the status of action short of a strike would need to be examined: would it be lawful in the smae circumstances as strike action?

56 The Donovan Commission considered whether the right to strike should be granted in express terms, and decided that it should not. However, it was suggested that if the law on trade disputes was codified the matter should receive further consideration. CBI might now wish that suggestion to be taken up.

57 To create a right to strike would involve a major change in industrial practice as well as the law itself, but it would have the merit that it would be a positive change by which trade unions would acquire a valuable right and so might be prepared to concede certain limitations on secondary action.

III IMMUNITY OF TRADE UNIONS IN TORT

The present law

58 The immunities dealt with in Part II of this paper relate to individuals, whether they are acting on behalfof a trade union or not. However, as stated in para 8 above, S.14 of TULRA confers an immunity in tort on trade unions themselves. In essence it provides that no action in tort shall lie in respect of any act done or alleged to have been done by the union. Not only is the union itself protected, but also its members and officials are protected from action being brought against them in a representative capacity.

59 The immunity covers all torts done in contemplation or furtherance of a trade dispute, and torts committed in other circumstances except those which result in personal injury or which involve breach of duty in connection with the ownership, occupation, possession, control or use of property.

60 The historical background to the immunity is that before the Taff Vale decision it was generally supposed that trade unions, like other unincorporated bodies, could be sued if at all only by means of a representative action. However, in that decision it was held that registered trade unions could be sued in their own name for damages

in tort, and that the funds of the union would become answerable for any damages awarded.

61 The unions and those who supported them however prevailed on Parliament that one of the main functions of a trade union was to be able to organise its members to enforce their side of the employment bargain if necessary. If this were to be regarded as unlawful inducement of breach of contract their functions would be seriously restricted and their duty to protect the interests of their members rendered almost meaningless. Moreover, union funds ought not to be put at risk of being depleted or absorbed by hostile litigation. Accordingly Trade Disputes Act 1906 contained a provision concerning tortious immunity which is the predecessor of S.14 of TULRA.

61a In this respect , United Kingdom law differs from most of its counterparts in Europe, though of course it should be borne in mind that the entire English legal system is on a different basis from other European systems. In Europe, with (the exception of Italy) the rights and obligations of trade unions are either guaranteed by the constitution or otherwise provided for by law. Generally speaking, European unions are themselves liable for wrongful acts done by them or on their behalf.

Effect of the immunity

62 The main importance of the immunity in practice is in relation to trade disputes. The effect of it is that any legal action arising from a tort done in contemplation or furtherance of such a dispute must be taken against an individual. So far as employers are concerned this has two major disadvantages. First they are reluctant to sue an employee because of the adverse effect on working relationships and also because by the time the case comes to court the matter will probably already be resolved and both parties will wish to forget all about it. Secondly, individuals are 'men of straw'; the employer may have to spend a considerable sum on litigation and has little hope of receiving damages or costs even if his complaint is upheld.

Amendment of the law

63 Despite these disadvantages, many employers feel that it is wrong that unions should not be legally responsible for tortious acts undertaken on their behalf. The fact that they are not distorts the balance of power between the employer and the union in an industrial dispute, and leads union members and officials to behave

in a way that they would not if a legal sanction was available. It is also felt that the immunity for torts other than in the context of a trade dispute is anomalous in that there is no reason why a trade union should not be liable for its wrongful acts in the same way as any other body. The Donovan Commission shared that view and recommended that the general immunity should be removed.

64 Contrary views have been put forward as to the effect amendment of the law would have on the influence of trade unions on their membership. On the one hand, the fact that the union would be liable, for the acts of its members could lead to a curtailment of unofficial disputes, and to less abuse of the law in both official and unofficial action. The threat that a union would disassociate itself entirely from action taken in disregard of its instructions could act as a deterrent to taking such action. The need to ensure that instructions were followed would improve the status and authority of trade unions in the eyes of their members.

65 As against that, however, it is argued that the major source of industrial unrest is not so much the unions themselves as a militant minority who may or may not be union members. For that reason, the main amendments should be directed towards limiting the immunity of individuals or, expressed more positively, raising the level of individual liability for tortious acts. To extend the liability of trade unions by removing their immunity would undermine them to no purpose and would in fact weaken their capacity to influence the conduct of industrial disputes.

66 If the law were to be amended to limit trade union's immunity in tort, some degree of co-operation from the unions themselves would be needed. Any change in their status, e.g. to make them into incorporated associations would have to be made after careful investigation of the possibilities and not simply by statutory amendment as in the Industrial Relations Act. In addition, employers would have to be prepared if necessary to use the remedies provided by the law, and they have not shown a readiness to do so hitherto. A failure on either side to observe the law would bring it into disrepute, especially as the sanctions available against unions e.g. sequestration of assets, imprisonment for contempt of court orders, could easily be exploited to considerable public relations effect.

66a It will be recalled that S.14 of TULRA applies to employers' associations as well. It goes without saying that any amendment to

IV LEGAL ENFORCEABILITY OF COLLECTIVE AGREEMENTS

67 "A collective agreement is an industrial peace treaty and at the same time a source of rules for terms and conditions of employment, for the distribution of work and for the stability of jobs. Its two functions express the principal expectations of the two sides, and it is through reconciling their expectations that a system of industrial relations is able to achieve that balance of power which is one of its main objectives". [1]

This description of a collective agreement expresses exactly the nature of the bargain struck between the parties. In this part of the paper, it is proposed to examine to what extent the law plays a part in enforcing that bargain and whether it is desirable or practicable to extend it.

The present law

68 In this country, unlike most others, collective bargaining has always been regarded as a voluntary procedure, and the law has not intervened, except for a brief interlude between 1971 and 1974. At common law, the predominant view of collective agreements is that they are not legally enforceable because the parties do not intend to be legally bound. (Ford Motor Co v AEF).

69 The terms of collective agreements can, however, become legally enforceable on employers and employees by express intention or by incorporation into individual contracts of employment. It is, for instance, common for employees' written statements to include the terms of relevant agreements by reference. However, S.18(4) of TULRA specifically provides that "no-strike clauses" shall not be imported into individual contracts unless a specific procedure

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1 Kahn-Freund : Labour and the Law, 2nd edn, 1977

is followed. The result therefore is generally that the substantive terms of agreements are regarded as legally enforceable on employers, whereas the no-strike provisions are not binding on employees.

70 For that reason, the emphasis in employers' consideration of the legal enforceability of collective agreements has always been on procedural aspects of agreements. Nonetheless, it is true to say that the terms and conditions of collective agreements, at least where they exceed statutory minima, are only incorporated voluntarily into individual agreements between employer and an employee; the employer is no more legally bound by the agreement itself than is the trade union.

European comparison

71 As in the case of immunities, English law on collective agreements differs from almost every industrialised country. In most European countries, an agreement will legally bind both sides for a fixed period, generally one year, during which industrial action will not be taken against an employer provided of course that he is himself abiding by his side of the agreement. The principle of legal enforceability appears to be completely accepted by the industrial parties in these countries and it is regarded as a non-controversial aspect of labour law. Moreover, the parties are prepared to use the courts if an agreement is breached and to abide by the decision of the Court once it is made.

