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3/16

Confidential Filing

Civil Servants: Contracts of Employment.
Possible legislation to enable Civil Servants to be laid off without pay.

CIVIL SERVICE

July 1980

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~14.7.80~~		~~28.10.83~~					
~~5.8.80~~		~~2.11.83~~					
~~1.10.80~~		~~4.11.83~~					
~~2.10.80~~		~~10.11.83~~					
~~20.11.80~~		7.7.87.					
~~4.12.80~~							
~~13.12.80~~							
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~~27.6.83~~							
~~1.7.83~~							
~~5.7.83~~							
~~14.9.83~~							
~~16.9.83~~							
~~24.10.83~~							

PREM 19/2038

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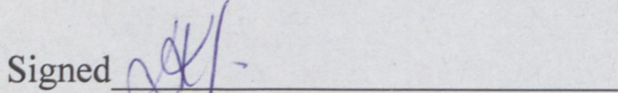
Cabinet / Cabinet Committee Documents

Reference	Date
E(80)83	01/08/1980
E(80)84	01/08/1980
E(80) 35th meeting, item 1. Limited Circulation Annex	02/10/1980
E(80) 35th meeting, item 1	02/10/1980
E(CS)(80)10	20/11/1980

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  Date 23/07/2015.

PREM Records Team

STAFF IN CONFIDENCE

File SH

S2HAKR

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

MR. JOHN DE QUIDT

I have shown the Prime Minister your minute of 3 July in which you seek her approval to waive the Cabinet Office nationality rules to enable Mr. John De Quidt, a Principal in the Home Office, to fill a post at that level in the European Secretariat.

The Prime Minister agrees that the nationality rules can be waived in Mr. De Quidt's favour.

N. L. WICKS

7 July 1987

STAFF IN CONFIDENCE

Prime Minister
Agree to waive the nationality rules for Mr De Quidt?
N. L. W. 3.7

Yes

Ref. A087/1956

MR WICKS

I need to seek the Prime Minister's approval for a waiver of our nationality rules to enable Mr John De Quidt, a Principal in the Home Office, to fill a post at that level in the European Secretariat. The nationality rules which apply here and in the Ministry of Defence are more stringent than those which operate elsewhere and Prime Ministerial approval is required to waive them. The rule for the Cabinet Office is that the person concerned and both parents should have been born within the Commonwealth and have been British subjects since birth.

2. Mr De Quidt does not satisfy the rule. He himself was born in this country in 1950, and has always been British. His mother was British and born in ths country. His father, however, was born in Belgium. He came to England from Belgium with his parents in 1930 and became a naturalised British subject in 1940. During the last War he volunteered for service in the British Army and after demobilisation graduated in History at Queen's College Oxford. In 1949 he was recalled for military service in Korea, was taken prisoner by the Chinese and spent two years in a prisoners-of-war camp. On his release he was awarded an MBE for courage as a prisoner, and spent two years in the War Office writing the official report on the treatment of prisoners-of-war in the Korean and Chinese camps. On his final demobilisation from the Army he joined the BP Oil Company and spent his career there. There is no doubt about Mr De Quidt's commitment and loyalty to this country.

3. Mr John De Quidt would serve in the Cabinet Office for the usual two year period. He is 36 years old, was positively vetted by the Home Office where he has spent all his career to date and he is in every way suitable for the post in the Cabinet Office.

4. I hope the Prime Minister will agree that our nationality rules may be waived in his favour.

RTA

3 July 1987

ROBERT ARMSTRONG

MANAGEMENT - IN CONFIDENCE

NBPM

SIR ROBERT ARMSTRONG

RESPONSIBILITY FOR DISCIPLINE IN THE CIVIL SERVICE

Thank you for sending me a copy of your minute of 24 October to the Prime Minister's office with the revised formulation on responsibility for discipline. I have now seen the responses from the Prime Minister's office and from the Private Secretaries to the Secretary of State for Social Services and the Attorney General.

2. There is one point I should like to make. If the formulation is to be silent on the issue of consulting Ministers in individual cases, then it seems to me that the understanding you refer to that Ministers would be consulted in sensitive cases acquires considerable importance, and indeed should be spelt out in very clear terms. I certainly would expect to be consulted in such cases and I know that my Permanent Secretary would expect to consult me. I accept that the judgment on what is a sensitive case would have to be left to the Permanent Secretary and that in practice the working relationship between a Permanent Secretary and his Minister would ensure that in cases where the Minister would want to be consulted he was consulted.

3. In cases which are referred to Ministers, I imagine that the occasions on which there would be substantive differences of view between the Permanent Secretary and the Minister would be rare. I see no need to spell out what would occur in such a rare case, but the fact that the Minister is answerable for his Department and may have to defend himself publicly makes it clear where responsibility must ultimately lie.

4. I am sending a copy of this minute to the recipients of yours.

L.B.

10 November 1983

CONFIDENTIAL

NBRM

01-405 7641 Ext.

Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 400/83/197

3 November 1983

Richard Hatfield Esq
Private Secretary to
Sir Robert Armstrong GCB CVO
Cabinet Office
Whitehall SW1

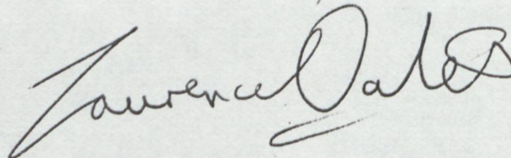
Dear Richard,

RESPONSIBILITY FOR DISCIPLINE IN THE CIVIL SERVICE

The Attorney General is content with the new formulation attached to Sir Robert Armstrong's letter of 24 October. It fully matches the criteria set for it in the discussion of 16 September.

I am copying this letter to the Private Secretaries to those who received Sir Robert Armstrong's letter.

Yours sincerely



LAURENCE OATES

CONFIDENTIAL

Civ Service July 80
Contracts of Emp

NBPM

DEPARTMENT OF HEALTH & SOCIAL SECURITY
Alexander Fleming House, Elephant & Castle, London SE1 6BY
Telephone 01-407 5522
From the Secretary of State for Social Services

F E R Butler Esq
Principal Private Secretary
10 Downing Street

2 November 1983

Dear Robin

RESPONSIBILITY FOR DISCIPLINE

My Secretary of State has considered Sir Robert Armstrong's minute to you of 24 October and has asked me to let you know that he is content with Sir Robert's proposed formulation on responsibilities for discipline. There have been some extremely difficult and contentious cases here (in relation to Special Hospitals' staff, for instance) and he considers that the draft meets his needs in respect of them.

I am copying this letter to the Private Secretaries to the recipients of Sir Robert's minute.

Yours
Steve

S A Godber
Private Secretary

MANAGEMENT IN CONFIDENCE

SH

10 DOWNING STREET

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

Responsibility for Discipline

Thank you for your minute of 24 October (A083/3004). Subject to the views of her colleagues, the Prime Minister is content with the revised formulation on the responsibility for discipline within the Home Civil Service, which was prepared in the light of the discussion among Ministers on 16 September and was attached to your minute.

I am copying this minute to the Private Secretaries to those who received your minute.

F.E.R.B.

28 October, 1983

MANAGEMENT IN CONFIDENCE

JU

Prime Minister

This formulation appears to satisfy the prescription which you gave at the end of the meeting you held with Ministers in September — please see the highlighted passage at flag A. Content with it, subject to the views of your colleagues?

FERB 27.10

Ref.A083/3004

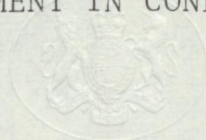
MR BUTLER

Responsibility for Discipline

Following the Prime Minister's discussion with some of her Ministerial colleagues on 16 September I was asked to prepare a revised formula on responsibility for discipline within the Home Civil Service. The meeting decided that they wanted arrangements which would so far as possible protect Ministers from accusations of politically motivated decisions; but they preferred not to spell out a chain of responsibility in the way I had suggested. The revised formula was to leave room for both the answerability of the Ministerial Head of the Department for the conduct of his Department, and for the Prime Minister's general responsibility for the conduct of the Civil Service.

2. I now attach a revised formulation which is intended to satisfy that description. Permanent Secretaries would be content with this formulation.

3. The new formulation is deliberately silent on the matter of consultation of Ministers in individual cases. Nothing in it is intended to preclude the Permanent Secretary from consulting as he chooses, and it is understood that a Permanent Secretary will consult his Minister on any case in which it seems appropriate to do so and particularly in any case which seems at all liable to become the subject of political or press comment. But any reference to "consultation" in the formulation could give rise to the possibility that the question whether consultation was a requirement and whether the requirement had been satisfied could become an issue in proceedings before the Civil Service Appeal Board or before an industrial tribunal.



4. If the Prime Minister and the other Ministers who attended the meeting on 16 September (and to whom I am sending copies of this minute) are content with what is now proposed, it will need to be formally promulgated, either by the Prime Minister to all Ministers in charge of Departments or by me to Permanent Secretaries. I will then arrange for it to be incorporated into the Pay and Conditions of Service Code.

5. I am sending copies of this minute to the Lord President of the Council, the Secretaries of State for Home Affairs, Defence, Social Services and Employment, the Minister of State, Privy Council Office and the Attorney General. I think that the Secretary of State for Employment was inadvertently omitted from your minute.

RCA

ROBERT ARMSTRONG

24 October 1983

DRAFT

Paragraphs on Discipline for Inclusion in Civil Service Pay and Conditions Code

The principles which govern the conduct of the Home Civil Service are the responsibility of the Prime Minister as Minister for the Civil Service. The Minister lays down the general procedures to be followed to ensure fairness and consistency of practice, and the Cabinet Office (Management and Personnel Office) is available to provide advice and guidance on their application to particular cases. But disciplinary action against an individual is the responsibility of the Department concerned.

2. Disciplinary powers are in practice exercised by the Permanent Head of the Department or, in the case of Permanent Secretaries and Heads of Departments, by the Head of the Home Civil Service.

3. In any case involving staff at Under or Deputy Secretary the Permanent Head of the Department himself decides whether disciplinary proceedings are to be instituted, and, if so, of what kind. These staff have a right of appeal to the Head of the Home Civil Service. The Permanent Head of the Department normally delegates decisions in respect of officers below Under Secretary level in order that he may be able himself to deal with appeals. The level to which decisions are delegated is decided by the Permanent Head of the Department in the light of the nature and size of the Department and of any other relevant considerations.

4. The Head of the Home Civil Service deals with any cases involving an officer of Permanent Secretary level or equivalent or a Head of Department. In such cases he will normally, after consultation with the Minister of the Department concerned and with the Prime Minister, set up a board of inquiry which will report to the Head of the Home Civil Service.

Civil Service : Contracts of
employment : July 80

Prime Minister

Responsibility for Discipline in the Civil Service

I suggest that the questions to be answered are:-

i. Which of the options in para. 5 of Sir Robert Armstrong's minute is preferred?

ii. If there is general agreement on option (3), is the draft formula attached to the minute acceptable?

F.E.R.B.

14.9.

CONFIDENTIAL

SUBJECT
C-MASTER

MJ 16/9.

cc LPO
LCO
HO
MOD LOD
DHSS
MIN/ARTS

10 DOWNING STREET

From the Private Secretary

SIR ROBERT ARMSTRONG

RESPONSIBILITY FOR DISCIPLINE IN THE CIVIL SERVICE

The Prime Minister held a discussion this morning on the issues raised in your minute to her of 23 June, ref. A083/1819. The Lord President of the Council, the Lord Chancellor, the Home Secretary, the Secretary of State for Defence, the Secretary of State for Social Services, the Minister of State, Privy Council Office and Minister for the Arts, the Attorney General, and you yourself were present.

In discussion it was noted that Ministers were answerable to Parliament for their Departments' conduct generally, including disciplinary issues. Thus, although the Permanent Secretary might carry out disciplinary action, it might become unavoidable, where there was public and political interest in the matter, for the Ministerial Head of the Department to answer for his Department's actions in Parliament. There had been cases in the Home Office, for example, where the Home Secretary had been drawn into a disciplinary issue by the political interest which had arisen in the case. Against this, it was argued that the Minister who should answer to Parliament on disciplinary matters ought not to be the Departmental Head, but the Minister for the Civil Service, or, if appropriate, the Prime Minister. Thus, responsibility for discipline would, in the first instance, rest with the Permanent Secretary in the Department concerned, through him to the Permanent Head of the Civil Service, and through him to the Minister for the Civil Service or the Prime Minister.

/In further

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In further discussion, it was argued that there were merits in both of these accounts. The principle that Ministers were responsible for everything that went on in their Departments was already breached in the fields of recruitment, promotion and pay. Furthermore, in certain, highly political, disciplinary cases, action taken by the Ministerial Head of the Department might well lead to an accusation that the civil servant concerned had been victimised by his Minister, for political reasons. As against this, however, it was simply not practicable in certain cases for a Ministerial Head of a Department to disclaim responsibility for a disciplinary action which had been taken in his Department.

Summing up the discussion, the Prime Minister said that the meeting saw no advantage in delineating in a clear public Code either of the accounts which had been discussed on the chain of responsibility in this matter. What was needed was a procedure which manifestly maintained the principles of natural justice, in which discipline was left mainly to the Permanent Secretary in each Department, and which left room for both the answerability of the Ministerial Head of each Department for the conduct of his Department and for the Prime Minister's general responsibility for the conduct of the Civil Service. The Prime Minister would be grateful if you would prepare a revised formulation which satisfies this description.

BF 11

I am sending copies of this minute to the Private Secretaries of the Ministers who attended the meeting. I should be grateful if they would ensure that access to these copies is closely guarded.

16 September 1983

14 September 1983
Policy Unit

PRIME MINISTER

RESPONSIBILITY FOR DISCIPLINE IN THE CIVIL SERVICE

The present position is unclear. Why? Because every civil servant is serving two masters - the head of his own Department, and the head of the Civil Service. So responsibility for discipline tends to be somewhat cloudy.

Should it be clarified? Can it be clarified in explicit regulations?

The Status Quo

The simplest way to look at the existing situation is: who is answering in Parliament? If there is a dispute throughout the Civil Service which results in controversial or politically sensitive disciplinary proceedings, Grey Gowrie replies. This is natural and correct. Suppose a dozen militants in half a dozen Ministries are being suspended for the same offence, it would be absurd for each of the six Ministers to be drawn in.

But where a dispute or a disciplinary controversy is confined to a single Minister, and is connected with the work of that Ministry, the departmental Minister has to answer. For example, if there is a political protest in local DHSS offices about some new social security regulation, Norman Fowler has to reply. Nor could he say: "The decision to suspend the protesters was taken by my Permanent Secretary who has responsibility for these matters". Norman's responsibility here is all of a piece, because the political germ of the row cannot be separated from the staff management aspect. He cannot distance himself from any really controversial decision.

In both cases, the Permanent Secretary - or his delegated subordinate - does the actual sacking or suspending. But he is understood - albeit tacitly - to be acting either on your authority or on the authority of his own departmental head, depending on the nature of the case.

The Options

1. Do nothing. Sir Robert does not enumerate the advantages in having clear and recognised arrangements, nor the practical disadvantages of the present lack of clarity. But the status quo does at least allow us to decide, quickly and informally, whether to treat a dispute as a

Service-wide or as a departmental matter. And you can decide how far you yourself want to be involved.

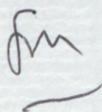
2. Give responsibility to the Departmental Minister. I think he already has it in the relevant cases.

3. Give responsibility to the Permament Secretary, acting under the authority of the Head of the Civil Service. The effect of this, in day-to-day terms, would be to weaken the power of the departmental Minister and to increase the status of the Permanent Secretary. But I can't see how it would work. If there is controversy, the Minister is drawn in and has to be seen to be holding the reins.

The underlying suggestion is that the existing lack of clarity may prevent Ministers from effectively shaping and managing their Departments. I doubt it. Effective Ministers get what they want out of their Departments. Ineffective ones don't.

The difficulty surely is that few Ministers really pay much attention to the organisation of their Departments; most prefer to accept the service that is laid on for them. Instead of really attacking such questions as: "How should the DHSS manage the NHS?", the Minister tends to be side-tracked into ceremonial and political duties. But a declaration of responsibility for discipline is unlikely to change matters.

We recommend no change in the existing arrangements.



FERDINAND MOUNT

CONFIDENTIAL

Civil Service
Contracting Empl
7/80

File

RM

10 DOWNING STREET

From the Principal Private Secretary

5 July, 1983

Dear John,

RESPONSIBILITY FOR DISCIPLINE IN THE CIVIL SERVICE

The Head of the Civil Service has invited the Prime Minister to consider proposals for clarifying the responsibility for decisions in individual disciplinary cases in the Civil Service.

Before taking the matter further the Prime Minister would like to have the opportunity of discussing this with a few of her colleagues. I enclose herewith a copy of Sir Robert Armstrong's minute to the Prime Minister.