72 However, it is important to bear in mind that the employer is not the sole beneficiary of a legally binding collective agreement. In return for the peace clause, European employers have agreed to equally substantial terms in the unions' favour. It is common, for example, for there to be provision in the law for a collective agreement to be extended by the Labour Courts, at the suit of the union, to cover non-signatory parties. There are usually restrictions on contracting-out of the agreement and it is sometimes a term of the agreement, as in France, that it must contain certain minimum standards of social legislation.

In Sweden there is a statutory requirement that collective agreements should settle employees' rights of "joint regulation", and in both Sweden and Denmark, unions are empowered to veto sub-contracting which appears to be contrary to the law or a collective agreement applying to the work in question.

Options for change

73 Employers' emphasis on the procedural aspects of agreements has been referred to earlier. Some would go so far as to say that action is only needed to make procedure agreements binding; the substantive side of agreements bites most heavily on employers and as it is observed in practice through individual contracts legal enforcement is unnecesary.

74 But it has been seen that in other countries both sides are bound by the law on an equal basis. It would be difficult to see how amendment could be made to the law here other than to this effect. As Donovan said "It is because and in so far as the law guarantees (the substantive) terms that unions are made to guarantee the peace. To enact the peace obligation without the corresponding legal guarantee for the enforcement of the substantive terms of the agreement would be an unusual step which only very exceptional circumstances could justify". [1]

75 Donovan went on to reject the idea of legally enforceable procedure agreements, first because the form of bargaining conducted between the industrial parties did not fit into the categories of the law of contract; secondly because it was at variance with the principles of the common law to impose terms on the parties to a contract against their will; and thirdly because it was thought to be unlikely to reduce unofficial disputes unless there was first of all a significant improvement in industrial relations.

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1 Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968: paragraph 469.

It must be said that these arguments are still very persuasive.

76 Notwithstanding Donovan's rejection of the idea, however, nor yet the failure of the relevant provisions of the Industrial Relations Act, some options for change are worthy of consideration.

77 From the employers' point of view, the most attractive method of enforcement against trade unions would be by providing that inducement of industrial action in breach of a procedure agreement should no longer be immune from legal action. This would enable injunctive action to be taken against trade unions and their officials, accompanied by claims for damages. To prevent such remedies being thwarted by "spontaneous" action by employees, it would also be necessary to provide that trade unions were responsible for the actions of their members, at least unless they could show that they had taken all reasonable steps to dissuade them from acting unlawfully.

78 As regards enforcement against employees, the law has always frowned on the idea of ordering specific performance of a contract (this is at present enshrined in s.16 of TULRA). The remedy of damages would not be practicable; employees are generally "men of straw" and employers would not generally wish to pursue individuals. An alternative penalty would be the loss of certain individual rights, eg a year's accumulative service, but this would not act as a deterent to the really commited and would bear particularly harshly on longer-serving employees.

79 The proposals for enforcement against trade unions and against employees would require action by employers. Employers have in the past been able to take action against those who induced breaches of commercial contracts, eg by secondary action, but have virtually never done so; similarly dismissal of employees who break their contracts by striking have been comparatively rare. The CBI, in its evidence to Donovan, said that this was mostly because "the main interest of the employer is in a resumption of work and preservation of goodwill". It is clear therefore that any provision

making procedure agreements legally enforceable will need to be accompanied by a fundamental change in employers' attitudes to using the law to enforce their rights. And it should not be forgotten that provisions for enforcement against trade unions and employees would need to be balanced by a right for them to take legal action against employers in relation to lock-outs in breach of procedure or breaches of status quo clauses. It is possible that encouragement of employers to enforce their rights at law could result in many cases being taken by trade unions in retaliation.

80 There are a number of other practical difficulties, such as the exploitation of status quo clauses and the possible refusal of trade unions to enter into or to continue legally binding agreements at all. The success of a fundamental change in the law rendering collective agreements legally enforceable would depend heavily on consensus about the objectives to be achieved and the manner of achieving them. It would entail a change of heart for trade unions which would have to be matched on the employers' side by a willingness to concede significant quid pro quos.

81 Finally, it should be pointed out that making procedure agreements legally enforceable would not as such directly affect the legality of secondary action. Unless there was a specific exclusion in an agreement or by statute, and consideration would need to be given to the practicability of this, there is on the face of it no reason why a sympathetic strike should not be lawfully taken after having exhausted procedure. Such strikes are perfectly lawful, for example, in Sweden.

SUMMARY AND CONCLUSIONS

82 It will be apparent from the account given in this paper of the existing law that it has developed piecemeal into a system of labyrinthine complexity. But although lacking in consistency and in need of rationalisation, it has the merit that it builds

on principles of law and industrial relations which are well-established in this country.

83 A number of common threads emerge in considering the options for change. First there is a need to limit the capacity of individuals to take industrial action against secondary parties. Secondly, it may be that trade unions as such should be given more extensive legal liability and should take greater responsiblity for the actions of their members. Finally, the law may need to intervene to create more formality between the parties to collective agreements and to ensure that procedures are properly observed.

84 All these changes would involve restriction on the existing rights of trade unions and their members. Many of them would entail a departure from long-established traditions. In order to achieve them, therefore, there is a need for:

- political will
- consensus
- a determination on both sides to observe the obligations and enforce the rights given by the law.

Without each of those, any change is likely to be ineffective and the law will be brought into disrepute, most probably with the gravest industrial consequences.

85 Important thought legal change may be, however, it is also clear that the law can only do so much. Legal change will not of itself make any difference to the practice of industrial relations, particularly where the tradition of voluntarism is as strong as it is in this country, unless the industrial parties themselves are prepared to act responsibly. Indeed, although the image of voluntarism is badly tarnished, there is no reason in theory at least why employers and unions could not by voluntary means bring about industrial relations reform without needing to involve the law at all. But the view may well be taken that this opportunity is no longer realistic, and that the way ahead must be in changes

to the law backed by a resolve on both sides to improve industrial relations.

86 Finally it should be said that although the options for change on the three principal subjects considered in this paper have been dealt with separately, they are not mutually exclusive. Changes may be needed in all three areas if an effective legal solution is to be found to these problems.

87 Decisions which need to be taken include:-

i should CBI recommend in addition to the "band-aiding" amendments already put to the Government a further modification of the law to limit the "lawfulness" of secondary action?

ii if so, should this be by amendment of the current immunities approach or through more radical amendment of the law, eg conferring a right to strike?

iii should CBI recommend that consideration be given to making trade unions themselves liable for their tortious acts, and if so should a distinction be made between torts in contemplation or furtherance of a trade dispute and torts committed in other circumstances?

iv should CBI recommend that consideration be given once more to making collective agreements and in particular procedure agreements legally enforceable?

v what priority should be put on any recommendations? Should the Government be recommended to proceed with legislation this Parliament? Or should they be advised to undertake some form of enquiry before preparing legislation?

Social Affairs Directorate
ACH/JK
September 1979

APPENDIX 1(a)

June 1979

CONFEDERATION OF BRITISH INDUSTRY

PC 48A 79

AMENDMENTS TO INDUSTRIAL RELATIONS LAW

Introduction

1 This paper sets out the CBI's proposals for immediate amendments to industrial relations law. They are grouped under three heads, designed to meet three separate needs:

- the need to restore a better balance in collective bargaining
- the need to remove the trade union bias in collective rights
- the need to alleviate the administrative burden and disincentive effects on employers of certain individual rights

A Restoring a Better Balance in Collective Bargaining

2 The CBI believes that issues between employers and workpeople are best settled by negotiation. Collective bargaining can, however, only produce sensible solutions if it is based on economic reality and a proper balance of bargaining power.

3 In considering what legal reforms might best contribute to a better balance the CBI has set itself four objectives:

- to reduce industrial conflict
- to provide a framework within which employment and collective bargaining relationships can operate with a reasonable balance of fairness between the parties
- to provide balance between the freedom necessary to a true democracy and the need for protection from abuses of that freedom
- to create and demonstrate standards of industrial conduct which society as a whole can regard as acceptable

It has also borne in mind the need to carry sufficient support within the total community to prevent the law from being brought into disrepute.

4 As a result the CBI has concluded that in order to improve the balance in collective bargaining, priority should be given to amendments in the following areas:

- the closed shop
- picketing
- financing of strikes

The CBI is also making an urgent study of the whole question of trade union immunity from legal action, including the problems of secondary action in all forms, and of the enforceability of procedural agreements.

The Closed Shop

5 There is a growing concern both amongst employers and the public at large about the effect of closed shops on individual freedom. However, the CBI acknowledges that a large number of closed shops exist in industry, covering some five million employees. In present circumstances, therefore, it is not proposed that they should be made unlawful, either directly or indirectly. Action does, however, need to be taken to remove some of their more objectionable effects on the freedom of the individual and to prevent the spread of closed shop agreements which do not conform to certain minimum standards.

6 The CBI therefore makes the following proposals:

a Workers who are arbitrarily excluded or expelled from a trade union should have a statutory right to complain to an industrial tribunal, or to the High Court, on the lines of Section 5 of the Trades Union and Labour Relations Act 1974.

b It should be provided by statute that a closed shop agreement made after this provision comes into effect should not be enforceable in the contract of employment unless the agreement is supported by an overwhelming majority of employees tested by secret ballot.

c The present exception from the terms of a closed shop agreement only on the grounds of religious belief should be extended to cover any employee who objects on grounds of deeply held personal conviction to being a member of a union.

d There should also be a statutory exemption from the terms of a new closed shop agreement for all existing non-union employees.

e There should be a statutory protection for applicants for employment and for existing employees against the unreasonable operation of a closed shop agreement.

f There should be a statutory right for employers accused of unfair dismissal on account of the operation of a closed shop to join as co-defendant a trade union which pressurised him into making the dismissal.

g There should be a statutory code of practice which would, inter alia, give guidance on the level of support necessary for a new closed shop agreement (normally at least 85 per cent of those entitled to vote) and on the reasonable operation of closed shops. The code would also provide for periodic reviews of closed shop agreements, including the holding of secret ballots to ensure that they still have the overwhelming support of the employees.

Picketing

7 The CBI considers that in principle all forms of secondary industrial action should be made unlawful, but the extent of the disruption caused by the development of secondary picketing in last winter's Road Haulage dispute makes action on this particular aspect imperative. The CBI therefore makes the following proposals for amendment of the law:

a Lawful picketing should be confined to employees directly involved in the dispute, and their full time union officials.

b Lawful picketing should also be confined to the premises where those directly involved in the dispute normally work.

c Statutory provision should be made to enable injunctions to be taken out against "the act of picketing", as opposed to the individual picket.

d There should be a statutory code of practice to provide guidance on peaceful picketing.

Financing of Strikes

8 In view of the public controversy about the financial support available to strikers from the State, the CBI has examined the subject in depth to see to what extent it contributes to the lack of balance in bargaining power between employers and unions. This study has revealed that changes in this area would have little effect on the majority of strikes which are of short duration and which are mainly financed through pay-in-hand, savings etc. Where there is greater room for change, however, and where there is greater cause for concern, is in the role such State support can play in longer strikes which are a real test of strength between employers and unions.

9 The CBI considers therefore that amendments are justified in relation to longer strikes. They will, however, need to achieve a balance between the priority of putting greater financial responsibility for financing strike action on trade unions, whilst at the same time recognising the role of the State in the prevention of undue hardship.

10 It is therefore proposed that:

a The Supplementary Benefits Commission, in assessing the level of benefits should assume that any claimant striker, official or unofficial, is receiving the equivalent of the single person's urgent needs allowance (currently £10.50) in strike pay, ie "deeming" the receipt of such strike pay.

b The present £4.00 "disregard" for strike pay should be abolished.

11 The CBI also believes that further consideration should be given to the taxation of short-term benefits.

B Removal of the Trade Union Bias in Collective Rights

12 The CBI has always been severely critical of the one-sided nature of the Trade Union and Labour Relations Acts and the Employment Protection Act. Most of the new rights they have provided have been for the benefit of trade unions and workpeople whilst the obligations have been placed on employers. These rights are enforceable against employers whilst no sanctions have been applied to unions or workers who abuse them. This does not provide an acceptable framework within which reasonable industrial relations can operate. There are three priority areas from which this bias must be removed.

Terms of Reference of the Advisory, Conciliation and Arbitration Service

13 The CBI believes that ACAS has an essential role to play in providing facilities for conciliation and arbitration and promoting good industrial relations. It cannot do this unless it is respected as an independent and impartial body by both sides of industry. At present its terms of reference imply that the extension of collective bargaining is synonymous with the improvement of industrial relations. The CBI does not accept this implication and therefore recommends that the reference to "the extension of collective bargaining" should be removed.

Trade Union Recognition

14 The statutory recognition provisions in sections 11-16 of the Employment Protection Act are one-sided and have not, in practice, provided an acceptable and effective method of dealing with recognition disputes. They should therefore be repealed.

Extension of Terms and Conditions of Employment (Schedule 11) and the Fair Wages Resolution

15 Schedule 11 of the Employment Protection Act has provided a statutory means for trade unions to obtain improvements in terms and conditions that they have not been able to obtain by normal negotiation. It is incompatible with free collective bargaining. In a number of cases awards under the "general level" provisions have proved disruptive and damaging. The CBI therefore proposes that the "general level" provisions in paragraph 1 of Part 1 of Schedule 11 should be repealed.

16 The exploitation of Schedule 11 has also drawn attention to the potentialities of the Fair Wages Resolution as a means of circumventing normal collective bargaining, and in some cases its use has proved even more damaging. The CBI therefore proposes that the Fair Wages Resolution should be re-examined in the light of modern circumstances.