I am sending copies of this letter to Bob Whalley (Lord President's Office), David Staff (Lord Chancellor's Office), Tony Rawsthorne (Home Office), Richard Mottram (Ministry of Defence), Muir Russell (Scottish Office), Chris Evans (DHSS), Barnaby Shaw (Department of Employment) Mary Brown (Lord Gowrie's Office) , Henry Steel (Attorney General's Office) and Richard Hatfield (Cabinet Office).

Yours ever,

Robin Butler

J. Kerr, Esq.,
HM Treasury

NR

CONFIDENTIAL

1

Prime Minister

Are you content to discuss this matter with the Lord President, Lord Chancellor, Home Secretary, S/S Defence, S/S Scotland, S/S Social Services, S/S Employment, Attorney General and Lord Gowrie? Are there any other Ministers you would want to involve?

FERB
4.7.

Ref. AO83/1930

MR BUTLER

Agreed

Responsibility for Discipline in the Civil Service

We did not have an opportunity of discussing at my meeting with the Prime Minister this morning how to seek the views of a few senior Ministers on the question which I raised with the Prime Minister in my minute of 23 June.

2. I suggest that the Prime Minister might send the colleagues concerned copies of my minute and its attachment with a short covering note (from you to Private Secretaries) on the lines of the draft attached.

3. I have included in the list of Ministers concerned the Secretary of State for Employment, because of the possible industrial relations implications of the matter; I have also included the Secretary of State for Social Services, because the problem to which my minute was addressed has arisen in an especially acute form in his Department recently.

RTA

ROBERT ARMSTRONG

1 July 1983

Meeting arranged to follow Cabinet on 15 Sept. 83.

DRAFT COVERING NOTE FROM MR BUTLER TO J O KERR ESQ.

Responsibility for Discipline in the Civil Service

The Head of the Civil Service has invited the Prime Minister to consider proposals for clarifying the responsibility for decisions in individual disciplinary cases in the Civil Service.

Before taking the matter further the Prime Minister would like to have the opportunity of discussing this with a few of her colleagues. I enclose herewith a copy of Sir Robert Armstrong's minute to the Prime Minister. I am sending copies of this letter to the Private Secretaries to the Lord President, the Lord Chancellor, the Home Secretary, the Secretary of State for Defence, the Secretary of State for Scotland, the Secretary of State for Social Services, the Secretary of State for Employment, the Minister of State, Privy Council Office (Lord Gowrie) and to the Legal Secretary to the Law Officers and we shall be getting in touch with you about arrangements for a meeting.

CONFIDENTIAL

FILE SH

10 DOWNING STREET

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

Responsibility for Discipline in the Civil Service

The Prime Minister has seen your minute of 23 June. The Prime Minister has commented that she is not sure that the balance of advantage lies in making detailed regulations in the name of the Minister for the Civil Service under which a Permanent Head of a Department should act. Before you were to ask your Permanent Secretary colleagues to seek the views of their Ministers, she would like the opportunity of a discussion with a few senior Ministers. Could you please let the Prime Minister have suggestions about how this might be done, which there might be an opportunity to discuss at your meeting with her on business this Friday.

E.E.R. BUTLER

27 June, 1983

CONFIDENTIAL

NR

CONFIDENTIAL

Not yet. I am not sure the balance of advantage lies in detailed regulations. I would prefer to discuss with a few senior ministers. MT

Prime Minister
Do you agree that Sir Robert Armstrong should take forward his proposal by writing to Permanent Secretaries with a request that they obtain the views of their Ministers?
FERB 24.6.

Ref.A083/1819

PRIME MINISTER

Responsibility for Discipline in the Civil Service

Under the Civil Service Order in Council the Prime Minister, as Minister for the Civil Service, has overall responsibility for the conduct of the Home Civil Service and for setting the general standards which should apply. It has been accepted practice over the years that Permanent rather than Ministerial Heads of Department deal with individual disciplinary cases. But the precise responsibilities and role of Departmental Ministers in this regard have never been clearly set out, nor have the arrangements for handling cases involving senior civil servants. This has not caused serious problems so far. But as public attention focuses more closely on relations between Ministers and their civil servants, particularly their senior advisers, it could do so and we have been considering the case for some clarification of the present rules.

2. There is good authority for saying that the Head of the Department is responsible for disciplinary action, but it has never been definitively established whether that means the Ministerial Head or the Permanent Head of the Department. Legal advice in recent cases has supported the view that it means the Permanent Head, but it remains unclear under what authority he acts. The question is whether, in exercising responsibility for discipline in individual cases, a Permanent Head of a Department acts on authority delegated by his Minister or on authority given to him directly under the regulations made by the Minister for the Civil Service. If it is the first, then the Minister is directly accountable to Parliament for each disciplinary decision, and this accountability could engage the Government collectively. If it is the second, then he is in a position to deal with any questions by pointing to the Permanent Secretary's responsibility for decisions on whether to institute disciplinary proceedings against an individual and for the action arising.

3. In most cases the distinction will be academic. But it could be very important in politically sensitive cases. Such decisions, if ascribed to individual Ministers, may generate political criticism, however unjustifiably, on the grounds that they have themselves been influenced by narrowly party political considerations. There could therefore be a significant advantage in establishing beyond a doubt the proposition that the Permanent Head of the Department, in taking decisions on individual disciplinary cases, is acting on his own authority — and not on authority delegated to him by his Minister. i.e. authority delegated by the Minister for the Civil Service

4. There exists no common practice for dealing with senior civil servants. The Prime Minister, the Departmental Minister and the Head of the Home Civil Service might all be expected to be involved. But there is no procedure laid down. Possible arrangements here (which could run whether Permanent Heads are regarded as acting on their own authority or as delegates for their Minister) would be as follows. In cases involving Permanent Secretaries, the Head of the Home Civil Service would, after consultation with the Departmental Minister and with the Prime Minister, set up a board of inquiry which would report to him. A decision to dismiss a Permanent Secretary would be taken by the Prime Minister. For Under and Deputy Secretary level staff, decisions would be taken by the Permanent Secretary, with a right of appeal to the Head of the Home Civil Service, and with the right to override a decision exercisable only by the Prime Minister.

N.B. that these words do not appear in the formulation attached to this minute. Would you want them to?

5. There is thus room for clarification both on where responsibility lies and on the practice for dealing with senior civil servants. There are three possible courses:

(1) To do nothing, and leave what is obscure unclarified. Recent experience suggests that the lack of clarity is liable to be practically disadvantageous.

(2) To rule that the Departmental Minister has ultimate responsibility for decisions on individual disciplinary cases arising in his Department. This would be consistent with the principle that Ministers are responsible for everything that goes on in their Departments; but that principle is already breached in the fields of recruitment, promotion and pay. It would expose Ministers more starkly to the political risks described in paragraph 3 above. It could also mean that the Minister had to answer before the Civil Service Appeal Board, if the civil servant took his case there, or before an industrial tribunal if he chose that route.

(3) To rule that the Permanent Secretary has responsibility assigned to him under regulations made by the Minister for the Civil Service as set out in the Pay and Conditions of Service Code which contains the main conditions of service for home civil servants. This would detach from the Minister responsibility for disciplinary decisions in individual cases. He would be answerable for the correctness and fairness of the procedures followed, but not for the decisions themselves. The Permanent Head would then be responsible for defending decisions at appeal, whether to the Civil Service Appeal Board or to an industrial tribunal.

6. In my own judgment, arrived at after discussing the matter with my fellow Permanent Secretaries, the balance of advantage lies in clarifying the position, and in making clear that the responsibility for individual disciplinary decisions lies with the Permanent Head.

7. I attach for consideration a draft formulation which would establish it clearly that responsibility for disciplinary decisions in individual cases lay with the Permanent Head of the Department under authority assigned to him by the Minister for

the Civil Service, and not with the Ministerial Head of the Department. That formulation would not of course preclude Permanent Heads discussing difficult cases with the central Departments and politically sensitive cases with their own Ministers. It would distance Ministers, and enable them to say that they were distanced, from responsibility for individual decisions. It would not prevent them from answering questions about the reasons for decisions in disciplinary cases, though in the last analysis they would be bound to say that the decision was taken by the Permanent Head of the Department on his own responsibility. It would clearly be embarrassing if a Minister felt obliged to say, or hint, that a decision taken by his Permanent Secretary was one which he would not have taken had he himself had formal responsibility; but that is a situation which should be, and I believe in all save very abnormal circumstances could be, prevented by sensible consultation between a Permanent Secretary and his Minister on any case that seemed likely to be politically sensitive.

8. Any clarification or new arrangements which Ministers agreed in this area would become public knowledge. They would need to be incorporated in the Code which sets out the main conditions of service for home civil servants, which is agreed with the trade unions and publicly available. This has some disadvantages. The arrangements for dealing with senior civil servants in particular would no doubt be regarded as necessary in every case, and we would lose the ability to adapt procedures to fit particular cases. There could also be some public criticism. There could be a suggestion that we were weakening the authority of Ministers over their Departments just at the time when the management responsibilities of Ministers are becoming more important. The arrangements could also be seen as another attempt by civil servants at self-protection. On the other hand, for cases which may be politically sensitive, I believe that there would be advantages in having clear and recognised arrangements rather than having to improvise in a crisis. There would also seem to be some advantage in arrangements

which enabled Ministers to distance themselves from responsibility in individual cases, given that they could expect to be consulted by their Permanent Secretaries in any sensitive case.

9. The essential question is whether Ministers take the view that the political advantages of formal arrangements which would distance them from accountability for individual disciplinary decisions outweigh the disadvantages of a clarification which would appear to underline and codify their lack of responsibility for these particular decisions concnerning individual staff in the Departments for which they are generally responsible.

10. The attached draft formula may need a little adjustment to fit the circumstances of certain statutory appointments. There is also a particular question as to whether these arrangements should apply to the Prison Service where, following the abolition of the Prison Commission, the Home Secretary assumed the Commissioner's powers and responsibilities in this area. But the general sense is applicable to all.

11. I am putting this to you in the first instance as Minister for the Civil Service, so that you can consider whether to take this matter to the next stage, which would be to give Ministers in charge of Departments an opportunity to comment. If you agree that we should move to this next stage, I will write to my Permanent Secretary colleagues on the lines of this ~~letter~~ minute, making it clear that I have consulted you and that you are content in principle subject to the views of your colleagues, and ask Permanent Secretaries to seek the views of their Ministers.

RTA

ROBERT ARMSTRONG

23 June 1983

DRAFT FORMULA ON RESPONSIBILITY FOR DISCIPLINE WITHIN THE HOME CIVIL SERVICE

The Minister for the Civil Service (ie the Prime Minister) is responsible for the general conduct of the Home Civil Service and for regulations, guidelines and standards to ensure fairness and consistency of practice.

2. In the case of civil servants below Permanent Secretary level these regulations assign responsibility for the institution of disciplinary proceedings and decisions arising from them to the Permanent Head of the Department and responsibility for an appellate function in respect of senior civil servants to the Head of the Home Civil Service. In the case of Permanent Secretaries or equivalent, the main responsibility is assigned to the Head of the Home Civil Service.

3. Within the Department the Permanent Head will normally delegate decisions in respect of officers below Under Secretary level in order that he may be able to act as a court of appeal. The nature and size of the Department will determine the delegation. In the case of Under or Deputy Secretary level staff, the Permanent Head takes the first decision. If there is an appeal, that appeal lies to the Head of the Home Civil Service.

4. In the exercise of his responsibility for the institution of disciplinary proceedings and decisions arising from them, the Permanent Head acts by virtue of the responsibility assigned to him under regulations made by the Minister for the Civil Service (or, in certain cases in a few Departments, by virtue of powers conferred by statute).

5. In the case of Permanent Secretaries or equivalent, the Head of the Home Civil Service should, after seeking the Prime Minister's view and after consultation with the Minister of the Department concerned, set up a board of inquiry which should report to the Head of the Home Civil Service. A decision to dismiss a Permanent Secretary or equivalent would be taken by the Prime Minister.

Civil Service

QEX Mr ~~Vereker~~

The PM has seen Mary O'Mara's letter of 11 March - without comment. MS 15/3

MR OWEN

cc Mr Mount
Mr Scholar ✓

DISCIPLINE IN THE CIVIL SERVICE

There is one hangover from my involvement with Civil Service issues which may come to the Prime Minister in the next few days, and of which you should be aware. That is the paper which the Chancellor will be sending to Lady Young, with a copy to us, on the Obligations of Civil Service Managers. Ferdie and I share strong views about the need for those who manage staff in the Civil Service to behave when industrial action is threatened or takes place in the same sort of way as we would expect managers to behave in the private sector. That means a) taking action to minimise the effect of industrial action in the area of their responsibilities; and b) doing what they can to persuade their staff to accept the management position on the point in dispute. This would be of course a considerable change in culture, given the extent of union penetration into the lower levels of management.

This issue was discussed in the Group on Industrial Action. After a considerable amount of effort we managed to get the drafts into a form in which we could advise the Prime Minister to accept them. I understand that the Chancellor has since strengthened them a little, and if so there should be no problems. But you may wish to check that the final text is acceptable to you and Ferdie.

J.

15 March 1983

~~Mr Scholar.~~

That letter isn't the one I mean (that's on the nature of Civil Servants' Contracts) - there will be a separate one on management obligations.

JV. 16/3

010

MANAGEMENT IN CONFIDENCE

Prime Minister (4)

To be aware.

MCS 14/3

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

11 March 1983

Colin Walters Esq
Private Secretary to the
Home Secretary
Home Office
Queen Anne's Gate
LONDON SW1

Dear Colin,

CONTRACT AND DISCIPLINE IN THE CIVIL SERVICE

A group of officials under Treasury chairmanship has prepared a position paper which explains clearly the formal position on contracts of employment in the Civil Service and the basis of disciplinary procedures which are used. Its contents have been approved by the Law Officers.

The Chancellor has asked me to circulate this paper for the information of all Cabinet Ministers.

I am copying this letter to the Private Secretaries to the Prime Minister and all other Cabinet Ministers.

Yours sincerely,

Margaret O'Mara

MISS M O'MARA

14 MAR 1983

Contract and Discipline in the Civil Service

The aim of this paper is to clarify the legal basis for and the availability of management sanctions against civil servants. It does not attempt to address the managerial implications of its conclusions. The paper contains general guidance on the issues covered: whilst in its terms it must necessarily give some indication of what may or may not in law be done in particular circumstances it should not be taken as removing the need for Departments to seek legal advice when confronted with particular problems.

1. The Contractual Framework

The relationship between a civil servant and the Crown is effectively contractual, and the "contract" is akin to a contract of employment. The express terms of the contract are to be found in the civil servant's letter of appointment, and, where incorporated thereby, in departmental staff rules, which depend for their validity on the Pay and Conditions of Service Code and, (so far as they are disciplinary codes) on Estacode Kb. The implied terms are first, those which the common law would imply in respect of any contract of service, and second, any terms which have developed as a matter of custom and practice over the years.

It follows that the relationship has the essential characteristic of a contract, that any change in its terms must be agreed by both parties. The proposition (which appears in the Code, and in many Staff Rule Books) that the Crown has the right unilaterally to change civil servants' terms and conditions of employment cannot now be relied upon to enable management to make any significant adverse change without the agreement of the staff or their representatives. The Crown, like any other employer, retains the right to determine the manner in which its employees carry out their work. Whether a proposed change relates to the terms of the contract, or the manner in which the work is done, will depend on the circumstances.

The content of any individual civil servant's contract will depend on the job he does, but in the context of industrial action (and in particular of selective industrial action) the question arises, to what extent a civil servant is entitled to refuse to carry out the work of another by standing on the terms of his contract of employment. There is now some authority for the view (which has been reflected in policy since the 1981 dispute) that, where it is essential to a Department that a particular job be carried out, any officer who is qualified, where necessary, and capable of carrying it out may be required to do so, if the work involved falls within the category or categories of work appropriate to his grade or the grades of those he supervises. (For example, it has been held that a Professional and Technology Officer, Grade I, (PTO I) could reasonably be instructed to carry out the duties of a PTO IV, where the PTO's IV and the intermediate grades were absent as a result of an industrial dispute.)

2. Breach of Contract

Where a civil servant is in breach of contract management may exercise

(1) the remedies open to any employer at common law (common law remedies), or

(2) the remedies available under Estacode Kb (disciplinary remedies) or

(3) both.

The corollary is also true: apart from those civil servants whose contract provides that they may be laid off when there is no work for them to do, a civil servant who is willing to work in accordance with his contract is entitled to be paid. If, in anticipation of or response to some industrial action, management "locks out" the staff, or purports to lay them off without pay, any member of staff not involved in the industrial action would have sound prospects of recovering his lost salary in the Courts, or of succeeding in a claim that he had been unfairly constructively dismissed.

(1) Common Law Remedies

(a) Temporary Relief from Duty (TRD)

The basis for TRD is that where an employee refuses to perform some material part of his obligations, the employer can legitimately refuse to perform his obligations, because of the reciprocal nature of the contractual relationship. This is a legitimate and defensible course for the employer to follow - for so long as the employee's refusal continues. (The principle of TRD has never been challenged in the Courts, in spite of the very extensive use made of it in the 1981 dispute : its application has been challenged once, unsuccessfully.)

(The same principle applies, a fortiori, when an employee is unjustifiably absent from work. The employer is in such a case entitled to withhold pay and pay-related benefits for so long as the absence continues.)

(b) Reduced Pay Options

Where a civil servant fails to work for the agreed number of hours, or fails to perform all the duties he ought to perform, management may have the choice of operating the

TRD procedures in his case or of keeping him at work but paying on a quantum meruit basis only for the work actually done. Difficult legal questions may arise and the latter course should only be adopted where an obvious division of the amount of work done can be made. (The reduced pay options have not been used in the Civil Service.)

Since the action by the employee which justifies the use of TRD or of the reduced pay options is ex hypothesi a breach of contract, it is open to the employer to take disciplinary proceedings.

(2) Disciplinary Remedies

(a) The incorporation into the contract between a civil servant and the Crown of a code of discipline has two results -

(i) Any conduct by a civil servant which is in breach of contract is chargeable, at management's discretion, as a disciplinary offence.
A civil servant who fails to turn up on time, or who is disrespectful to his superiors, or who refuses to obey a legitimate instruction, commits a breach of contract, which can be made the subject of disciplinary proceedings. If the alleged offence is proved, the civil servant concerned is liable, at the discretion of his Head of Department, or of the officer to whom disciplinary powers have been delegated, to any of the penalties set out in Estacode Kb. These range from a formal reprimand to dismissal. (Dismissal, which may give rise to particular difficulties, is discussed separately.) The fact that the action may be taken in furtherance of a trade dispute is irrelevant. This has recently been made clear in relation to action taken by civil servants in connection with disputes "outside" the Civil Service (ie not involving the terms and conditions of employment of civil servants). It would be equally open to management to advise staff that, in future, breaches of contract in connection with disputes "inside" the Civil Service would also be dealt with as disciplinary offences.

(ii) The appropriate disciplinary procedures must be used before any sanction mentioned in the code is used against a civil servant.

Like any other aspect of the relationship between

employer and employee, the disciplinary sanctions open to an employer can be the matter of agreement. If they have been agreed, they govern the parties' rights and duties just as much as do the provisions as to payment, hours of working etc. If the employer has bound himself to follow certain procedures before fining, or demoting, or dismissing, an employee, he must follow those procedures. A failure to do so will be a breach of contract, the possible consequences of which are discussed below. Some disciplinary codes provide for summary action in certain cases. Estacode Kb does not. (But it does provide for suspension without pay pending investigation, (paras. 8 and 9), so that the practical result need not be markedly different.)

(3) Dismissal

(a) Crown's Right to Dismiss at Will

The proposition that the Crown may dismiss its servants at pleasure, and that any provision in a contract which purports to override the prerogative in this respect is void, appears in Estacode. But in view of the fact that the Crown is bound by the unfair dismissal provisions of the Employment Protection (Consolidation) Act 1978, the usefulness of the prerogative right to dismiss at will has diminished to the point where it no longer merits mention in a paper considering general practical options. Further, it is perhaps doubtful whether the Crown has any common law right to dismiss civil servants at will in Scotland. For this purpose, therefore, it is assumed that the Crown is in the same position as any other employer.

(b) Conduct Justifying Dismissal

A fundamental breach of contract will justify the employer in treating the contract as being at an end, and will justify dismissal. A fundamental breach is one "going to the root of" the contract, eg, fraudulent mismanagement of funds, or repeated and unjustified absence from work. Only a fundamental breach will justify dismissal without due notice. Whether or not a particular breach is fundamental depends first on the terms of the contract, and second, on the attitude of the parties to similar breaches in the past. Thus a breach which would, on consideration of the terms of the contract, have justified dismissal, may not do so if the employer has treated it less seriously on previous occasions. In such a case warning would be required before a more serious view could be taken of the breach.

(c) Summary Dismissal

(By summary dismissal is meant dismissal without the use of the agreed procedures).

Paragraph (b) above sets out the general rules, which should be borne in mind in formulating general policy, but two qualifications should be made.

(i) There may be action by the employee of such a nature as to justify the inference that the employee no longer regards himself as bound by the contract (eg a broadcast by a permanent secretary, the object of which was to disclose and criticise some confidential Government policy, or the unannounced, and therefore unauthorised, departure of an official on a single handed sailing voyage round the world.) In such a case the disciplinary procedures are unnecessary, although it would be necessary for management to inform or to attempt to inform the employee concerned of the legal consequences of his action. Depending on the circumstances, it may be possible to draw the same inference at some stage during a prolonged strike by employees attempting to secure a material change in their contract.

(ii) There may be specific instances of outrageous behaviour by senior members of staff where the risk of an adverse unfair dismissal finding is sufficiently remote to enable legal objections to a summary dismissal in the particular case to be withdrawn.

(d) Unfair Dismissal

At common law, provided due notice as stipulated in the contract of employment is given, any employer may dismiss without any good reason. However, this statement has now been overtaken by the unfair dismissal provisions of the Employment Protection (Consolidation) Act 1978, which apply to the Crown as to any other employer. Under this legislation (except where section 62 applies), an industrial tribunal may be asked to consider whether a dismissal was fair and reasonable in all the circumstances. In the context of the present paper, that question is most likely to arise where the proper procedures have not been used, or where their use has resulted in a dismissal in respect of an offence which the tribunal does not regard as justifying such a course.

Section 62 operates to prevent the tribunal from considering a complaint of unfair dismissal arising out of industrial action if certain conditions are met. Originally, these conditions were that all the complainant's fellow employees who had at any time been involved in the industrial action had also been dismissed. These conditions were relaxed by section 9 of the Employment Act 1982: in order to obtain the protection of section 62, an employer need only have dismissed such of the complainant's fellow employees as (a) worked in the same establishment as the complainant and (b) were taking part in the industrial action on the date of the complainant's dismissal.

(4) Consequences of failure to use, or misuse of, the agreed procedures

If management does not use the disciplinary sanctions in accordance with the agreed procedures, or misuses them, or threatens that it will in some way by-pass or ignore them, various risks arise.

(a) A civil servant who has been dismissed summarily may apply to an industrial tribunal for a finding of unfair dismissal. If management has failed to use the correct disciplinary procedures it would be extremely difficult for it to claim that the dismissal had been fair.

(b) If the procedures have been misused, as, for example, to dismiss a civil servant for a single minor breach of the rules, it is likely that he would be able successfully to claim that he had been unfairly dismissed.

(c) A civil servant who has lost money as a result of an improperly-imposed disciplinary sanction may, with some prospect of success, sue in the ordinary courts for repayment of the money lost, founding on the breach of contract by management in not using the agreed procedure.

(d) It may be possible for a civil servant to seek a declaration from the court that the use or the proposed use of the sanctions in an irregular manner is or would be in breach of contract.

3. SUMMARY

(a) The arrangements between the Crown and the civil servant are essentially contractual in nature, and any attempt to change them unilaterally may be open to successful legal challenge.

(b) Any breach of contract by a civil servant, including any breach arising in contemplation or furtherance of industrial action, may be the subject of disciplinary proceedings.

(c) The sanctions mentioned in Estacode Kb including dismissal may only be imposed safely following the use of procedures reconcilable with those set out in that code.

(d) The use of disciplinary sanctions otherwise than in accordance with the agreed procedures would expose management to legal risks.

(e) The imposition of TRD (or of any of the reduced pay options)

(a) does not involve the use of disciplinary sanctions; and

(b) does not preclude the use of such sanctions.

Civil Service

17/6.

The Rt Hon William Whitelaw CH MC MP
Secretary of State for the Home Department
50 Queen Anne's Gate
London SW1H 9AT

16 June 1982

Dear Willie,

CIVIL SERVICE NATIONALITY RULES

Thank you for your letter of 5 June. I am also grateful to other colleagues for their replies to my letter of 6 May.

In view of your comments, which confirm my own misgivings and those of several of our colleagues, I am now clear that we should not introduce an unestablished (nationality) category for those candidates who are subject to immigration conditions. Although several colleagues were prepared to go along with the proposed change, none appeared to see any overriding merit in it.

The consensus of opinion was clearly in favour of retaining the waiver clause with discretion exercised centrally by the Civil Service Commissioners. We shall proceed accordingly.

I was pleased to have Francis Pym's confirmation that he foresees no difficulty in defending the proposed Diplomatic Service rule against possible criticism.

Revised drafts of the normal rule and of the special MOD/Cabinet Office rule reflecting the changes mentioned above are enclosed. My officials will make arrangements for the revised rules to be formally promulgated in the Civil Service Commission General Regulations at the appropriate time.

As before, copies of this letter go to the Prime Minister, Francis Pym, John Nott, other Ministers in charge of Departments and Sir Robert Armstrong.

Yours ever

Janet

BARONESS YOUNG

DRAFT 'NORMAL' NATIONALITY RULE

A. To be eligible for appointment (other than to a situation covered by paragraphs B, C or D below) you must be:

a. a British citizen;

or

b. a Commonwealth citizen (other than a British citizen), or a British protected person, or a citizen of the Irish Republic, in which case you must satisfy one of the following conditions:

i. at least one of your parents must be, or have been at death, a Commonwealth citizen, a British protected person, or a citizen of the Irish Republic;

or

ii. you must have resided in a country or territory within the Commonwealth, or in the Irish Republic, or have been employed elsewhere in the service of the Crown, or partly have so resided and partly been so employed, for at least five years out of the last eight years preceding the date of your appointment.

c. If you are not qualified under sub-paragraphs a. or b. above, you must satisfy the Civil Service Commissioners that you are so closely connected with a country or territory within the Commonwealth either by ancestry, upbringing or residence, or by

reason of national service, that an exception may properly be made in your favour.

Note. The term 'Commonwealth citizen' applies to any of the following categories as defined in the British Nationality Act 1981: British citizens, British Dependent Territories citizens, British Overseas citizens, British subjects under the Act, citizens of independent Commonwealth countries.

DRAFT 'SPECIAL' NATIONALITY RULE FOR CABINET OFFICE AND MINISTRY OF DEFENCE

B. You will be eligible for appointment to a situation in the Cabinet Office or Ministry of Defence (other than the Meteorological Office, to which paragraph A applies) only if:

a. at all times since your birth you have been a Commonwealth citizen or a citizen of the Irish Republic and

b. you were born in a country or territory which is (or then was) within the Commonwealth or in the Irish Republic; and

c. each of your parents was born in such a country or territory or in the Irish Republic and has always been, or (if dead) always was, a Commonwealth citizen or a citizen of the Irish Republic.

d. If these conditions are not satisfied, you may exceptionally be admitted to appointment by special permission of the Minister responsible for the department concerned, provided that the conditions specified in paragraph A above are satisfied.

Note. The term 'Commonwealth citizen' applies to any of the following categories as defined in the British Nationality Act 1981: British citizens, British

Dependent Territories citizens, British Overseas citizens, British subjects under the Act, citizens of independent Commonwealth countries.

[NB. The note applying to rules A and B will appear only once in the final version.]

PF

CONFIDENTIAL

Civil Service

DEPARTMENT OF HEALTH AND SOCIAL SECURITY
ALEXANDER FLEMING HOUSE
ELEPHANT AND CASTLE
LONDON S.E.1

TELEPHONE: 01-407 5522

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
LONDON
SW1

14 June 1982

Dear Janet.

CIVIL SERVICE NATIONALITY RULES

You copied to me your letter of 6 May to Willie Whitelaw about revision of these rules, which need to be changed following the British Nationality Act 1981.

My Department's main interest in terms of recruitment is in the proposed revision of the "normal" rule, and I agree with your basic approach of preserving the position of all those who are currently eligible to join the Civil Service and of keeping the rules as simple as possible. We certainly should not seek to depart from any undertakings given when the Nationality Bill was before the House.

The present rules have not caused us any difficulty and I would not wish to suggest that my department has a special or significant interest in the matter. However, there is a wider aspect in the sense that it is essential to have regard to the work the Civil Service (including our local offices) does in inner city areas among large groups of coloured people. I regard it as important, therefore, that we go out of our way to avoid doing anything which could be said to create new barriers or attract a racist label. For these reasons I share the doubts colleagues have expressed and which you evidently share about creating the proposed unestablished (nationality) category, even though a case can be made for it in logic. As you rightly point out, this is a potentially sensitive issue and, as I read paragraph 11 of Annex A to your letter, the new category means that some people who are at present granted established appointment will not be eligible for them in the future. The paper does not indicate how many people might be affected by the proposed new rules but I must confess that this proposal causes me some apprehension.

I agree that the power to make exceptions should be retained and that this power should be exercised centrally.

I am copying this letter to the Prime Minister, Francis Pym, John Nott, other Ministers in charge of departments and Sir Robert Armstrong.

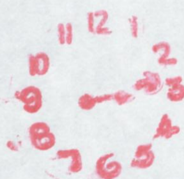
cc - Mr NE Clarke
Miss K. Boston
Mr DB Severn
Mr Utling
Mr BH Street
Mr AG Turner

Yours Norman

NORMAN FOWLER

CONFIDENTIAL

1 6 JUN 1982



SECRETARY OF STATE
FOR
NORTHERN IRELAND

NORTHERN IRELAND OFFICE
GREAT GEORGE STREET,
LONDON SW1P 3AJ

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
LONDON SW1

14 June 1982

Dear Janet

CIVIL SERVICE NATIONALITY RULES

Thank you for sending me a copy of your letter of 6 May to Willie Whitelaw about the revised Civil Service nationality rules.

I agree that we should seek to preserve the position of all those who are currently eligible to apply for the Civil Service, and I am therefore generally content with the draft "normal" rules attached to your letter. On balance, I agree that we should retain the existing power to make exceptions (A(iii) of the present Rules) provided that the discretion continues to be exercised by the Civil Service Commissioners. I also agree, for the reasons you advance, that we should not introduce a new unestablished (nationality) category.

I should perhaps put on record that the nationality rules for the Northern Ireland Civil Service are different from those which apply to entry to the United Kingdom Civil Service, but they will also require amendment to take account of the British Nationality Act and the opportunity is being taken to look at them more generally in the light of what is finally decided for the United Kingdom Civil Service.

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

Yours
Jim

KW

1 4 JUN 1982

With the Compliments

of

THE LORD ADVOCATE

11th June 19 82

LORD ADVOCATE'S CHAMBERS
FIELDEN HOUSE
10 GREAT COLLEGE STREET
LONDON SW1P 3SL

Telephone: Direct Line 01-212 0515
Switchboard 01-212 7676

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Civil Service

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone: Direct Line 01-212 0515
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The Rt Hon the Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
London SW1A 2AZ

11th June 1982

CIVIL SERVICE NATIONALITY RULES

Thank you for sending me on request a copy of your letter of 6th May to Willie Whitelaw.

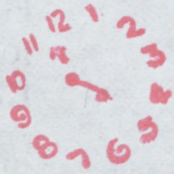
I agree with the general approach you propose. As to the two particular points on which you sought views, I would agree with the Home Secretary's view on the first as set out in the second paragraph of his letter of 5th June.

I also think it right to retain a discretion and that it should be centrally exercised by the Civil Service Commissioners.

I am copying this letter to the recipients of yours.

CONFIDENTIAL

11 JUN 1982



From:

The Rt. Hon. Lord Hailsham of St. Marylebone, C.H., F.R.S., D.C.L.

Civil Service

House of Lords,
SW1A 0PW

CONFIDENTIAL

10th June, 1982

The Right Honourable
The Baroness Young,
Lord Privy Seal,
Management and Personnel Office,
Whitehall,
London,
SW1A 2AZ.

My dear Janet,

Civil Service Nationality Rules

Thank you for sending me a copy of your letter of 6th May to Willie Whitelaw.

I do not think that it makes sense to establish a person in a Civil Service post at a time when his ability to remain in the country is in doubt. The proposal to allow an unestablished appointment does not prevent those who are subject to immigration restrictions from obtaining a post in the Civil Service; it only rationalises the basis of their employment.

The proposal to abolish the power to make exceptions to the normal nationality requirements is more difficult. I agree that if the power of waiver is to be retained it should be retained by the Commission as an exception to the work soon to be delegated to departments, but on balance I would be inclined not to complicate matters in this way, particularly if the proposed rules are slightly more liberal than the present regulations.

I am copying this letter to the recipients of yours.