C Alleviating the Administrative Burden and Disincentive Effects of Individual Rights

17 Many of the problems associated with the new individual rights enacted by the previous Government have been caused by their rapid introduction over a short period of time. Nevertheless there can be no doubt that they have sometimes had a disincentive effect on employment. The main need is for a period of stability during which employers can continue to adapt their employment policies to conform with the new legal requirements without the imposition of further legislation, either domestic or European. Certain limited changes of detail should, however, be made which, without affecting stability, would lighten the administrative burden and lessen the disincentive effect.

Guarantee Payments

18 Section 13(1) of the Employment Protection (Consolidation) Act 1978 provides that an employee shall not be entitled to guarantee pay if the failure to provide him with work is due to a trade dispute involving any employee of his employer or of an associated employer.

In the CBI's view the exclusion should also apply to lay-off where work is prevented by the effects of extraneous industrial action.

Maternity Pay

19 Sections 35, 37 and 39 of the EP(C) Act set out a complicated procedure for the calculation of maternity pay, for payments to be made by employers, and for 100 per cent rebates to be claimed from the Government-managed Maternity Fund. Virtually all other EEC countries provide for maternity pay to be paid direct by a Government Department and it would clearly alleviate the administrative burden on employers if a similar system were followed in this country. The CBI therefore proposes that the payment of statutory maternity pay under the Act should be taken over the by Government.

Unfair Dismissal

20 a Onus of proof. The Trade Union and Labour Relations Act 1974 changed the onus of proof in unfair dismissal cases so that the employer not only has to prove that the reason for dismissal was an admissible one but also that he acted reasonably in treating it as sufficient to justify dismissal. In other words there is now a presumption of unfairness which the employer has to rebut.

In the CBI's view the onus of proof should be returned to the original formula under which, after the employer has proved that the reason for dismissal is an admissible one, the tribunal has to decide in the light of the evidence whether the employer acted reasonably in dismissing the employee.

b Dismissal in connection with a lock-out, strike etc. Section 62 of the EP (C) Act provides that when an employee is dismissed during the course of a strike or lock-out an industrial tribunal shall not be empowered to hear a complaint that the dismissal was unfair unless one or more of the employees involved was not dismissed or was offered re-engagement when no such offer was made to the complainant. The section needs to be amended so that the test of discriminatory action applies only to those involved in industrial action at the actual time of dismissal. There should also be a time limit of one year after which re-engagement of a dismissed employee would not give rise to a right of action by those not re-engaged.

c Qualifying period for claiming unfair dismissal. The qualifying period of service for the right to complain of unfair dismissal has been successively reduced from two years to one year and then to six months. Six months is often too short a period within which to assess properly the potentialities of employees, particularly staff, and this has acted as a disincentive to smaller employers to enlarge their workforces to meet what may be only temporary or seasonal needs. It has also had an unfortunate effect on the employment opportunities of workers whose capabilities may be in doubt. The CBI therefore proposes that the qualifying period should be increased at least to one year.

d Joinder. There should be a general provision that an employer against whom an unfair dismissal complaint has been made and who claims that he was pressurised by a trade union into dismissing the employee should be able to apply for the union to be joined as co-defendant. If the tribunal finds that his claim is justified, it should be able to order that some, or all, of any compensation awarded should be paid by the union.

e Industrial tribunal procedures. The CBI continues to be concerned about the administrative and financial burden on employers of defending themselves against complaints of unfair dismissal, a high proportion of which are subsequently dismissed by industrial tribunals. The Government must keep the situation under constant review, with the aim of providing the cheap, speedy and informal system of justice that was originally intended.

Procedure for Handling Redundancies

21 Sections 99-107 of the Employment Protection Act were based on the EEC Directive on Collective Redundancies which became law in 1975. However, they go further than the Directive in requiring consultation with trade unions on single redundancies and requiring a minimum consultation and notification period of 60 days where ten or more employees are to be made redundant, instead of 30 days as required by the Directive. The CBI proposes that these provisions should be reviewed in order to bring them into line with the Directive.

APPENDIX 1(b)

September 1979
(in answer to CBI's
consultative paper)

PC 48B 79

CONFEDERATION OF BRITISH INDUSTRY

PROPOSED INDUSTRIAL RELATIONS LEGISLATION ON PICKETING, THE CLOSED SHOP AND FINANCE FOR UNION BALLOTS

CBI MEMORANDUM OF VIEWS

GENERAL COMMENTS

1 The CBI generally welcomes the proposals in the Government's three working papers on picketing, the closed shop and support from public funds for union ballots. The overwhelming view of our members is that changes are needed to redress the present imbalance in industrial relations legislation and that urgent action is required in some cases.

2 The papers on picketing and the closed shop are very much in line with CBI's own thinking on these subjects, and are regarded as the minimum necessary to deal with certain abuses which have developed in recent years. The CBI did not itself make proposals for financial support for union ballots. We naturally support the idea of greater involvement of trade union members in decision-making in their unions, but we have reservations as to the extent to which the offer of financial assistance by Government will encourage this. Nevertheless we believe that it may be helpful in certain situations.

3 Against this background we make our detailed comments which are set out below.

4 In the CBI's memorandum on Amendments to Industrial Relations Law which we sent to the Secretary of State in June we made other proposals which are designed to remove some of the bias in recent legislation and to alleviate the administrative burden and disincentive effects on employers. We would urge that priority should be given to this limited package of amendments as a first step towards correcting the balance of existing legislation.

5 We believe that in due course the law may have to be further amended. In the present consultation, for example, many of our members

have expressed concern that trade unions themselves are largely immune from action in tort, and have recommended that they should be made accountable in law for their own actions and for those undertaken on their behalf.

PICKETING

6 The CBI agrees that recent developments in picketing activities designed to bring pressure on companies not directly involved in disputes, and resulting in economic disruption and hardship to the community in general, require statutory action to limit the scope of what is permitted by law. At the same time it is necessary to point out that no amendment of the law on picketing alone will be effective without the proper and uniform enforcement of the criminal law which applies to such situations. This point has repeatedly been made to us by CBI members and has been urged on Government consistently by the CBI in recent years.

Limiting picketing

7 It is agreed that section 15 of the Trade Union and Labour Relations Acts should be limited so that it includes within its scope only those who are a party to the relevant trade dispute and who are picketing the place where they work. This provision needs to be drafted so as to include within the definition of "party" the full time officials of the employees concerned and ex-employees whose dismissal may be an integral part of the dispute. This may present difficulties of identification, but provided the law is properly enforced to limit the numbers of pickets, these should not prove insuperable and should not deflect the Government from taking the necessary action.

8 A consequential amendment of section 13 will obviously be required. Paragraphs 10 and 11 of the working paper offer the alternatives of a narrow amendment to deal only with secondary picketing or a broader amendment, the effect of which would be to remove legal immunity from persons who directly induce the breach of commercial contracts. CBI strongly supports the option in paragraph 10 which deals only with secondary picketing.