Yrs:

Q

CONFIDENTIAL

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TJf

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6106 6106

The Rt Hon Nicholas Edwards MP

9 June 1982

CIVIL SERVICE NATIONALITY RULES

Thank you for sending me a copy of your letter of 6 May to Willie Whitelaw about the changes to the Civil Service nationality rules. I am sorry to be a few days late in replying.

I fully accept the proposed introduction of the unestablished (nationality) category. However, as I understand it, other types of unestablished appointments are subject to a 5 year limitation at the end of which a decision has to be made about the continuing employment or termination of an officer's services. Why not apply the same rule to the nationality category? During this 5 year period the individual would be free to take steps to change his status in order to comply with the nationality rules, thus qualifying for an 'established' appointment. Should he not change his status during this period, (and 5 years gives him plenty of time) because he does not wish to, then it seems to me that he will have provided real grounds for doubting his attachment to this country and his appointment should properly be terminated. On the other hand, if, for some reason, the Home Office cannot issue the appropriate documentation to change an individual's status so that he complies with the rules within 5 years, I should have thought that there must surely be reason for the delay sufficient to cast doubt on the wisdom of continuing to retain the individual in Crown service?

Although my compromise proposal would not alleviate the burden complained of by the Home Office it would be seen as being on all fours with other unestablished appointments. It would also ensure better handling of difficult cases.

The waiver clause is very rarely used and I therefore think it administratively sensible to do away with it. However, I do not feel strongly about this and if the majority of colleagues favour retention I would not object. In such case I agree that central monitoring by the Civil Service Commission appears appropriate.

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
LONDON SW1A 2AZ

Civil Service

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD
WHITEHALL PLACE, LONDON SW1A 2HH

From the Minister

CONFIDENTIAL

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
London SW1A 2AZ

9 June 1982

Dear Janet

CIVIL SERVICE NATIONALITY RULES

Thank you for sending me a copy of your letter of 6 May to Willie Whitelaw about the proposed changes to these rules as a consequence of the British Nationality Act 1981.

I agree that the general approach of these proposals is right in that you are seeking in the "normal rule" to preserve the position of all those who are at present eligible to apply for the Civil Service.

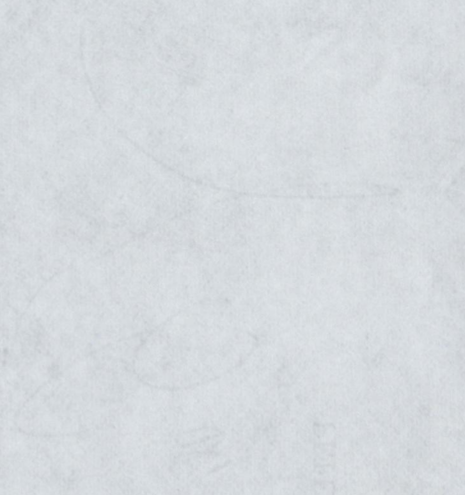
You asked for views on two points which constitute a slight departure from this general approach: the proposed introduction of an unestablished (nationality) category in respect of candidates who are not free of immigration conditions and the proposal to remove the power to make exceptions. I appreciate your concern on this first point in view of its sensitivity and the possibility of some bad publicity in the wake of the ethnic monitoring survey in Leeds. I do not feel strongly about this proposed change but I believe it has some attraction because it will rationalise the situation and can be presented as a reasonable compromise. I can also go along with your idea to retain the power to make exceptions and your proviso that the discretion should continue to lie centrally with the Civil Service Commissioners for all recruitment.

I am copying this letter to the Prime Minister, other Ministers in charge of Departments and to Sir Robert Armstrong.

Yours ever

PETER WALKER

09 JUN 1982



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MINISTRY OF DEFENCE
WHITEHALL LONDON SW1A 2HB
Telephone 01-218 6621 (Direct Dialling)
01-218 9000 (Switchboard)

Minister of State
for Defence Procurement

D/MIN/TT/14/10

8 June 1982

Dear Janet

You sent John Nott a copy of your letter of 6th May to Willie Whitelaw on the subject of the Civil Service Nationality Rules and their revision. In view of John's preoccupation with the Falkland Islands' operation at this particularly crucial period he has asked me to write on his behalf.

Basically, our position is that any changes made to the Nationality Rules should be limited to their form, and that the substance of the rules should remain unaltered. This position is reflected in the proposals in Annexes C and D to your letter.

On the two additional points you raise we are content to go along with the proposal to introduce an unestablished (nationality) category for those applicants, subject to immigration conditions since for all practical purposes it would make little difference to the Ministry of Defence. As you are aware, applicants for the majority of our posts have to be normally vetted. This generally requires, amongst other things, a period of residence in the United Kingdom

/ prior ...

The Baroness Young

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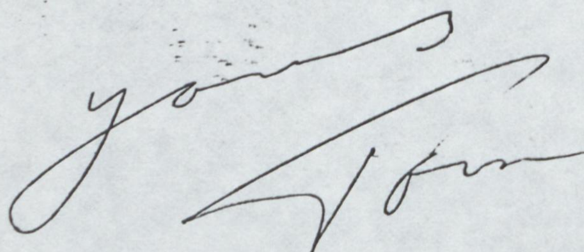
prior to appointment of five years, in which time, any restriction would normally have been lifted. If, however, following your consultation with our colleagues, it should be decided to drop this proposal, it would not worry us unduly.

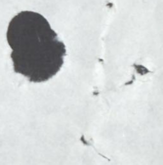
Again, we have no strong views on whether the waiver provision applicable to the "normal" rules should be retained or not. Since the Restricted Nationality Rules apply to the great majority of applicants for MOD posts, the precise form of the "normal" rules is largely of academic interest to us. On balance, we prefer the proposal, inherent in Annex C, to drop the waiver provision because it simplifies the rules, it is more restrictive and therefore to a very minor extent makes for better security. But there are no grounds on which we would wish to oppose retention of the waiver.

I am copying this letter to the Prime Minister, Willie Whitelaw, Francis Pym and Robert Armstrong.



Trenchard

09 JUN 1982



CONFIDENTIAL

QUEEN ANNE'S GATE LONDON SW1H 9AT

5 June 1982

Dear Janet

CIVIL SERVICE NATIONALITY RULES

Thank you for your letter of 6th May. We were at pains during the passage of the British Nationality Bill to stress that existing rights outside the nationality field would not be removed by the legislation. I am therefore content with your general approach, that as a result of the Act the Civil Service Rules should not be made more restrictive as regards eligibility to apply. I note that it is your intention to continue to make it clear to intending candidates in your recruitment literature that they cannot be employed if this would conflict with any restrictions imposed on them under the immigration law and that where employment is subject to the Department of Employment's approval, that Department's approval must first be obtained. This is obviously right, since neither the Civil Service as an employer nor its employees can or should expect to be exempted from the provisions of the immigration law and the conditions relating to the issue of work permits as these apply from time to time.

That said, I share your misgivings about the creation of an unestablished (nationality) category for those candidates who are subject to immigration conditions. We occasionally find ourselves in the rather awkward position of having to refuse leave to remain here to a person who has been a Civil Servant for perhaps as much as eight or nine years (e.g. the dependant of a student). But cases of this sort are rare and the difficulties of dealing with them, if the person concerned is an established as opposed to an unestablished Civil Servant, are in my view less important than the practical and presentational objections to creating a new category of what would inevitably be seen as second class Civil Servants drawn from the ethnic minorities. Subject to the views of colleagues I should be willing to leave the existing Rule unchanged.

You also ask for my views on the proposal to remove the discretion in A(iii) of the current Rules. I would not object to the retention of this discretion if you think this is right. However, if it is to be retained I agree that, to avoid uneven practice and dilution of the Rules, it would be best for the discretion to be exercised centrally by the Civil Service Commission.

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

Yours ever

Willie

The Rt. Hon. The Baroness Young

CONFIDENTIAL

07 JUN 1982

CONFIDENTIAL

WR 4/10

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

4 June 1982

The Rt. Hon. Baroness Young
Lord Privy Seal

Dear Lord Privy Seal,

CIVIL SERVICE NATIONALITY RULES

Thank you for sending me a copy of your letter of 6 May to Willie Whitelaw.

On the first point - the proposed unestablished (nationality) category - I share your concern that this new restriction, even though only a halfway house, could be regarded as discriminatory; and I wonder whether it will really achieve much in the way of reducing pressure for back door immigration. Unless I have underestimated its effect, I would be inclined to drop the proposal.

On the second point I should have thought that the occasional case might turn up where the power to waive rules in the kind of case described in A(iii) of Annex B might be missed if it had been abolished. I wonder whether retention of the power would really result in significant dilution - I agree with you that it would need to be exercised centrally - or whether there would be enough cases needing to be referred to the Civil Service Commission, under delegated recruitment, to cause practical difficulties. I feel therefore that the balance of argument is in favour of retaining the power of waiver.

I am copying this letter to the other recipients of yours.

Yours sincerely,

Jill Rutter

pp GEOFFREY HOWE

Seen and approved by the Chancellor of the Exchequer and signed in his absence

4 JUN 1982

Civil Service

LW 3/6

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

CONFIDENTIAL

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
LONDON
SW1A 2AZ

3 June 1982

Dear Janet,

CIVIL SERVICE NATIONALITY RULES

I am writing to support the proposals contained in your letter to Willie Whitelaw of 6 May 1982. I accept the general approach set out in the draft "normal" rules at Annex C. The introduction of an unestablished (nationality) category seems to be a fair compromise from the ethnic point of view.

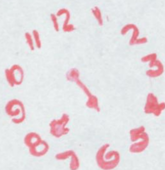
In the interests of clarity and simplicity of the "normal" rule especially where there is to be increased delegation of recruitment I would favour excluding the exception clause from the revised rule. If there is a strong lobby to retain it, however, I would accept that the discretion should rest centrally with the Civil Service Commissioners for the reasons you set out.

I am copying this to the recipients of your letter.

Yours ever,

George.

03 JUN 1982



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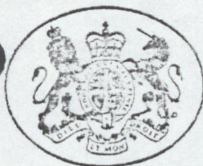

JFF695

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

24 May 1982

The Rt Hon Baroness Young
Lord Privy Seal
Management and Personnel Office
Whitehall
LONDON
SW1A 2AZ

Dear Janet,

CIVIL SERVICE NATIONALITY RULES

You sent me a copy of your letter of 6 May to Willie Whitelaw about the proposed changes in these rules in the light of the British Nationality Act 1981.

2 As far as my Department is concerned, the changes proposed do not present any problems.

3 I do not have strong views about the two points raised in your letter. But I share your concern that the introduction of an unestablished (nationality) category for candidates who are not free of immigration conditions and the abolition of the power to make exceptions to the normal requirements might, especially when taken together, attract criticism. Neither necessarily follows from the British Nationality Act, and they both involve a departure, albeit small, from the general approach that the position of all those at present eligible to apply should be preserved. The introduction of an unestablished (nationality) category can be presented as a reasonable rationalisation as it does not make sense to give a permanent established appointment to a person who is subject to conditions under the immigration rules and might be required to leave the country. Also, the proposal does not affect an immigrant's prospects of obtaining employment in the Civil Service, only his chance of becoming established. It would be more difficult to defend publicly the removal of the existing power to make exceptions, even though it is rarely used. Like you, therefore, I would be inclined to retain this

CONFIDENTIAL

power but, for the reasons given in your letter, to leave the exercise of the discretion with the Civil Service Commissioners for all recruitment, including that which is delegated to departments.

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

Yours ever

Peter

25 MAY 1982

Await other ministerial comments 10/5

Management and Personnel Office
Whitehall London SW1A 2AZ
Telephone 01-273 } 4400
GTN 273 }

Civil Service

6 May 1982

The Rt Hon William Whitelaw, CH, MC, MP
Secretary of State for the Home Department
50 Queen Anne's Gate
LONDON SW1H 9AT

Dear Willie,

CIVIL SERVICE NATIONALITY RULES

One consequence of the British Nationality Act 1981 is that the Civil Service nationality rules will have to be revised. The rules form part of the Civil Service Commission General Regulations, which are made by the Commissioners under the provisions of the Civil Service Order in Council 1978 with the approval of the Minister for the Civil Service and the Secretary of State for Foreign and Commonwealth Affairs.

The present rules are based on the concept of the "British subject" as the common status term under the British Nationality Act 1948 for all people connected with the Commonwealth. That concept will be superseded by the citizenship categories of the 1981 Act when that comes into operation (probably on 1 January 1983, I understand). It will thus become necessary for the Civil Service rules to be re-defined in terms of the new citizenships.

My officials have been working closely with yours in considering what form the new rules should take. They have also discussed the more restrictive rules which apply to the Foreign and Commonwealth Office, the Ministry of Defence and the Cabinet Office with officials of those departments. Their detailed proposals are set out in the annexes to this letter.

I am sure that the general approach of these proposals is right, in that we should seek in the "normal" rule to preserve the position of all those who are at present eligible to apply for the Civil Service. This is in keeping with undertakings given during the passage of the British Nationality Bill through Parliament. In some detailed respects the proposed rule is in fact slightly more liberal than the present one. It has also the merit of greater simplicity.

However, the proposed introduction of an unestablished (nationality) category in respect of candidates who are not free of immigration conditions is not an automatic consequence of the 1981 Act. I can understand the argument that this would ease the pressure to allow

"backdoor" immigration (paragraph 11 of Annex A). Nevertheless this is a sensitive area and it would be unfortunate if the Civil Service, having gained some credit for the ethnic monitoring survey in Leeds, were to reap some bad publicity on this account. I shall be glad to know how strongly you favour the proposed change and to have the views of colleagues.

The other significant change proposed in the normal rule is the removal of the power to make exceptions (A(iii) of the present rule). I understand that it has rarely been used, and not at all in recent years. My own instinct is nevertheless to retain it. But if it were retained I think that the discretion should continue to lie centrally with the Civil Service Commissioners for all recruitment as a safeguard against uneven practice across the Service and the possibility of dilution of the rules. I should welcome colleagues' views before coming to a final decision.

I am pleased that the Ministry of Defence and Cabinet Office have followed the same general approach in re-drafting their special rule so as to preserve the position of those categories who are at present eligible to apply. The same point about unestablished appointments arises here as in the normal rule and John Nott may wish to comment on that in particular.

The re-draft of the Diplomatic Service rule appears to be more stringent than its present counterpart because it limits eligibility to British citizens. I understand, however, that the tightening of the rule is more apparent than real. Perhaps Francis Pym will confirm that he foresees no difficulty in defending the proposed rule against possible criticism.

I am copying this letter to the Prime Minister, Francis Pym, John Nott, other Ministers in charge of Departments and Sir Robert Armstrong. I should be grateful for replies by 4 June.

Yours ever

Janet

BARONESS YOUNG

Annex A

REVISION OF THE CIVIL SERVICE NATIONALITY RULES

1. Because the Civil Service nationality rules are based on the nationality law they will require revision when the British Nationality Act 1981 comes into operation (probably on 1 January 1983). The present rules form part of the Civil Service Commission General Regulations 1978 made under the powers of the Civil Service Order in Council 1978 which governs the Civil Service Commissioners' operations. A simplified version of the present rules as sent to prospective candidates is at Annex B, from which it will be seen that different conditions govern entry to:

a. the generality of government departments (the "normal" rule);

b. the Ministry of Defence (except the Meteorological Office) and the Cabinet Office, where security considerations are particularly important;

c. the Diplomatic Service, for which closeness of connection with the United Kingdom is of paramount importance in ensuring credibility in the representational function; and

d. other appointments under the Secretary of State for Foreign & Commonwealth Affairs (in effect Government Communications Headquarters) where strict security considerations apply.

2. The Civil Service Commission, in consultation with the Home Office, has drafted a proposed revision of the normal rule (Annex C). Draft "special" rules (Annexes D and E) have been prepared by the departments concerned who will clear them with their Ministers.

Effect of the British Nationality Act 1981

3. The Act creates new and distinct categories of citizenship. Citizenship of the United Kingdom and Colonies will be replaced by 3 separate citizenships, as follows:

a. British citizenship. In broad terms, this will be acquired by all those citizens of the UK and Colonies who have the right of abode here when the new Act comes into force. In addition, there will be preservation for a period of 5 years of the right to registration by citizens of Commonwealth countries who were settled here before 1973 and have remained so; and by wives of those citizens of the United Kingdom and Colonies who become British citizens, provided the marriage still subsists. After the Act comes into force, British citizenship will be acquired in various ways specified in the Act.

b. British Dependent Territories citizenship. This will apply to those people who "belong" to one of the existing dependencies or associated states. The detailed provisions are broadly analogous to those for British citizenship.

c. British Overseas citizenship. This will be acquired on the coming into force of the Act by all those remaining citizens of the UK and Colonies who do not acquire either British citizenship or British Dependent Territories citizenship. They are mainly people who derive their present citizenship from a connection with a former colony. With minor exceptions, this citizenship will not be acquired by people in the future, and will die out in time.

4. In addition to the three new citizenships described above, the following groups of people are of interest in relation to the Civil Service nationality rules:

a. Citizens of the Irish Republic. No change is made by the Act to the special status of Irish citizens under British law.

b. <u>British protected persons</u>. These are people connected with former protectorates and with existing and former protected states (only one - the protected state of Brunei - continues to exist). No change is proposed in the present status of British protected persons.

c. <u>British subjects</u>. Although the term 'British subject' is to lose its present usage as a collective description of Commonwealth citizens it will still be used in relation to certain people who are now British subjects but without citizenship.

d. <u>Citizens of independent Commonwealth countries</u>. There are some 45 independent Commonwealth countries each with its own citizenship laws. Except to the extent that some of their citizens may also be citizens of the United Kingdom and Colonies (and will thus acquire one of the three new citizenships under the Act) their position will not be changed by the current legislation except that they will no longer be classed as "British subjects" in United Kingdom law.

5. To summarise, a person who at present holds the status of 'British subject' will in future hold one (or perhaps more than one) of the following statuses:

British citizen

British Dependent Territories citizen

British Overseas citizen

British subject (in the narrower sense defined in the Act)

Citizen of an independent Commonwealth country

The term "Commonwealth citizen" will in future cover all these statuses, but not British protected persons.

The Act's Implications for the Civil Service National Rules.

6. With the discontinuation of the term "British subject" as denoting the common status of all people connected with the Commonwealth (apart from British protected persons), and of citizenship of the United Kingdom and Colonies, the Civil Service rules will have to be redefined in terms of the new citizenships created by the Act.

Revision of the "Normal" Rule

7. The present "normal" rule admits British subjects (= Commonwealth citizens), citizens of the Irish Republic and British protected persons, subject to their also satisfying certain requirements as to parentage or residence. However we make it clear to intending candidates in our recruitment literature (see statement at Annex F) that they cannot be employed if this would conflict with any restrictions imposed on them under the immigration law.

8. In drafting a revised rule the Commission began by considering whether the long-term objective (ie after a reasonable transitional period following the enactment of the new law) should be to use the concept of British citizenship as the sole test of eligibility. This would be logical to the extent that British citizenship is the status of people closely connected with the United Kingdom, conferring on its holders the right to enter and remain in the country without restriction; in short it is the distinct citizenship of those who "belong" to the United Kingdom. This approach would also overcome criticism that under the present rules the Civil Service admits people, including Irish citizens, who owe no prima facie loyalty to the Crown. In addition it would have the great merit of simplicity.

9. We reached the view, however, that a "British citizens only" rule was likely to provoke severe criticism. Apart from revoking the long-standing undertaking in respect of Irish citizens, it would be seen as discriminating against ethnic minorities, and it would create anomalies with non-British citizens already in the Civil Service. Those who would be deprived of their existing right to apply for a Civil Service appointment would include:

a. citizens of the Irish Republic;

b. British Dependent Territories citizens and British Overseas citizens;

c. citizens of independent Commonwealth countries including those who have the right to be registered as British citizens but choose not to exercise that right or who are lawfully settled here but without an automatic right to be registered as British citizens;

d. British subjects (in the narrower sense defined in the Act);

e. British protected persons.

10. Thus the draft "normal" rule at Annex C seeks to safeguard the position of all those categories who are at present eligible to apply.

11. The major change that is introduced is that established appointment is made conditional on freedom from restrictive conditions under the immigration law, and a new form of unestablished (nationality) appointment is created to cover those who have restrictions on their stay or right to take employment. At present the immigration aspect is taken account of administratively rather than in the nationality rules and established appointments are granted even where immigration restrictions apply. It seems opportune to rationalise the position. Ideally, the Home Office would like to see those with immigration restrictions excluded altogether from Civil Service employment on the grounds that such employment puts pressure on them to extend or remove immigration restrictions and thus encourages "backdoor" immigration, notably among those admitted originally as students. Such a move might, however, be criticised on the grounds that it discriminated unfairly against recent immigrants, and the creation of an unestablished (nationality) category is a halfway house which goes a long way to meet Home Office's concern and which their officials have accepted. Unestablished status should not persist for too long in any particular case;

immigration restrictions are normally lifted after 4-5 years. For a transitional period there would be an anomaly with restricted immigrants already holding established status within the Service, but this should not create difficulties.

12. The draft rule envisages 2 basic categories of eligibility:

a. British citizens. There seems no overriding need to attach parentage or residence requirements to British citizens. By definition they "belong" to the United Kingdom and are free from immigration restrictions. The great majority would in any case satisfy the parentage/ residence conditions of the present rule, and where the draft rule is less stringent, eg in the case of foreign born wives who marry British citizens and become registered in less than 5 years, the relaxation seems acceptable.

b. Commonwealth citizens (other than British citizens), British protected persons, and citizens of the Irish Republic. The present parentage/residence requirements have been retained for this category since it seems reasonable to demand additional evidence of "closeness of association" with this country. A simpler approach has been adopted than in the present rule, by dropping the distinction between those who were Commonwealth citizens etc at birth and those who were not. This simplification might make the rule less stringent in a few cases, eg a person who was born an alien and only later became a Commonwealth citizen, and one of whose parents is, or was at death, a Commonwealth citizen, but who has not himself resided within the Commonwealth for 5 out of the last 8 years. But this is unlikely to cause problems. The implications of the immigration proviso have been discussed above. Irish citizens are not subject to immigration control so the proviso would not apply to them.

13. We have consulted the Home Office, the Foreign & Commonwealth Office and the Northern Ireland Office, about the possibility of objections to brigading Irish citizens with "other Commonwealth citizens" rather than British citizens under

the revised rule. None of the departments foresees objections. The Home Office has pointed out that Irish citizens are accustomed to being grouped with citizens of independent Commonwealth countries in such matters as acquiring citizenship of the United Kingdom and Colonies and that they will receive comparable treatment under the new Act in relation to registration and naturalisation. The Foreign and Commonwealth Office consider that the Irish Republic Government would be unlikely to protest and would have no grounds on the basis of reciprocity for doing so.

14. The position regarding citizens of the Irish Republic has its origin in 1948, when the Government of Eire, as it then was, announced its intention of repealing the Eire External Relations Act and of leaving the Commonwealth. The Bill which became the British Nationality Act 1948 was then going through Parliament. During the debate the then Prime Minister, Mr Attlee, announced on 25 November 1948 that "the United Kingdom Government will not regard the enactment of this legislation by Eire as placing Eire in the category of foreign countries or Eire citizens in the category of foreigners." This position was maintained in the Ireland Act 1949, after the Republic of Ireland had left the Commonwealth. On 2 May 1949 the then Financial Secretary to the Treasury indicated, in answer to a Question in the House of Commons, that the undertaking given by Mr Attlee on 25 November 1948 would be followed so far as concerned the employment of citizens of Eire by the Crown or in Government Departments. Successive Governments have adhered to this undertaking and the Civil Service nationality rules are framed so as to give effect to it.

15. It is also proposed to remove the rarely used waiver provision at A(iii) of the present rule. This further simplifies the rule. More importantly it removes a possible source of pressure to dilute the rules. An additional consideration is the Commission's impending withdrawal from the delegated recruitment area. The application of the nationality rules to individual cases will then become a matter for departments alone without the traditional backstop of a Commission check. The more clear-cut the rules can be made the less opportunity there will be for deliberate or inadvertent dilution.

Nationality regulations

The following statement is based on the relevant provisions of the Civil Service Commissioners' General Regulations. The references to British subjects apply equally, throughout the statement, to Commonwealth citizens and to citizens of the Irish Republic; as regards paragraph A only, they also apply to British protected persons.

A To be eligible for appointment (other than to a situation covered by paragraph B, C, or D below) you must be a British subject and in addition satisfy one of the following conditions:

(i) If you were a British subject at birth,

(a) at least one of your parents must be, or have been at death, a British subject,

or

(b) you must have resided in a country or territory within the Commonwealth, or in the Irish Republic, or have been employed elsewhere in the service of the Crown, or partly have so resided and partly been so employed, for at least five years out of the last eight years, preceding the date of your appointment.

(ii) If you were not a British subject at birth, you must satisfy condition A(i)(b) above.

(iii) If not qualified under sub-paragraph A(i) or sub-paragraph A(ii) above, your must satisfy the Commissioners that you are so closely connected with a country or territory within the Commonwealth either by ancestry, upbringing or residence, or by reason of national service, that an exception may properly be made in your favour.

B You will be eligible for appointment to a situation in the Cabinet Office or Ministry of Defence (other than the Meteorological Office, to which paragraph A applies), only if

(i) at all times since your birth you have been a British subject, and

(ii) you were born in a country or territory which is (or then was) within the Commonwealth or in the Irish Republic, and

(iii) each of your parents was born in such a country or territory or in the Irish Republic and has always been, or (if dead) always was, a British subject.

(iv) If those conditions are not satisfied, you may nevertheless be admitted to appointment, by special permission of the Minister responsible for the department concerned, if the conditions specified in paragraph A above are satisfied.

C You will be eligible for appointment to a situation in the Diplomatic Service only if

(i) at all times since your birth you have been a British subject, and

(ii) each of your parents has always been, or (if dead) always was, a British subject,

and

(iii) the Secretary of State is satisfied that you are so closely connected with the United Kingdom, taking into account such considerations as ancestry, upbringing, and residence, that you may properly be appointed,

and

(iv) you undertake to become a citizen of the United Kingdom and Colonies as soon as possible after your appointment if you are not already such a citizen.

(v) If condition C(ii) is not satisfied, you may nevertheless be admitted to appointment, by special permission of the Secretary of State, if

(a) one of your parents has always been, or (if dead) always was, a British subject (see below),

and

(b) your father, if not always a British subject, is or was at death a British subject.

(c) for the purpose of C(v)(a) above, any period before 1 January 1949 during which your mother lost British nationality as a result of marriage to an alien may be disregarded.

(vi) The requirements in paragraph C may also be applied to situations under the Secretary of State for Foreign and Commonwealth Affairs, other than situations in the Diplomatic Service, if the Commissioners, with the approval of the Secretary of State, so prescribe.

D You will be eligible for appointment to a situation under the Secretary of State for Foreign and Commonwealth Affairs, other than a situation to which paragraph C applies, only if condition C(i) and C(ii) above are satisfied. If those conditions are not satisfied, you may nevertheless be admitted to appointment, by special permission of the Secretary of State, if the conditions specified in paragraph A are satisfied.

NOTE: If you were born outside the United Kingdom you should note that, in addition to the above requirements as to nationality, there is also a residence requirement for certain posts, for security reasons. See Security on page 6.

'RAFT 'NORMAL' NATIONALITY RULE

A. To be eligible for appointment (other than to a situation covered by paragraphs B, C or D below) you must be:

a. a British citizen;

or

b. a Commonwealth citizen (other than a British citizen), or a British protected person, or a citizen of the Irish Republic; in any case you must be free of conditions under the United Kingdom immigration rules, and in addition satisfy one of the following conditions:

i. at least one of your parents must be, or have been at death, a Commonwealth citizen, a British protected person, or a citizen of the Irish Republic;

or

ii. you must have resided in a country or territory within the Commonwealth, or in the Irish Republic, or have been employed elsewhere in the service of the Crown, or partly have so resided and partly been so employed, for at least five years out of the last eight years preceding the date of your appointment.

Notes

1. The term 'Commonwealth citizen' applies to any of the following categories as defined in the British Nationality Act 1981: British citizens, British Dependent Territories citizens, British Overseas citizens, British subjects under the Act, citizens of independent Commonwealth countries.

2. If you satisfy all the requirements of Ab. above except that you are not free of conditions under the United Kingdom immigration rules, you will be eligible only for an unestablished appointment unless and until those conditions are removed.

DRAFT 'SPECIAL' NATIONALITY RULE FOR CABINET OFFICE AND MINISTRY OF DEFENCE

B. You will be eligible for appointment to a situation in the Cabinet Office or Ministry of Defence (other than the Meteorological Office, to which paragraph A applies) only if:

a. at all times since your birth you have been a Commonwealth citizen or a citizen of the Irish Republic; and

b. you were born in a country or territory which is (or then was) within the Commonwealth or in the Irish Republic; and

c. each of your parents was born in such a country or territory or in the Irish Republic and has always been, or (if dead) always was, a Commonwealth citizen or a citizen of the Irish Republic;

d. if these conditions are not satisfied, you may exceptionally be admitted to appointment by special permission of the Minister responsible for the department concerned, provided that the conditions specified in paragraph A above are satisfied.

Notes

1. The term 'Commonwealth citizen' applies to any of the following categories as defined in the British Nationality Act 1981: British citizens, British Dependent Territories citizens, British Overseas citizens, British subjects under the Act, citizens of independent Commonwealth countries.

2. If you satisfy all the requirements of paragraph B but you are not free of conditions under the United Kingdom immigration rules, you will be eligible only for an unestablished appointment unless and until these conditions are removed.

[NB. The notes applying to rules A and B will be brought together in the final version.]

Annex E

DRAFT 'SPECIAL' RULES FOR DIPLOMATIC SERVICE AND OTHER APPOINTMENTS UNDER THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

C. You will be eligible for appointment in HM Diplomatic Service only if:

a. you are a British citizen; and

b. each of your parents has always been, or (if dead) always was, a Commonwealth citizen; and

c. the Secretary of State is satisfied that you are so closely connected with the United Kingdom, taking into account such considerations as ancestry, upbringing and residence, that you may properly be appointed.

d. If condition b. is not satisfied, you may nevertheless be admitted to appointment, by special permission of the Secretary of State, if one of your parents has always been, or (if dead) always was, a Commonwealth citizen.

D. For certain appointments under the Secretary of State for Foreign and Commonwealth Affairs, other than appointments in the Diplomatic Service, the requirements in paragraph C above may apply or particular requirements may be prescribed.

Annex F

EMPLOYMENT RESTRICTIONS: STATEMENT IN GI LEAFLET

Intending candidates overseas who consider making application must note that, since 1 January 1973, entry into the United Kingdom has been controlled under the Immigration Act 1971. This legislation applies both to Commonwealth citizens and to foreign nationals, and makes everyone who is not patrial* subject to immigration control. Any Commonwealth citizen subject to control who can establish that one of his grandparents was born in the United Kingdom, the Channel Islands or the Isle of Man, or in Southern Ireland before 31 March 1922, and who is granted an entry certificate endorsed 'UK grandparent', will be given leave to enter the United Kingdom for an indefinite period and will not be subject to any employment restrictions. Apart from this, all those subject to immigration control who are coming for employment in a government department must hold a work permit issued by the Department of Employment, which must be obtained before setting out for this country. Application for a work permit will be made, when necessary, by the prospective employing department when it is ready to make the candidate a firm offer of appointment; the candidate is not required to apply for the permit himself. There is no guarantee that a work permit will be issued for every candidate on whose behalf an application is made.

Work permits cannot be issued to enable candidates to attend examinations or interviews for Civil Service appointments; and the Home Office will not normally authorise the issue of entry certificates for this purpose. In exceptional cases, however, the Commission may be able to arrange with the Home Office for candidates for certain professional and scientific appointments to be allowed to enter the United Kingdom as visitors in order to attend interviews; applications from candidates for such appointments will be considered on their merits. Apart from this, Commonwealth citizens overseas are advised that no useful purpose would be served by entering for any of the Commissioners' schemes of recruitment unless they are patrial or have satisfied themselves that they are otherwise eligible to enter the United Kingdom for permanent residence.

The holder of a work permit for employment in a government department will be admitted to the United Kingdom for up to twelve months in the first place, subject to a condition requiring him to obtain the approval of the Department of Employment if he wishes to change his job. At the end of the first year, his stay may be extended if he is still in approved employment. After four years, he can apply to be accepted for permanent settlement; if his application is granted, the time limit on his stay can be removed and he will then be free to take any employment.

Commonwealth citizens who have already been admitted to the United Kingdom may apply to be considered for any Civil Service appointment for which they are eligible, provided that their stay in this country is not subject to a condition prohibiting them from taking employment. If they are subject to a condition requiring permission from the Department of Employment before taking or changing employment, that Department's approval must be obtained before an appointment is made. Approval will only be given if the work offered satisfies the criteria for the issue of a work permit to a Commonwealth citizen overseas. If approval is given a work permit will be issued.