So far as the wider amendment is concerned the CBI is conscious of the extraordinary complexity of the whole area of trade union immunities from legal action and both the DE and the CBI are now examining it in depth. We are therefore convinced that at this stage legislative change should deal solely with the subject of secondary picketing in a way which can be simply understood by employers so that they can enforce their rights at law, and also by the public at large.

9 The CBI would also urge that there should be statutory provision to enable injunctions to be taken out against "the act of picketing", rather than against individual named pickets. Instances are increasingly coming to light where picketing is carried on by rotating pickets whom it is often difficult to identify. Without such provision the use of such pickets could make it more difficult to take action under the amended law.

Code of Practice

10 The CBI strongly supports the preparation of a code of practice on picketing. We have for many years advocated the publication at least of official guidance, setting out the law on the subject in order to encourage its observance by pickets and uniform enforcement by the police and the courts. Since matter of criminal law are involved, it would not be appropriate for the code to be drawn up by ACAS. It should be drawn up jointly by the Secretary of State and the Home Secretary, in consultation with ACAS as appropriate.

11 We would naturally welcome clear guidance for unions issued by the TUC on the organisation of peaceful picketing revised to take account of the amended law, but its effectiveness will depend on the determination of unions to see that their members observe it. There would, however, still be a need for an official code setting out the criminal law relevant to the subject for the assistance of the police and courts. In the event of the TUC guidance not proving effective, the scope of the statutory code will need to be broader.

CLOSED SHOP

12 There is widespread concern amongst CBI members about the growing abuse of the closed shop and the way in which it interferes with individual freedom. They believe that legislative changes are needed to protect individual rights and to ensure as far as possible that best practice is followed. The CBI therefore supports the objectives of the Government's proposals to ensure that new closed shop agreements are only made with the overwhelming support of the employees concerned and that the rights of existing employees and those who genuinely object to joining a union on grounds of conscience are fully protected.

13 The CBI recognises that a large number of closed shops exist which operate to the satisfaction of the parties and do provide protection for the minority of employees who object to union membership; also that there are a number of situations where there is a high level of union membership but where the position has not been formalised by a union membership agreement. Some concern has been expressed, particularly by employers with experience of such situations, that the proposed changes should not disturb existing arrangements which are operating satisfactorily as this could lead to industrial relations problems. The CBI fully accepts these arguments but it nevertheless considers that certain limited action must be taken to set standards for the reasonable operation of closed shops and to protect the essential rights of the individual.

Protection against dismissal

14 The CBI agrees that employees covered by a closed shop who are not members of the union at the time the agreement is made should be protected against having to join. Since it was not a term of their employment when they were taken on, it is unreasonable that they should have to accept such a fundamental change in their contracts.

15 In our proposals to the Government last June we suggested that the present "conscience clause" relating only to religious belief might be extended to cover employees who object on grounds of deeply held personal conviction to joining a union. Although a small minority of our members foresee difficulties in negotiating changes in their agreements to comply with a wider conscience clause, we are convinced that the present statutory protection is altogether too narrow. A wider definition inevitably raises the possibility of difficulties of

interpretation, but the aim should be to find a formula which as far as possible is capable of objective assessment and which makes clear that the issue of personal conviction relates only to objections on moral or ethical grounds.

16 Our consultations have shown that the alternative of using the wording of the 1974 Act and extending protection to all "who object on reasonable grounds to being a member of a particular union" is regarded as being far too wide and likely to lead to major difficulties of interpretation and to industrial relations problems. The CBI membership remain's divided on whether the protection should relate only to those who object to being a member of any union whatsoever or whether it should be widened to cover those who object to being a member of a particular union. Although a majority would prefer the latter formulation an important minority, mainly those in areas where closed shops are more prevalent, feel that it could be exploited and might therefore lead to problems. This view is held by the Engineering Industry in particular.

Joinder

17 In view of the intolerable pressures that can be brought to bear on an employer in a closed shop situation it is agreed that in complaints of unfair dismissal due to the operation of a closed shop, the employer should be enabled, if he so chooses, to join a trade union as co-defendant, and that the tribunal should be empowered to apportion any compensation payable between the employer and the union. This process should not be available to complainants. We would also suggest that action should be taken when the unfair dismissal provisions are being amended to extend this principle to all unfair cases where trade unions have exerted pressure on employers to dismiss their employees.

Overwhelming Support before closed shop agreements introduced

18 As stated in paragraph 1 above, there is a minority view amongst employers that the formalisation of union membership arrangements in certain areas could be damaging. The CBI is, however, convinced that it is fundamental to the establishment of reasonable standards of behaviour that new closed shop agreements should only be made with the overwhelming support of the employees concerned and, indeed, that a high level of existing union membership should be a pre-condition before consideration is given to making a closed shop agreement. There should

also be the possibility of retesting the degree of support in both new and existing closed shops if there are reasonable grounds for believing that sufficient support no longer exists. We have considered whether such provisions might appropriately be covered by a code of practice rather than by statute and, as recommended in our June memorandum, have concluded that the initial protection against the making of new closed shops without overwhelming support it so basic that it should be provided in primary legislation on the lines proposed in the working paper including provision for secret ballots so as to ensure that a sufficient degree of support exists. Views on what would constitute an overwhelming degree of support differ but our membership is clear that very much more than a simple majority of those entitled to vote would be required in addition, of course, to a high level of existing membership. In our earlier proposals we suggested a level of 85 per cent. The question of reviewing the level of support is a matter which will need very careful handling if it is not to be exploited. It should therefore be dealt with in a code of practice.

Code of practice

19 It is agreed that there should be a statutory code of practice which would be capable of being taken into account in legal proceedings. It should, however, be pointed out that the working document does not clearly indicate the legal proceedings to which the code would relate. Provisions which carry no legal status at all are liable to be ignored. This is why, in our own recommendations, CBI proposed that there should be a statutory protection for applicants for employment and for existing employees against the unreasonable operation of a closed shop.

20 A number of suggestions have been made as to the matters to be included in the code. Generally speaking it will need to reflect best practice in relation to such matters as the level of union support before consideration should be given to making a closed shop, the definition of the employees who might be covered and those exempted, the obligations on both parties, methods of dealing with issues of interpretation and with grievances, and procedures for review and amendment of the agreement. In addition the code should include a clear statement that since a closed shop inevitably impinges on "the right of the worker to earn his living in an occupation freely entered upon" (vide the European Social Charter), it should be operated reasonably and humanely. It will need to explain

the law in layman's language, and deal in detail with arrangements for balloting.

21 The code should apply immediately to all new closed shop agreements. In that it will reflect best practice it should be possible to bring existing closed shops broadly into line with its provisions. Care will, however, need to be taken not to upset existing arrangements which are working well and to the satisfaction of all concerned.

22 The CBI believes that in principle the code should be drawn up by ACAS. It would, however, first be necessary to amend ACAS's terms of reference to avoid their bias being reflected in it. There should certainly be a reserve power for the Secretary of State to produce a code if ACAS failed to do so. Its preparation should, of course, be subject to the normal consultation with the CBI and TUC.

Arbitrary exclusion and expulsion

23 The CBI agrees that there should be a new right not to be arbitrarily or unreasonably excluded or expelled from union membership, on the lines proposed in the working paper. On the question of the appropriate adjudicating body, there are obviously arguments for and against both the High Court and industrial tribunals and the CBI has no strong views either way.

Voluntary Procedures

24 The CBI entirely agrees that it is desirably that voluntary procedures should continue to be available and used wherever problems in this field can be dealt with effectively under them rather than by recourse to law.

Application of closed shop to employees of contractors, suppliers and customers.

25 The reform of the closed shop principle would be seriously undermined if nothing were done to prevent companies, organisations and local authorities from continuing to require that contractors should use only unionised employees and that visiting employees of suppliers and customers must be union members. The CBI believes that action must be taken to end this practice.

SUPPORT FROM PUBLIC FUNDS FOR UNION BALLOTS

26 Although the CBI did not include the idea of financial support for union ballots amongst the proposals it made to the Government last June, the majority of our members feel that if it results in the wider use of secret ballots by trade unions it may well prove beneficial. Doubts have naturally been expressed as to the extent to which unions may be expected to make use of this facility and there are also a number of practical difficulties; for instance failure to maintain up-to-date records of membership could lead to complaints of disenfranchisement. It is agreed that unions must retain discretion as to whether to call ballots but there must be adequate supervision to obviate abuse of the process. The CBI also considers that the legislation should not be open-ended; a general power of review and amendment, both in respect of the subjects covered and the amount of financial support, will need to be included in the legislation.

Matters to be covered by ballots

27 The majority of our members see no difficulties in applying this scheme to the election of trade union officers and to matters involving changes in union rules. As regards strike ballots it is obviously desirable that a majority of the employees concerned should be in favour of industrial action. On the other hand abuses can arise over the drafting of the questions subject to ballot and in relation to the timing of a ballot. For instance an early ballot may be called to strengthen the union negotiators' hands. Similarly reservations have been expressed about ballots about the ending of industrial action. Although in many cases it may be helpful to find out whether there is still support for the action, balloting can result in delays and limit the discretion of union officials.

Postal and non-postal ballots

28 A number of member organisations felt that financial assistance should be limited to postal ballots and to such easily identifiable items as the cost of printing and postage. There was much less support for assistance to be given for ballots conducted at the place of work due to the difficulty in establishing which items of expenditure may have been justified and whether the ballot has been properly conducted.

Administration of the Scheme

29 It is agreed that the Certification Officer would be the most appropriate person to administer the scheme.

CONFIDENTIAL

2

cc Mr Whitfield

Prime Minister

To note

JR

26/10

PRIME MINISTER

CLOSED SHOP IN THE NEWSPAPER INDUSTRY

Cabinet last Thursday approved, subject to one proviso, my proposal to reinforce the general provisions on the closed shop in the case of journalists by incorporating a separate section relating specifically to them in the Code. The proviso was that I should satisfy myself that the proposal was consistent with undertakings given to previous Party Conferences.

I have now checked the position and am reassured on the question of consistency. The only Conference statement made on this in recent years was one I made in 1977 in which it is clear that I was talking about the contents of the Press Charter envisaged by the then Government. The latest authoritative statement on what would need to be done to protect journalists in the absence of a Press Charter was made by Leon Brittan in November last year. The approach he adumbrated then - in which he emphasised the value of a Code of Practice - is entirely consistent with the line we are now proposing to take.

I am therefore proceeding on the basis agreed by Cabinet.

Copies of this minute go to members of the Cabinet and Sir John Hunt.

J P
26 October 1979

5 OCT 1970

hd PSL

JFH

cc HO IND LCO
FCO LPO PGO
HMT ENG LOD
MAFF CO
TRADE
Ch.Sec.

BC Walton

10 DOWNING STREET

From the Private Secretary 22 October 1979

Consultations on Industrial Relations Legislation

The Prime Minister has read your Secretary of State's minute of 19 October, and is content with what he proposes - including the draft working paper on statutory protection against SLADE-type recruitment tactics which he intends to send to the TUC and CBI.

I am sending a copy of this letter to the Private Secretaries to the members of E Committee, to Ian Maxwell (Lord Chancellor's Office), Richard Prescott (Paymaster General's Office), Bill Beckett (Law Officer's Department) and Martin Vile (Cabinet Office).

T. P. LANKESTER

Ian Fair, Esq.,
Department of Employment.

CONFIDENTIAL

VLB

CONFIDENTIAL

cc Mr Whitmore
Mr James

Prime Minister

This seems alright.

PRIME MINISTER

Content?

CONSULTATIONS ON INDUSTRIAL RELATIONS LEGISLATION

19/10

In accordance with yesterday's agreement in Cabinet I shall be writing to the CBI and TUC on Wednesday 24 October to invite comments on the proposal to provide legislative protection against SLADE-type recruitment tactics. I attach for your information a copy of the working paper which I shall be sending to them. This has been agreed with the Solicitor General, with whom I shall be discussing further the form a legislative provision to give effect to this proposal might take.

I shall publish the working paper on the same day and make copies available on request to others interested. I shall make clear that I aim to complete consultations on this subject in time for a final decision to be taken on the provision for inclusion in the Bill to be introduced in December.

I shall be pursuing my consultations on repeal of the Press Charter through meetings with the organisations concerned.

I am sending copies of this minute and its enclosures to other members of E Committee, the Lord Chancellor, the Paymaster General, the Solicitor General and Sir John Hunt.

J P
19 October 1979

Department of Employment
Caxton House
London SW1

WORKING PAPER FOR CONSULTATIONS ON PROPOSED INDUSTRIAL RELATIONS LEGISLATION

Statutory protection against certain trade union recruitment activities

As a result of widespread public concern at the recruitment practices of the Society of Lithographic Artists, Designers, Engravers and Process Workers (SLADE), the Government appointed Mr Andrew Leggatt QC on 7 June "to inquire into recent industrial relations developments, including in particular union recruitment activities, in the artwork, advertising and associated industries". Mr Leggatt's report was published on 17 October.

2. The report found that between 1975 and 1978 the National Graphical Association and SLADE undertook a recruitment campaign within the artwork and advertising industry, which has hitherto employed mainly non-union labour. The report is particularly critical of SLADE's activities. It found that SLADE pursued a systematic campaign of recruitment in this industry without regard to the wishes of those it was seeking to recruit. When normal methods failed, it tried to coerce employees into union membership against their will by blacking or threatening to black their employers' work at the printing houses. The employees concerned were thus faced with the stark choice of joining the union or losing their jobs because their employers had been driven out of business. Mr Leggatt comments in his report, "where employees are coerced into joining a union against the alternative of being put out of business, the union subscription is bound to look like payment for a licence to work or 'protection' money".