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*The following are patrial under the Immigration Act 1971, and thus free from immigration control:

i. All citizens of the United Kingdom and Colonies who have that citizenship by birth, adoption, registration, or naturalization in this country, or who have a parent or grandparent who was born here or acquired citizenship by adoption, registration, or naturalisation here.

ii. Citizens of the United Kingdom and Colonies who have come from overseas, have been accepted for permanent residence, and have resided here for five years.

iii. Commonwealth citizens who have a parent born in the United Kingdom.

Anyone who is in any doubt about his status under the Act should make enquiries of the British Embassy, Consulate or High Commission overseas or of the Home Office, Immigration and Nationality Department, Lunar House, Wellesley Road, Croydon, CR9 2BY.

July 1981

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Civil Service

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SECRET

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10 DOWNING STREET

From the Private Secretary 13 February 1981

Laying Off Without Pay

The Prime Minister was grateful for the Lord President's minute of 9 February, and has noted the work that has been done on a contingency basis to prepare two draft Bills.

I am sending a copy of this letter to Richard Dykes (Department of Employment) and David Wright (Cabinet Office).

T. P. LANKESTER

Jim Buckley, Esq.,
Lord President's Office.

SECRET

SECRET

PRIME MINISTER

LAYING OFF WITHOUT PAY

In my minute of 2 December I reported that instructions had been given for the preparation of draft Bills to permit the laying off without pay of employees who were without work because of the industrial action of others. I said that knowledge of the Bills would be tightly restricted.

Draft Bills have been drawn up by Parliamentary Counsel in consultation with officials in the Department of Employment, the legal Departments, and my Department. One Bill covers all employees; the other is confined to the civil and public services. In my view it would be unwise to widen knowledge of the Bills at this stage by sending copies of them to other Departments. Jim Prior agrees. Given priority, it should be possible to consult other Departments, and to prepare final versions, within a week of taking a decision to lay either Bill before Parliament.

The draft Bills include wide powers of lay-off but Jim Prior and I agree that this is inevitable. We also agree that we shall have to do without provision for pension protection in the Bills. My minute of 2 December warned that it would be very difficult to achieve this for the generality of employees; the study by officials has confimed that this is so. (If we wanted to, however, we could amend the relevant civil/public service schemes without a specific provision in either of these Bills.)

In view of the severe damage which would result from a leak, I have instructed that no further work should be done on the drafts until a decision has been taken to introduce legislation.

I am copying this only to the Secretary of State for Employment and Sir Robert Armstrong.

SOAMES

9 February 1981

SECRET

-9 FEB 1981

SECRET

file TMP

2

c. MOD
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SO
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CDL
CO
FS,HMT

Civil Service

10 DOWNING STREET

From the Private Secretary

4 December 1980

LAYING OFF WITHOUT PAY

The Prime Minister has read the Lord President's minute of 2 December on the above subject, and is content with the conclusions reached by E(CS) Committee.

I am sending copies of this letter to Private Secretaries to Members of E(CS) and to Robin Birch (Chancellor of the Duchy of Lancaster's Office) and David Wright (Cabinet Office).

T. P. LANKESTER

Jim Buckley, Esq.,
Lord President's Office.

SP

SECRET

PRIME MINISTER

LAYING OFF WITHOUT PAY

At its meeting on 2 October (E(80)35th Meeting, item 1) E Committee invited E(CS) Sub-Committee to pursue the question of drawing up on a contingency basis two Bills to permit the laying off without pay of employees who were without work because of the industrial action of others. This minute reports progress.

E(CS) have now met to consider the matter on the basis of a report prepared for us by officials. We have agreed on the contents of the two Bills, one covering both the public and private sector, and the other confined to the Civil and Public Services. The latter Bill will consciously exclude the nationalised industries because, if we want to cover them we will need, we think, to go for the universal Bill. The Public Services Bill would be drafted in such a way that the precise coverage could be decided at the time and in the light of the threat we face. The Sub-Committee were very conscious that either Bill would be represented as, and indeed would represent, a massive invasion of private rights including common law rights. So we decided to seek a flexible draft to preserve the possibility of limiting the opposition we would face should the Bill ever have to be introduced.

Among other points of detail we agreed that we could not confine the provisions to staff who had a direct interest in the outcome of the industrial action concerned because that would make it too easy to defeat the object of the Bill. We also thought it particularly important that the pension entitlement of staff laid off should not be permanently affected, and we have instructed officials to do everything possible to devise a Bill which would protect pension entitlements. This may not be easy, because of the wide variety of pension schemes, particularly in the private sector, but the attempt must be made. Otherwise we will be accused of imposing a life-long penalty on the 'innocent'.

In addition the CPRS have prepared, and E(CS) have endorsed, a check-list of the sort of questions to which we would need urgent answers at the time when we were considering whether or not to introduce the legislation.

We hope that drafts for the Bills could be available by about Christmas and I have asked the Chancellor of the Duchy to see that the necessary priority is given. We have also instructed that knowledge of the existence of the Bills should be tightly restricted to those with a need to know because any leak would be gravely damaging. As you may know there is a reference in Peter Hennessy's article in Friday's Times to E(CS) and to the "slaughter of the innocents option". Fortunately, this article (like another of a few days before) is ill-informed and betrays no inside knowledge of our contingency planning. It appears to be no more than an intelligent extension of his similar article earlier this year (30 January). But it does reinforce the need to restrict very severely any knowledge of the draft Bills.

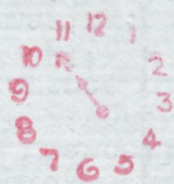
I am copying this only to members of E(CS), to the Chancellor of the Duchy of Lancaster and to Sir Robert Armstrong.

S.

SOAMES

2 December 1980

3 DEC 1980



Civil Service

Ref. A03119

PRIME MINISTER

Civil Service Contracts of Employment

(E(80) 83 and 84)

BACKGROUND

Ministers have been concerned for some time that the absence of powers to lay off Civil Service white-collar staff without pay in a trade dispute can impose heavy costs on Government while the union's commitment is confined to supporting the few key staff whose withdrawal brings operations to an end. The Ministerial Sub-Committee on Industrial Relations in the Civil Service (E(CS)) looked into this matter earlier in the year, and concluded that a legislative solution would not run; and that only the option of importing a specific provision into the contracts of employment of new recruits offered a convenient - though necessarily slow - way of making progress.

2. The Lord President of the Council minuted you in the above sense on 27th June, and you asked that some further work should be done to define the shape of possible legislation - including legislation extending to the private sector - and that the results should be brought to E. As a basis for discussion the Committee will have before it two memoranda by the Lord President of the Council: E(80) 83 - covering a report by officials on the general scope for altering civil servants' contracts of employment so as to widen management's range of response to industrial action (this is essentially the same paper that the Lord President sent to you in June); and E(80) 84 dealing specifically with the question of legislation. It will also have a minute dated 5th August from the Attorney General pouring legal cold water on the concept of changing contracts by statute. These papers were on the agenda for the meeting on 7th August but there was not time to take them.

3. Although the issues - and the papers - are complex, it should be possible to narrow the discussion down to a few basic questions of principle, leading, where appropriate, to further work. The four questions are:-

(a) Is the Government prepared to legislate to abrogate the present protection of white-collar staffs against laying off without pay in both the public and private sectors, given that this protection arises from freely-negotiated contracts of service? Both the Lord President and the Attorney General are against this course which would represent a very substantial interference by Government in private contracts.

(b) Can legislation be contemplated for the Civil Service alone? The same arguments of principle apply though there is apparently a precedent in Australia. However, the CSD's information is that the Australian Government has never sought to invoke their legal right to lay off "innocent" staff without pay, and are believed to be very reluctant to even contemplate doing so. Although the papers do not touch on the point, it is also possible that legislation confined to the Civil Service could be judged by the House authorities to be "hybrid" with all the legislative complications this entails.

(c) Is there some other action which can be taken short of legislation? Discussion so far has suggested that the most profitable route might be to alter the terms of employment of new entrants. The Lord President, in paragraph 9 of E(80) 84, says that he has a wide review of the terms of employment offered to new recruits in hand which will take some time to complete. A decision here could sensibly be deferred until the results of this review are available.

(d) Is there a different route available, e.g. through "no-strike agreements"? This possibility is not touched on in the papers but a no-strike agreement which could be made to stick would remove the problem. Any such agreement would be likely to be negotiable only if the Government, for its part, could offer concessions, e.g. on pay determination, which would provide a package attractive to the Civil Service unions. The Chancellor of the Exchequer already has in hand a review of the options for determining Civil Service pay, which is due to come to E on 16th October. If any colleagues show interest in the possibility of

grafting a no-strike agreement on to any new pay system - perhaps with implementation of the system conditional on performance in avoiding industrial disputes - this might be pursued further at the meeting on 16th October as part of the consideration of the Chancellor's proposals on pay.

HANDLING

4. You will wish the Lord President to introduce his two papers and then hear comments from colleagues, starting with the Attorney General and the Secretary of State for Employment. You might then seek to concentrate discussion on the questions outlined above.

CONCLUSIONS

5. Four conclusions are possible:-

(i) Whether there should be legislation to provide for the laying off without pay of white-collar employees across the public and private sectors. If so, the Secretary of State for Employment, in consultation with the Lord President of the Council, should be invited to bring specific proposals to colleagues.

(ii) If the answer to (i) is no, whether there should be similar legislation confined to the Civil Service (and perhaps to other parts of the public services). If so, the Lord President of the Council, in consultation with the Secretary of State for Employment, should be invited to bring proposals forward.

(iii) If the answer to (i) and (ii) is no, inviting the Lord President to bring forward proposals for action in the Civil Service short of legislation when his present review is completed.

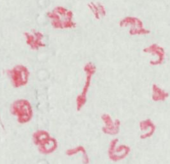
(iv) /Possibly/ agreeing to consider further on 16th October, and in the light of advice from the Chancellor of the Exchequer, in consultation with the Lord President, the possibility of including "no-strike" agreements in any new arrangements to be negotiated for handling Civil Service pay.

RTA

(Robert Armstrong)

1st October, 1980

1 OCT 1980



O.O. cc Vereker Duguid

CONFIDENTIAL

HOUSE OF LORDS,
SW1A 0PW

4021/65

30 Sep: 80.

My dear Margaret

Civil Servants' Contracts of Employment

I had hoped to attend E Committee for the discussion of this subject, but the meeting has been fixed for Thursday morning, when I must be present in the House of Lords to join in the tributes to Lord Dilhorne. I therefore cannot attend the meeting, but it may be useful if I briefly record my view of the matter, on the basis of the Lord President's two papers (E(80)83 and 84).

The issue seems to me political rather than legal. There is quite a good argument on one level for legislating. I think that circumstances might well arise, short of a general national emergency, in which selective industrial action by civil servants made it desirable, and reasonable in the eyes of the public, to lay off some civil servants without pay. I would not myself regard it as fundamentally inadmissible to legislate so as to alter the terms of service of civil servants in the way proposed. It is artificial to regard their relationship with the State which employs them as if it were a matter of private contract, and I do not accept that they necessarily have a right to be treated in every way like employees in the private sector. The proposed power to lay off might be useful in the public interest, and I do not see that it would be unreasonable in principle to take it, as against civil servants.

In practice, however, I doubt whether the game would be worth the candle. I recognise that such legislation might

The Right Honourable
The Prime Minister

be quite attractive to some of our supporters. Nevertheless, it seems doubtful whether the benefit to be gained, in terms of increased leverage in disputes, would be worth the price, in terms of Parliamentary and union opposition and bad feeling. It is true that if we face a winter of discontent in the Civil Service, such powers might be all the more useful; on the other hand, the process of taking them might aggravate discontent by uniting moderates with militants in common opposition to the legislation. On balance, I do not think that the case is made out for going ahead with this project in present circumstances.

I would like to make it clear that in any event I would be opposed to attempting to extend such powers to the private sector, which I think would be a serious mistake.

I am sending copies of this letter to the other members of E Committee, to the Attorney-General and the Lord Advocate, and to Sir Robert Armstrong.

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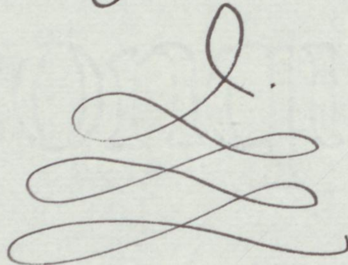

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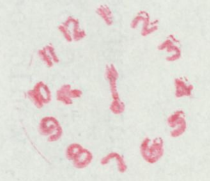
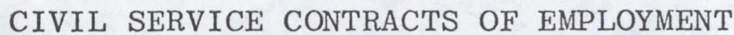


29 September 1980
Policy Unit

PRIME MINISTER


CIVIL SERVICE CONTRACTS OF EMPLOYMENT

This important question comes before E on Thursday. Here are our comments on an issue which lies at the heart of public service union power; and therefore of the public service pay problem; and therefore of public expenditure; and so, eventually, of any PSBR overshoot and any knock-on effects in the private sector.

1. Christopher Soames admits that the selective strike is a new and very powerful weapon and that there are strong practical arguments for being able to lay off those unable to work due to disruption.

2. We agree with him that if a change is made, it should be for all white collar workers, not just the Civil Service. Of course, it would be controversial: that is not an argument against it. Of course many employers may not yet see the need for it: the phenomenon is new.

3. A legislative change would not, as he suggests, be contrary to our general approach of avoiding the intervention of the law. On the contrary, it is the law which at present stands between cause and effect. If some people are unable to work as a result of action by their colleagues, it is economic nonsense to continue to pay them regardless. This does not happen when blue collar workers go on strike. Why should the law confer this special privilege on white collar workers - at the expense of the future health of their enterprise (in the private sector) or the taxpayer (in the public sector)?

4. Can the Government afford to take no action in this area? If we are seriously trying to curb excessive pay increases and reduce disruption, we had better ensure that the rules give us a chance of doing so. What is at stake is the control of public expenditure and the reduction of inflation.

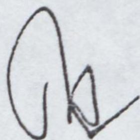
5. Inevitably, this subject raises strong emotions. Ideally, we would only act to affect all future contracts. However, this would take too long to become effective. To a large extent, the moral objection to acting soon in a way which affects existing contracts can be

overcome by giving a reasonable period of advance notice of our intentions. We suggest that, because public opinion has not yet focussed on this issue, the first step should be to air publicly the need for such a change - and the inequity of present arrangements viz a viz the blue collar workers. After this has been debated in the media, the Government should give a period of warning of at least one year before acting. Thereafter, we favour a change in the law. If private sector employers do not find it necessary to use the legislation, it will have succeeded.

6. In discussing issues of this kind, it is important to make sure, first of all, that colleagues realise that we are in the middle of an economic emergency, and will be for 2-3 years to come. Timid and conventional "peacetime" responses will be too little and too late. The most important aim, therefore, is to prevent E taking quick, "easy way out" (ie do nothing) decisions, so that bit by bit, the pass is sold.

7. It may be that, as with the Green Paper on trade union immunities, we will need a fuller briefing to ensure colleagues grasp the crucial connections between specific measures like these and the larger task of getting the economy back onto an even keel without extinguishing the private sector in the process.

I am sending a copy of this minute to Geoffrey Howe.



JOHN HOSKYNS

CONFIDENTIAL

Ref. A02835

PRIME MINISTER

Civil Service Contracts of Employment

(E(80) 83 and 84)

BACKGROUND

Ministers have been concerned for some time that the absence of powers to lay off Civil Service white-collar staff without pay in a trade dispute can impose heavy costs on Government while the union's commitment is confined to supporting the few key staff whose withdrawal brings operations to an end. The Ministerial Sub-Committee on Industrial Relations in the Civil Service (E(CS)) looked into this matter earlier in the year, and concluded that a legislative solution would not run; and that only the option of importing a specific provision into the contracts of employment of new recruits offered a convenient - though necessarily slow - way of making progress.

2. The Lord President of the Council minuted you in the above sense on 27th June, and you asked that some further work should be done to define the shape of possible legislation - including legislation extending to the private sector - and that the results should be brought to E. As a basis for discussion the Committee will have before it two memoranda by the Lord President of the Council: E(80) 83 - covering a report by officials on the general scope for altering civil servants' contracts of employment so as to widen management's range of response to industrial action (this is essentially the same paper that the Lord President sent to you in June); and E(80) 84 dealing specifically with the question of legislation. It will also have a minute dated 5th August from the Attorney General pouring legal cold water on the concept of changing contracts by statute.

3. Although the issues - and the papers - are complex, it should be possible to narrow the discussion down to a few basic questions of principle, leading, where appropriate, to further work. The four questions are:-

CONFIDENTIAL

(a) Is the Government prepared to legislate to abrogate the present protection of white-collar staffs against laying off without pay in both the public and private sectors, given that this protection arises from freely-negotiated contracts of service? Both the Lord President and the Attorney General are against this course which would represent a very substantial interference by Government in private contracts.