3. The Government believe that such recruitment acitvities are an abuse of industrial power, which is in conflict with the voluntary tradition and foundation of trade unionism and which will be deplored by responsible trade unionists. Such coercive tactics are damaging to the reputation of the trade union movement as a whole, in whose interests it is to see that they are not used again.

4. Mr Leggatt's report confirms that, under the law as it stands, there is often no remedy where the employees of one company take industrial action against another company for the purpose of coercing the latter's employees into membership of a particular union. This is so even where the action threatens to destroy - and may in fact destroy - the business of that company and the livelihood of its employees. The Government consider this to be an unacceptable situation.

5. The Government therefore propose that the law should be changed to provide protection against such action by enabling redress to be sought in the courts. This might be achieved in a number of different ways, for example by excluding such action from the immunity in S.13 of the Trade Union and Labour Relations Act 1974 (as amended in 1976) for inducing a breach of or interfering with a contract, or by amending the definition of "trade dispute" in S.29 of the same Act. The Government would intend to ensure that a legislative provision to afford protection against these coercive recruitment activities does not also cover disputes over recognition and demarcation and does not restrict primary action in disputes over union membership.

6. The Government would welcome views on this proposal.

19 OCT 1979

Prime Minister

Hector Laing's letter, also in this folder, is of interest.

TL
17/10

CONFIDENTIAL

Ref. A0430

PRIME MINISTER

Industrial Relations Legislation

(C(79) 43)

BACKGROUND

This paper is about the four outstanding points which need to be resolved before the Bill can be introduced. Although the Secretary of State for Employment, in his speech at Blackpool, carefully left open the possibility of later introduction, he still wants a Second Reading in December if possible. To do this, leaving time for drafting and for the necessary formal and informal consultations, he believes it is absolutely essential to get decisions at this meeting of the Cabinet. If questions arise in Cabinet which look like requiring further work to be done before decisions can be taken, you might like to ensure that the Secretary of State and the Chief Whip are prepared to accept the resulting delay before agreeing to it. All the earlier discussion was in E, so that a few Cabinet Ministers will come fresh to this subject. However this paper is self-contained and they do not need to see the earlier papers.

HANDLING

2. After asking the Secretary of State for Employment to introduce his paper I think you should then take the Cabinet through the four separate issues, discouraging further general contributions.

(i) Closed Shop. The revised formula of 'religious, moral or ethical objections to being a member of any union whatsoever or of a particular union' is pretty wide. It meets most of the doubts expressed in earlier Cabinet or E discussions. The key seems to be the introduction of the word 'ethical' which seems to provide an escape route from almost any union. I think this may well be the answer to your doubts, when you first saw the paper, whether existing employees could refuse to join a new closed shop. But you will want to hear the Secretary of State and the Solicitor General on the point.

(ii) Unreasonable exclusion or expulsion. I think this is the section which has worried you most in the past: you have been anxious to preserve the 'right to work' of individuals, who might be intimidated by their union or shop stewards into taking part in a strike. The proposal is to rely on 'the general test of reasonableness' as interpreted by an Industrial Tribunal, and not to try to lay down guidelines in the legislation. The 'test' would be reinforced by provisions in the Code of Practice. This is the 'highway code' procedure which has been suggested for dealing with some of the problems of picketing as well. I believe you were unhappy about this point when you saw the paper at the weekend. However, provided the Code gives the tribunals proper guidance, this approach would give the substance of what you want. But because it is a non-statutory remedy, you will want to make sure that the Lord Chancellor and the Solicitor General are content. Otherwise, I doubt if other colleagues will resist this compromise solution.

(iii) Closed Shop in the newspaper industry. The proposal is to repeal the requirement for a Press Charter in the Trade Union and Labour Relations (Amendment) Act 1976, and to rely on the wider definition of valid defection to membership of a trade union in a closed shop reinforced by a separate section in the statutory 'Code of Practice'. This would bring the 'ethical objection' test to bear directly on journalists who insisted on Press freedom. It seems to meet Ministers' wishes very neatly.

(iv) SLADE. The Leggatt Report will have been published the day before Cabinet meets. (The Secretary of State circulated it to Cabinet with his minute of 12th October and you have already agreed to publication, subject to a very strong indication of the Government's dislike of SLADE's practices (Mr. Lankester's note of 15th October)). The problems it exposes are highly technical, and further consultations seem essential before a suitable provision can be drafted for incorporation in the Bill.

I doubt if any Minister will object to the Secretary of State's proposals in paragraph 14.

CONCLUSIONS

3. Subject to the course of discussion, you should be able to secure agreement on the four proposals set out in paragraph 16 of C(79) 43 without further amendment.

(John Hunt)

17th October, 1979

Mr James

CONFIDENTIAL

Prime Minister, Ind Pol

Henry James and Tim Lankester both think that the point about the TUC meeting is important. (They didn't know about it when this was discussed this morning).

Do you agree to a Wednesday publication as originally proposed?

R Carter
Duty Clerk.

Caxton House Tothill Street London SW1H 9NA
Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

PM - yes

T L Lankester Esq
Private Secretary
10 Downing Street
LONDON SW1

T&LI D/Employment Ok. for tomorrow

15 October 1979

Dear Tim

TL 16/10

REPORT OF INQUIRY INTO CERTAIN TRADE UNION RECRUITMENT ACTIVITIES

You phoned this morning to suggest that there might be advantage in issuing the Leggatt report on Friday 19 October rather than on Wednesday 17 October as we planned.

We here are not in favour of such a change. Next Wednesday was deliberately chosen for publication because it should service effectively to counter any public criticisms of the Government's industrial relations policies which may emerge from the meeting of the TUC's Employment Policy Committee that day. Moreover we will want to get ahead as soon as possible with consulting on what might be done to deal with SLADE's activities but will need to have time to assess the public reaction to the Leggatt report before doing so.

Finally, the press are likely to be suspicious of publication on Friday (not normally a good day for securing coverage) particularly since they are well aware that the RPI/TPI is due to appear on the same day.

You also wrote this morning about the terms of our proposed press notice on the Leggatt report. My Secretary of State is quite content to accept the Prime Minister's suggested amendment.

I am sending a copy of this letter only to Richard Prescott in the Paymaster General's Office.

Yours sincerely

Ian Fair

I A W FAIR
Principal Private Secretary

FUE

Ind Pol

VB

10 DOWNING STREET

From the Private Secretary

15 October 1979

Dear Ian,

Report of Inquiry into certain Trade Union Recruitment Activities

The Prime Minister was grateful for your Secretary of State's minute of 12 October with which he enclosed Mr. Andrew Leggatt's Report of Inquiry and a draft press notice which Mr. Prior would like to issue when the Report is published on Wednesday.