(b) Can legislation be contemplated for the Civil Service alone? The same arguments of principle apply though there is apparently a precedent in Australia. However, the CSD's information is that the Australian Government has never sought to invoke their legal right to lay off "innocent" staff without pay, and are believed to be very reluctant to even contemplate doing so. Although the papers do not touch on the point, it is also possible that legislation confined to the Civil Service could be judged by the House authorities to be "hybrid" with all the legislative complications this entails.

(c) Is there some other action which can be taken short of legislation? Discussion so far has suggested that the most profitable route might be to alter the terms of employment of new entrants. The Lord President, in paragraph 9 of E(80) 84, says that he has a wide review of the terms of employment offered to new recruits in hand which will take some time to complete. A decision here could sensibly be deferred until the results of this review are available.

(d) Is there a different route available, e.g. through "no-strike agreements"? This possibility is not touched on in the papers but a no-strike agreement which could be made to stick would remove the problem. Any such agreement would be likely to be negotiable only if the Government, for its part, could offer concessions, e.g. on pay determination, which would provide a package attractive to the Civil Service unions. The Chancellor of the Exchequer already has in hand a review of the options for determining Civil Service pay, which is due to come to E in September. If any colleagues show interest in the possibility of

CONFIDENTIAL

grafting a no-strike agreement on to any new pay system - perhaps with implementation of the system conditional on performance in avoiding industrial disputes - this might be included in the Chancellor's review.

HANDLING

4. You will wish the Lord President to introduce his two papers and then hear comments from colleagues, starting with the Solicitor General (in the absence of the Attorney General) and the Secretary of State for Employment. You might then seek to concentrate discussion on the questions outlined above.

CONCLUSIONS

5. Four conclusions are possible:-

(i) Whether there should be legislation to provide for the laying off without pay of white-collar employees across the public and private sectors. If so, the Secretary of State for Employment, in consultation with the Lord President of the Council, should be invited to bring specific proposals to colleagues after the Recess.

(ii) If the answer to (i) is no, whether there should be similar legislation confined to the Civil Service (and perhaps to other parts of the public services). If so, the Lord President of the Council, in consultation with the Secretary of State for Employment, should be invited to bring proposals forward after the Recess.

(iii) If the answer to (i) and (ii) is no, inviting the Lord President to bring forward proposals for action in the Civil Service short of legislation when his present review is completed.

(iv) /Possibly/ inviting the Chancellor of the Exchequer, in consultation with the Lord President, to report to the Committee in September on the possibility of including "no-strike" agreements in any new arrangements to be negotiated for handling Civil Service pay.

RA

ROBERT ARMSTRONG

6th August, 1980

CONFIDENTIAL

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn 3201

5 August 1980

PRIME MINISTER

LEGISLATION ON CONTRACTS OF EMPLOYMENT

I have seen Christopher Soames' Note E(80)(84) covering a paper by officials on the shape of legislation to enable white collar workers to be laid off without pay when there is no work for them to do as a result of industrial action by others.

As I cannot be at "E" Committee on 7 August the Solicitor General will attend in my place but I have the following general comments.

In my capacity as a Law Officer I share the Christopher Soames' view that we ought not to go down the road suggested. My case rests on the following propositions.

(1) The contract for the services of a white collar worker has long been regarded as a contract for skill and experience in which these resources are put at the sole disposal of the employer (and particularly so in the civil service where there are formal restrictions on taking on other work). This has some legal significance in that the common law has never imported in to such contracts any term that the employee may be laid off without pay when he has no useful work to do, nor do written contracts for white collar workers normally include such a term. Instead, the employee is generally required to put in such hours as may be needed to perform his duties (which, in the case of senior civil servants, can be greatly in excess of the "conditioned hours", a fact which is often recognised in their letters of appointment).

(2) There are, of course, in industry, and in particular in the car industry, agreements which contain "no work, no pay" provision but these are usually based on hourly contracts and are quite different from the usual conditions of employment in the civil service.

(3) To upset this principle by legislation would be a very serious step and would call in question the whole basis on which the agreement for services is traditionally formulated in both the public and the private sector. In this sense there is no case for distinguishing between civil servants and other white collar workers.

(4) In any event the use of new legislative powers would interfere with "privity of contract" between employer

/and employee.

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-405 7641 Extn

and employee. This is not merely a legal concept but a practical safeguard by which all parties to the bargain have the guarantee that it cannot be changed except with their agreement. I do not think the circumstances we face justify removing any part of that safeguard by legislation.

(5) As a general principle it cannot be right to legislate to enable staff to be deprived of their legal right to pay in circumstances where no breach of contract has occurred and their conduct may be blameless in every other respect.

Furthermore, I doubt whether the procedures to be applied under the legislation before lay off could take place - which would be justiciable in the courts - are of a kind which would necessarily help to produce a quick solution to industrial disputes. They might well have the opposite effect.

I can see some merit in the gradual introduction of change in the terms for new entrants, and in particular to allow for employees to do the work of lower grades in suitably defined circumstances, but the proposals canvassed in E(80)(84) are of an entirely different kind and I am strongly in favour of their rejection.

This is copied to all members of "E" Committee, the Lord Advocate and Sir Robert Armstrong.

MH

cc MOD FST
D/Emp CO
SO
DHSS

Civil Service

10 DOWNING STREET

From the Private Secretary

14 July 1980

B/F 24.7.80

Civil Servants' Contracts of Employment

The Prime Minister has now had an opportunity to consider the Lord President's minute of 27 June. She has also seen the minutes of 7 July from the Secretary of State for Defence, of 8 July from the Financial Secretary and 9 July from the Secretary of State for Social Services.

The Prime Minister agrees with Mr. Pym that Ministers should reconsider the possibility of legislation in order to make it possible to change the contracts of white collar civil servants already in post. She would like this issue to be taken in E Committee; but before it is, she would be grateful if some further work could be done to define the shape of legislation that would be required; and in order to stave off criticism that, if the legislation option were to be pursued, the Government would be discriminating against civil servants, she would like the possibility of legislation which would cover white collar workers in the private sector to be considered as well.

I am sending copies of this letter to Private Secretaries to members of E(CS) and David Wright (Cabinet Office).

being covered in E papers

T. P. LANKESTER

Jim Buckley, Esq.,
Lord President's Office.

CONFIDENTIAL

Prime Minister

This whole issue will come to E, hopefully before the recess. The point at X about taking immediate action on new entrants can be considered then.

TL 16/7

PRIME MINISTER

CIVIL SERVANTS' CONTRACTS OF EMPLOYMENT

I have now seen Francis Pym's minute to you of 7 July.

I have a good deal of sympathy with what he says, particularly in the light of the problems he is facing at ROF Bishopton. When E(CS) discussed the possibility of legislation, we concluded that this could only be contemplated if there were clear public demand for it. This was not the case then, nor is it now. However, it may be that the demand would emerge if the legislation were introduced. Accordingly, I would favour Francis' suggestion that officials consider the shape of legislation that would needed: this would enable us to take a view on whether it would be workable, and what the public reaction to it might be. But I would not wish this to hold up progress on the more immediate option of introducing a revised contract for new entrants. X

I am sending copies of this minute to members of E(CS), and to Sir Robert Armstrong.

NL

NIGEL LAWSON
14 July 1980

14 JUL 1980

1

PRIME MINISTER

c.c. Mr. Hoskyns

CIVIL SERVANTS' CONTRACTS OF EMPLOYMENT

Lord Soames' minute at Flag A concerns the question of whether we should try to change civil servants' contracts of employment so that, in the case of white collar staff, they can be laid off without pay when there is no work because of industrial action. He concludes that, for legal and practical reasons, it would be inadvisable to try to "engineer" changes in existing contracts; but he seems prepared to pursue the idea of introducing a revised contract for new entrants.

This latter course would take quite a time to have much effect, although not quite as much as one might assume since there is a high turn-over at clerical levels and that is where disputes arise most often. Mr. Pym (at Flag B) therefore suggests that Ministers should consider legislation to make changing the contracts for all civil servants possible. He suggests that "officials should be invited to consider the shape of legislation that would be necessary". The CSD say that such legislation would be exceptionally controversial since the Government would be accused of discriminating against civil servants; for white collar employees in the private sector and in other parts of the public sector cannot at present be laid off when there is no work for them.

Mr. Lawson (at Flag C) and Mr. Jenkin (at Flag D) suggest that we should move urgently to changing the contracts of new entrants to the Civil Service; they does not argue for the legislation option.

The legislation option was ruled out at an earlier stage by E(CS). But in view of Mr. Pym's intervention, would you like this whole issue to be taken in E, on the basis of the Lord President's report and some further work on what would be required in terms of new legislation if the legislation option were to be pursued?

Yes

PS:- The Policy Unit suggest that we should consider legislation for white collar workers in the private sector as well. This would avoid the charge of discrimination; and while the CBI have not asked for it, it would not hurt them to have it. Shall I ask for this to be covered too? — Yes please MT

10 July 1980

PRIME MINISTER

CIVIL SERVANTS' CONTRACT OF EMPLOYMENT

I have a good deal of sympathy with the points made by Nigel Lawson in his minute of yesterday's date commenting on Christopher Soames' minute of 27 June. The existing range of options has proved effective in dealing with industrial action, for example, in local offices, but our difficulties at Newcastle last year demonstrated our vulnerability to selective action in large computer installations. Since then contingency plans for dealing with similar action in future have been improved but we remain vulnerable while we are without any effective management response to selective action, which results in large numbers of staff without work.

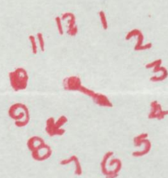
We have to accept, as the official paper says, that common law and recent employment legislation determine management's freedom of action, but a start can be made by changing the contracts of employment for new entrants, and I hope that we will agree to the proposal by officials that we should examine this possibility.

I am copying this to Christopher Soames, members of E(CS) and to Sir Robert Armstrong.

P.J.

9 July 1980

- 9 JUL 1980



CONFIDENTIAL

PRIME MINISTER

Christopher Soames sent me a copy of his minute to you of 27 June.

I strongly agree with the recommendation in the report by officials attached to the minute that the question of introducing a revised contract for new entrants should examined. Indeed, I think this should be treated as a matter of some urgency. We are all aware that the selective strike is being used increasingly by trade unions as a means of exerting maximum pressure at minimum cost. This is as true in the Civil Service as elsewhere, given our vulnerability in some areas to selective action by computer staff. So far, with existing weapons and a tough stance, we have managed to cope pretty adquately with the problems that have arisen. But that is no reason for not wanting to reinforce our armoury.

Changing the contracts of employment for new entrants will take some time to have effect - though less so for the clerical grades, which are the main problem, because staff turnover there is relatively high. If we are to take this step - and my initial reaction is that we should - we ought to make up our minds quickly.

I am sending copies of this minute to Christopher Soames, and to the recipients of his minute of 27 June.

NL

NIGEL LAWSON
8 July 1980

-8 JUL 1980

MO 20/17/6

PRIME MINISTER

CIVIL SERVANTS' CONTRACTS OF EMPLOYMENT

I have read with interest the Lord President's minute to you of 27th June and the report by officials which serves to highlight the very limited range of management options open to us in dealing with industrial action in the Civil Service.

2. I do not think that we can leave matters as they are. The private sector has rarely had to deal with this sort of action by non-industrial staff. As events at ROF Bishopton have recently demonstrated, TRD may be of only limited value and we must clearly increase the options at our disposal.

3. I agree that further examination of introducing a revised contract for new entrants would be worthwhile. But I would like to see us go well beyond this. At an earlier stage the consensus was against legislation but I suggest that we should think again so as to be ready to deal with the sort of dispute that poses a real threat to defence or to other vital areas of government activity. I would propose that officials should be invited to consider the shape of legislation that would be necessary to give us power in appropriate circumstances to lay-off non-industrial civil servants without pay.

4. I am sending copies of this minute to the Lord President; the Secretaries of State for Employment, for Scotland, and for Social Services; the Financial Secretary; and the Secretary of the Cabinet.

F.P.

Ministry of Defence

7th July 1980

- 8 JUL 1980

CONFIDENTIAL

cc J. Hoskyns.

PRIME MINISTER

CIVIL SERVANTS' CONTRACTS OF EMPLOYMENT

... I attach a report by officials on the scope for altering civil servants' contracts of employment so as to widen management's range of response to industrial action. This question is of particular interest in regard to lay-off without pay when work dries up because of the industrial action of other civil servants - an issue which has some topical relevance to the state of affairs at ROF Bishopton.

2. In the case of industrial civil servants, such lay-off is explicitly provided for. It can be done immediately if the lack of work is caused by the action of other industrials; after 28 days, if it is because of the action of non-industrials. Non-industrial staff, on the other hand, cannot be laid off under existing conditions. In this, they are on a par with white-collar workers in the private sector.

3. Unilateral variation of the contracts of non-industrials in order to change this position would call for legislation. As for attempting to proceed by agreement, the legal and management arguments against seeking to engineer changes in existing contracts (eg at the stage of promotion or of a general salary increase) seem to me decisive. The arguments against changing the terms to be offered to new entrants are much less decisive, but the impact of any changes would take a considerable time to permeate the grades concerned.

4. I conclude that we shall have to live with the existing range of management options in dealing with industrial action in the Civil Service, just as the private sector has to. There is room for other opinions, however, and I should be grateful to know whether you think the question ought to be discussed further, whether in E Committee or in E(CS).

5. I am sending copies of this minute and the report to members of E(CS) and to Sir Robert Armstrong.

S

SOAMES

27 June 1980

CONFIDENTIAL

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Report by the Official Committee (OCS))

INTRODUCTION

1. E(CS) has several times expressed concern that the restrictions imposed by civil servants' contracts of employment appear to impose unreasonable constraints on management's freedom of response to industrial action.

2. The Committee first considered the problem posed by management's inability to lay-off non-industrial staff without pay when work could not be provided because of the industrial action of other civil servants. The terms and conditions of service of non-industrial civil servants protect them against such lay-off (unlike industrial civil servants - see footnote Ø - but in line with practice in the private sector for white collar workers); and the Law Officers advised that there are major legal obstacles to imposing a <u>unilateral</u> change which would fundamentally alter the nature of the employee's rights. On the basis of the Law Officers' advice, E(CS) concluded (E(CS)(79)3rd meeting) that any general unilateral variation of contracts was not possible without legislation; they also decided that legislation to enable such a change to be made should not be contemplated.

Ø Industrial civil servants, on the hand, can be laid off without pay when there is no work because of the action of <u>other industrials</u>. Under the Agreement on Guarantee Payments, however, industrials can be paid for the first 28 days if there is no work because of the action of <u>non-industrials</u>.

3. E(CS) therefore instructed OCS to consider whether changes in contracts with the aim of minimising any restrictions might be secured by agreement - for example, for new entrants, on promotion, or at the time of a general salary increase. The aim would be not only to secure a right to lay off without pay but also to remove doubts about management's right to expect staff to work overtime and to require staff to undertake the work of a lower grade.

RECENT AND CURRENT INDUSTRIAL ACTION

4. As background to the main discussion, E(CS) might care to be reminded of recent industrial action and of the success or otherwise of the management responses adopted.

i. Department for National Savings (DNS); DHSS Local Offices

Staff who refused to work normally at the end of last year in protest about Civil Service manpower reductions were put on TRD. The staff affected in both Departments (600 in total) returned to work after a few days.

ii. TUC Day of Action

The 16,400 staff who took part lost pay (estimated saving in salaries was £310,000).

iii. ROF Bishopton

43 Professional and Technology (P & T) supervisory grades who have refused to operate a bonus scheme were placed on TRD some weeks ago. (Some of them were put on TRD after refusing to undertake the work of the lower grade P & Ts). Over 1,200 industrials have been laid off with pay as a result, in some cases for more than the 28 days provided for in the Agreement on Guarantee Payments.

iv. Customs and Excise

Staff at Felixstowe refused to work Sunday overtime. The Staff Side were reminded that overtime is obligatory and a refusal could be regarded as a disciplinary matter. As a result, the staff complied with the management direction. Staff at Portsmouth refused to report for an early shift and maintained their refusal until told that TRD was being contemplated.

5. The use of TRD in DNS and DHSS was encouraging and resulted in an early return to normal working. Similarly, the "no pay for no work" response to a one-day stoppage (TUC Day of Action) is seen to be a firm management action (publicity beforehand about the no pay rule may have prevented larger support for the stoppage). The Customs and Excise approach to limited industrial action (iv. above) appeared to be effective. The recent use of TRD (ROF Bishopton) is not so far encouraging. The P & T staff affected

are still on TRD, there are significant financial implications (because the industrial staff are still being paid after 28 days), and there is a loss of production.