The Prime Minister's view is that the Report is so decisive in its condemnation of SLADE's recruitment methods that it is essential that action is taken to provide protection against any recurrence. She has suggested that the third paragraph of the draft press notice be changed as follows:

"In the light of Mr. Leggatt's findings I am now considering what further action is needed to afford protection against any recurrence. I hope that the Report will be widely read and discussed. Informed public opinion is enormously important in checking behaviour of this kind."

I am sending copies of this letter to the Private Secretaries to members of the Cabinet and to Martin Vile (Cabinet Office).

Yours ever,

Tim Lankester

TCR 889

Ian Fair, Esq.,
Department of Employment.

CONFIDENTIAL

cc Mr Jones
Mr Whitmore
Mr Hodgson

PRIME MINISTER

REPORT OF INQUIRY INTO CERTAIN TRADE UNION RECRUITMENT ACTIVITIES

I have received the report of Mr Andrew Leggatt QC who was appointed on 7 June to inquire into "recent industrial relations developments, including in particular union recruitment activities, in the artwork, advertising and associated industries". Arrangements have been made to publish the report on Wednesday 17 October.

The report is factual and contains no recommendations, but it clearly confirms and reinforces the criticisms that have been directed at the recruitment tactics of SLADE (the Society of Lithographic Artists, Designers, Engravers and Process Workers) in Parliament and the media over the last two or three years. It is likely to attract considerable attention.

I enclose an advance copy of the report and of the press statement I propose to make on the day of publication, indicating that we are considering what action may be needed in the light of Mr Leggatt's findings. I think it important that colleagues who may be asked for their views should not go beyond that general line for the time being.

I am about to circulate a paper for Cabinet dealing with matters outstanding from E Committee's discussion of my proposals for legislation on picketing, the closed shop, and union ballots; and I shall be covering the Leggatt Report in a preliminary way in that paper.

I am sending copies of this minute and enclosures to Cabinet colleagues and to Sir John Hunt.

J.P.
12 October 1979

(Approved by the Secretary of State for Employment and signed in his absence)

12 OCT 1970

LEGGATT REPORT

DRAFT PRESS NOTICE

1. Mr Andrew Leggatt QC was appointed on 7 June 1979 by the Secretary of State for Employment to inquire into "recent industrial relations developments, including in particular union recruitment activities, in the art work, advertising and associated industries, and to report". Mr Leggatt has now submitted his report, which is published today (Cmnd).

2. Commenting on the report, Mr Prior said:
"The evidence in this report fully justifies the criticisms that led to the setting up of this Inquiry. The report documents the bullying tactics adopted by SLADE and their total disregard for the clearly expressed wishes of those whom they sought to recruit.

I believe that the use of methods such as these to boost union membership, which are so much in conflict with the voluntary tradition and foundation of trade unionism, will be deplored by responsible trade unionists. I note that those directly concerned were not willing to defend their conduct before this independent inquiry.

3. I hope that the report will be widely read and discussed. Informed public opinion is enormously important in checking behaviour of this kind. I am now considering in the light of Mr Leggatt's findings whether further action is needed to afford protection against any recurrence".

4. A summary of the main findings of the inquiry is attached.

REPORT OF INQUIRY INTO CERTAIN TRADE UNION RECRUITMENT ACTIVITIES

1 Mr Andrew Leggatt QC was appointed on 7 June 1979 "to inquire to recent industrial relations development, including in particular union recruitment activities, in the artwork, advertising and associated industries; and to report."

2 The inquiry found that between 1975 and 1978 the National Graphical Association (NGA) and the Society of Lithgraphic Artists, Designers, Engravers and Process Workers (SLADE) undertook a recruitment campaign within the artwork and advertising industry, which had hitherto employed mzinly non-union labour. Although both unions relied on "blacking" or threatening to black non-union sources, the NGA was generally selective and sought mainly to protect its traditional areas of recruitment. SLADE on the other hand recruited indiscriminately, and by its uncompromising tactics was often able to impose a closed shop on companies where not only the employer but all the employees were opposed to it.

3 The report says that SLADE's main purpose was to increase its membership. In addition to recruiting in art studios, photographic laboratories and advertising agencies, SLADE's campaign was also directed at freelances. The intention was to maintain its own standing and influence as a union, which were threatened by the application of new technology.

4 The report gives a number of detailed case histories based on evidence given to the inquiry. In a typical case, SLADE officials tried to persuade the employees of a company to join. When this failed, sometimes after a secret ballot overwhelmingly rejecting

union membership, the union would approach management. The threat of blacking would be made at this stage if it had not been made earlier. Management would then be faced with the choice of either conceding the union's demands or having the companies' work blacked at printing houses. Some gave in immediately; others held out until blacking seriously affected their business. In a few cases, the company only found out that SLADE was seeking to recruit its employees when its work was blacked. Mr Leggatt comments that this form of duress was likely to succeed since almost all the work of those concerned had to go through printing houses and competitors were always available to carry out work which was blacked.

5 The report finds that the recruitment campaign was conducted "without any regard whatever to the feelings, interests or welfare of the respective recruits." It comments that SLADE officials were mainly ignorant of the kind of work done by their new members and that many of those recruited were unsuitable for membership and unlikely to benefit from it. The report is particularly critical of the way in which freelance artists were recruited.

6 The report concludes that on the whole the unions' recruitment tactics were within the law, but questions whether they could be regarded as good trade union practice. The report notes that SLADE now finds itself with many members who are opposed to its policies, as well as having provoked widespread criticism. Mr Leggatt comments in conclusion that since the print unions preferred not to give evidence to the inquiry, "it is impossible to gauge whether they have learned from their recruitment activities that meaningful co-operation cannot be procured by force."

With the Compliments
of

Private Secretary

1.10.79.

LORD ADVOCATE'S CHAMBERS
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CONFIDENTIAL

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1 October 1979

Andrew Hardman Esq
Private Secretary to the
Secretary of State for Employment
Caxton House
Tothill Street
London SW1H 9NA

Dear Private Secretary

CONSULTATIONS ON LEGISLATION
WORKING PAPER ON TRADE UNION RECOGNITION PROVISIONS
OF THE EMPLOYMENT PROTECTION ACT 1975

The Lord Advocate has now seen a copy of your letter of 24th September to the Private Secretary at No.10, to which was attached the final version of the above Working Paper.

The Lord Advocate has considered the final version of the Working Paper on the trade union recognition provisions of the Employment Protection Act 1975. He has noted that that paper raises "the question whether it is necessary or valuable to have statutory provisions of this kind to deal with these matters." While he agrees that the formal procedures set out in sections 11 to 16 of the 1975 Act should be removed from the ACAS field, he considers that any discussion should take account of the possibility of referring to a tribunal recognition issues which cannot be resolved by conciliation or arbitration. The tribunal might be either an Industrial Tribunal or a tribunal specially constituted.

I am copying this letter to the recipients of yours.

Yours sincerely

Private Secretary

CONFIDENTIAL

-2 OCT 1979

PART 2 begins:-

Lord Advocate's Chambers to DGmp 1.10.79

PART 1 ends:-

E(79) 9th Mtg, Item 3 27.9.79