6. It is difficult to draw general conclusions. In the case of ROF Bishopton, provisions in the conditions of service of the P & T grades concerned that they would not take industrial action and that they could be required to undertake the work of lower grades might have been helpful, but it is unlikely that these provisions would have prevented the industrial action. (E(CS) considered the question of no-strike agreements and came down against them, partly because of significant practical difficulties and partly because such agreements would only be achievable at an unacceptably high price - E(CS)(79)2nd meeting, Item 2).

RESTRICTIONS ON MANAGEMENT FREEDOM - THE LEGAL POSITION

7. Paragraphs 3 and 4 of Annex 'A' describe the legal relevance of civil servants' terms and conditions of service to management responses to industrial action.

8. The first sentence of paragraph 2 of Annex 'A' comments that the relationship between the Crown and its employees is assumed to be basically contractual (Law Officers' Joint Opinion of 2 October 1979). The important point is that, in common with most contracts of employment, those for civil servants do not give management freedom to do whatever it wants. Where it can be demonstrated that a civil servant is in fundamental breach of his contract of employment, it may be possible for management to dismiss staff lawfully, or send them home without pay (Temporary Relief from Duty (TRD)), or make deductions from their pay without sending them home (reduced pay options). In that important respect, management is not powerless (see paragraphs 4-6 above on recent industrial action). In practice it is common law and recent employment legislation which, taken together, determine management's freedom of response.

SCOPE OF THE OCS STUDY

9. Although paragraphs 4 to 6 show that management has available good responses to industrial action - despite legal restrictions found in the generality of contracts of employment and not just in those of civil servants - we have considered whether it might be possible to seek the agreed variation of existing individual contracts or to introduce new contracts for Civil Service recruits, with the aim of reducing the restrictions. To give one example by way of illustration, would it be helpful for contracts to make it clear that civil servants could be required, if necessary, to do the work of lower grades?

10. We concluded that, realistically, changes of the sort envisaged would be negotiable only at an unacceptably high price - in return, say, for an allowance, or for an enhanced salary. We

turned our attention, therefore, to the possibilities open to management to "engineer" agreed changes in contract conditions - for example, by exerting pressure on an individual to agree to a change in conditions of service either at a time of promotion or at the time of a general salary increase.

11. The position is rather different in the case of future recruits to the Civil Service. The individuals would have the choice of accepting the new different terms and conditions of service or declining the appointment.

12. The legal background to attempts by management to "engineer" agreed changes is set out in paragraphs 9 to 16 of Annex 'A' and paragraph 5 of Annex 'B'. Broadly speaking, it would be legally possible (to a greater extent in Scotland than in England and Wales) to seek to achieve agreement, by such means, to changes in a civil servant's terms and conditions of service.

13. Throughout the paper, references to agreed changes in contracts are references to changes which have or may acquire legal validity. Some of the methods which are discussed for "engineering" such changes may nevertheless be open to criticism. On this point, the views of the Attorney General are highly relevant. The Attorney General, when consulted during our study, expressed concern about the propriety of management adopting either of the options set out in paragraphs 14 and 15 of Annex A. These options relate to the introduction of new terms in favour of management at the stage of promotion or a general salary increase. The Attorney General's view is that the use of either would not escape justifiable criticism merely on the grounds that the change was or might become valid in law; it might still fairly be regarded as an unfair and unreasonable burden on individual civil servants in the sense that they had no real choice but to accept it in return for benefits which ought to have been theirs in any event.

14. The Lord Advocate, who was also consulted during our study, took the view that whether Civil Service management should proceed as suggested in paragraph 5 of Annex B is a matter for political decision. Nevertheless, he recognised the Attorney General's reasons for the advice set out in paragraph 13 above.

SEEKING TO "ENGINEER" AGREED CHANGES - MANAGEMENT AND PRACTICAL CONSIDERATIONS

15. There are management arguments both for and against bringing pressure to bear on staff to accept changes to their detriment.

16. In the case of existing contracts, the adoption of a policy to change contracts by such means might demonstrate that the Government, as an employer, intended to take a firmer stand in relation to industrial action by its employees. In addition, it would enable management to use the procedure for changing terms and conditions of service to make explicit some conditions of service which, in the view of management, are currently implicit.

For example, it is arguable that confirmation that staff would, on occasion, be required to undertake the work of the grade below is closely linked to the issue of promotion and that it could reasonably be insisted upon as a condition of promotion. A step to make such a condition explicit would leave the unions in no doubt about management's determination to use this power if it thought it appropriate.

17. On the other hand, there would be a good many practical difficulties to be overcome by management. Changes might take a long time to work through the system although this would depend on the stage at which they were introduced. If change was introduced at the point of promotion it would create two classes of staff in the higher grade because only some would be governed by the new obligations. Such discriminatory action might disturb working relationships in the office concerned for a long time. Apart from the practical disadvantages, a decision to adopt a policy of changing contracts by requiring staff to agree to changes in return for receiving promotion or a general salary increase, would considerably worsen industrial relations and not only on a short-term basis.

18. In the case of contracts for new entrants (either long term or period appointees) the management disadvantages though similar to those in paragraphs 16 and 17 are a good deal less acute. The distinction between new entrants and existing staff with preserved rights would be less open to attack than differences opened up between present staff. Some recruits might be deterred by the contract terms but it seems likely that these would in any case be a minority and particularly so in a time of high unemployment. The new contracts would take a long time to work through the whole system although the impact would be felt more quickly in the case of the main recruitment grades (the clerical grades, for example).

19. There must in any case be considerable doubt whether at the end of the day these changes would greatly strengthen management's position in dealing with industrial action. Management already has powers; the use of TRD, as shown in paragraph 5, has so far in most cases proved effective and there is also power (not so far used in the Civil Service but used in the National Health Service and available to us - E(CS)(80)3) to reduce pay if duties are not fully performed. It is true that power to lay staff off without pay when they were without work by reason of the industrial action of others might reduce the financial cost to management of some forms of selective industrial action - but at a cost in managerial and industrial relations terms which management might not wish to pay. Certainly the representatives of the private sector who were consulted said that they would never contemplate such action in respect of their white collar staff. There is no evidence yet that the existing management options are inadequate for dealing with industrial action and there is a case for saying that these should be further tested before taking a step into the unknown with what would, inevitably, be (at least as regards England and Wales) a limited change in contracts of employment.

SUMMARY AND CONCLUSIONS

20. This is a difficult and complex subject on which, perhaps understandably, the Official Committee did not reach firm conclusions. Civil servants' contracts of employment do restrict management's freedom of response to industrial action. However, restrictions are founded in common or statute law and are no more pronounced for the Civil Service as an employer than for other employers. The legal advice (Annexes 'A' and 'B') shows that it would be possible to go down the road of attempting to 'engineer' changes in contracts terms. In deciding whether or not to adopt that course, account must be taken of the Attorney General's strong doubts about the propriety of doing so, and of the management and practical considerations.

21. On balance, the weight of the management arguments is probably against seeking to 'engineer' agreed changes in existing contracts.

22. The position in the case of contracts for new entrants is different in the sense that the individuals can either accept the terms offered or decline the appointment. Legal difficulties are fewer, and the question of propriety does not arise. On the other hand, if they accepted the contract offered, some of the management disadvantages referred to in paragraph 17 would still apply (a divided Service, for example). There would also be an adverse reaction from the Civil Service unions.

23. Apart from the legal and management considerations, and the question of propriety, there are, of course, political arguments to which the Lord Advocate has drawn attention.

RECOMMENDATIONS

24. E(CS) is invited to discuss the possibility of seeking to 'engineer' agreed changes in Civil Service contracts of employment, and

i. to agree that the proposal should not be pursued in the case of existing contracts

ii. to agree that the question of introducing a revised contract for new entrants should be examined.

Civil Service Department
Whitehall
London SW1A 2AZ

June 1980

ANNEX A

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Note by the Treasury Solicitor)

Introduction

1. Although some of the legal rights and obligations of employer and employee may derive from statute or the common law, for the most part they are usually determined by the parties themselves in terms of the contract of employment. In order to ascertain what these terms are one needs to look primarily at the express provisions set out or incorporated in the contract. Where the contract is silent on any given issue a particular term may be implied by the common law or derive from the conduct of the parties. But in considering the employer's freedom of action against an employee one must first look at the express provisions of the contract itself.

2. The Law Officers, in the Joint Opinion of 1 October 1979 on the status of civil servants, make the assumption that the relationship between the Crown and its employees is basically contractual. Although the Opinion did not pursue the matter any further, it is considered that the express provisions of the contract of employment of a civil servant are to be found in the letter of appointment received by each new recruit, read together with the relevant terms and conditions set out or referred to in the Departmental Staff Handbook and the Civil Service Pay and Conditions of Service Code (both of which are referred to in the letter of appointment). In the course of time the express terms of the contract will almost always be varied in some respects - but the original contract will be found in the relevant parts of these documents (together with any documents referred to in the Code or the Handbook eg Staff Circulars). The provisions of the Staff Handbook and the Code are supplemented by guidance given to management (mainly in the Establishment Officers' Guide) but this is for the exclusive use of management and does not constitute part of a civil servant's terms and conditions of employment. However, to the

extent that management guidance can be said to reflect normal practice in the day to day work of a Department, eg in the allocation of duties between grades, it may be legally relevant.

General relevance of civil servants' terms and conditions of service to management response to industrial action

3. Like the contracts of employment of most white collar employees the terms and conditions of service of non-industrial civil servants are relevant in terms of management freedom of response in the negative sense that they do not expressly give management freedom to do whatever it might consider expedient. For example they do not expressly authorise departments to respond to industrial action by sending home without pay those who work selectively, or to lay off without pay those for whom there is no work, or unilaterally to alter the contractual rights of civil servants. This being the case it is the general law ie both the common law and recent employment legislation which determines management's freedom of response. But this does not mean that management are powerless. Depending on the nature of the industrial action and the circumstances of each case, management may lawfully dismiss staff, or send them home without pay (TRD) or make deductions from their pay without sending them home (reduced pay options).

4. These responses are available only where the civil servant is in fundamental breach of his contract of employment. In cases where the industrial action takes the form of staff refusing to do certain work, management must first be able to show that the work which the staff refused to do was that which they were legally obliged to do. Such an obligation may arise from the express provisions of the contract (eg where there is a job description which clearly embraces the work in question) or from a term implied by the common law or from custom and practice or from conduct of the particular employee indicating that he has accepted that he is obliged to do the work.

What duties is a civil servant obliged to perform?

5. In considering what duties a civil servant is obliged to perform it is necessary to distinguish between the obligations attaching to his present post or job and his potential obligation to take up other posts or jobs within the civil service. Every civil servant is a member of a grade which embraces a number of different types of job, and which therefore determines the type of job he can be posted to. Accordingly a non-industrial civil servant's potential obligations in the course of his career extend well beyond those relating to the particular post which he holds at a particular time. He may for example be liable to be transferred to a different department or, if he is in a mobile grade, to be posted to another part of the country. He may be posted to a job (within the same grade) the subject matter of which is very different from what he was used to in his previous job. The potential liability to be posted to another job within the overall terms of the contract always remains. However in determining what duties a civil servant is bound to perform at any one time it is necessary to look at the duties attached to the present job. First reference has to be made to the express provisions in the contractual documents - the letter of appointment, Staff Handbook etc, the Civil Service Pay and Conditions of Service Code. It is unlikely however that these documents alone will provide a sufficient answer as to what the civil servant is obliged to do and it is necessary to look for other indicators. The starting point is to look at what he actually does. If an employee normally carries out certain duties on behalf of an employer this is a very strong indication that those duties are ones which the employee has accepted that he is obliged to perform. There may however be an element of goodwill over and above his contractual obligations which he can withdraw without breaching his contract. For example an employee might frequently work overtime when the needs of the job appear to require it but it does not necessarily follow that the frequency of such overtime working alters the voluntary character of the overtime in the particular case.

6. The extent of an employee's obligations may not be limited to the duties which he has so far been called upon to perform. There may be work which the employee would be obliged to perform but which he has not yet been required to perform. The needs of management will change and so too will the work required to be performed. The question will be whether particular work is within the ambit of his duties. In the civil service it is likely that the outer limit of his duties will be ascertained by reference to the grade of the individual civil servant. Because of the importance of the grading structure within the civil service it is likely that an industrial tribunal would hold that a civil servant's obligations cannot extend beyond those appropriate to his grade unless there is an express contractual provision or established practice to the effect that he is obliged to perform the duties appropriate to a higher or lower grade where necessary. In this connection it should be noted that while the courts have been willing to elaborate the employee's obligations of cooperation and of fidelity they have tended to resist arguments for implied terms giving employers the right to alter his job specification.

7. In ascertaining in a particular case what duties are within the ambit of the job reference may be made not only to what he has actually been doing but also to job descriptions contained in recruitment literature, management circulars and annual staff reports. Such job descriptions are unlikely to be incorporated into the contract as such but will be of evidentiary value as to what the contractual scope of the job is. Such job descriptions should not be given a strained interpretation in order to include obligations which are unlikely to be accepted by reasonable staff as being within the scope of their obligations. At the same time it is not necessary to construe job descriptions so narrowly that tasks reasonably within the ambit of the individual civil servant's general duties are thereby excluded.

8. Paragraphs 5 to 7 above necessarily provide only very general guidelines. Whether a task is within the ambit of a civil servant's duties can only be determined in the light of all the relevant facts and circumstances.

<u>Changing a civil servant's terms and conditions of service to give management greater freedom of response to industrial action</u>

9. The agreement of both parties to a contract of employment is needed for any material change in the employee's terms and conditions of service - unless the contract of employment expressly authorises the employer to make unilateral variations or the change is effected by legislation. Although in their letters of appointment civil servants are informed of the claimed right of the Crown to alter any term of service unilaterally, the effect of the Attorney General's advice in the Joint Opinion of 1 October 1979 is that it is doubtful whether the Crown can (without resorting to dismissal and re-engagement) impose different terms if these were to fundamentally alter the nature of the employee's rights since the employee must have the opportunity to refuse further service on the new terms.

10. Before dealing with the question of what is a material change in terms and conditions of service it is necessary to note that a distinction can be drawn between contractual terms and conditions of service, properly so called, and what are merely lawful orders which the employer is authorised by the common law to give to his staff. These "standing orders" or "working rules" will normally be clearly recognisable as such since they will deal with such matters as whether (for health or hygiene reasons) employees must wear protective clothing, whether male office staff must wear suits, the extent to which staff may be required to share office accommodation with others etc etc. These instructions are not normally made part of the contractual terms and conditions of service and accordingly are within the prerogative of the employer - for which reason they may be unilaterally changed from time to time, so long as they are reasonable.

11. If what an employer seeks to vary unilaterally is not a working rule within the meaning of the preceding paragraph but a term or condition of service, the employee will be in a position to allege that the attempt to impose the change amounts to a wrongful repudiation by the employer of his contractual obligations. The question which then arises is whether the variation is sufficiently significant to amount in law to a wrongful repudiation. If the variation is fundamental ie if it is a variation of a fundamental term of the contract it will clearly amount to wrongful repudiation - in which case the employee may leave and claim constructive unfair dismissal. But it can also be argued that the deliberateness of the attempt by the employer to impose a change makes the variation into a repudiation irrespective of its magnitude. In this connection recent case law seems to indicate that if an imposed variation is held to be outside the latitude allowed by the contract of employment, that very fact may demonstrate the repudiatory character of the employer's conduct - provided that the change is not insignificant ie trivial. But these statements are of necessity of general application and the case law clearly shows that whether a particular attempt to impose a unilateral variation does amount to a wrongful repudiation by the employer will depend on all the facts of the particular case.

12. Although an attempt unilaterally to change the nature of the employee's work will normally amount to a wrongful repudiation by the employer, eg by switching an employee from skilled to unskilled work, the employer has a general right to control the method of doing the work. Since he can give instructions as to how the work is to be done, it follows that he has the right to change the instructions. Where any change involves traditional methods of working there will be no difficulty. But the position becomes more complicated when the change involves the use of machines which require some degree of skill and training. In the absence of any case law on "new technology" issues it is considered likely that the courts

would in most circumstances permit the employer to require his employees to utilise mechanical aids - provided that their use does not alter the whole nature of the job ie make it difficult to maintainthat the job remains the same.

13. It is important to bear in mind that the legal consequences of an attempt by the employer unilaterally to alter any term or condition of service (where this amounts to wrongful repudiation) will depend on the response of the employees affected. An employee may by his conduct be regarded as having tacitly approved the change - thereby making it consensual - or as being estopped by his conduct from claiming that it does not bind him. Or he may continue to work but make it clear that he does not accept the change, in which case he would remain free eg to sue for arrears of pay withheld if the change had been a reduction in his salary. Finally, if because of the change he leaves his employment he will be able to claim constructive unfair dismissal. If the change was repudiatory and significant then, unless the employer can satisfy the Tribunal that there were good grounds for justifying the change, the Tribunal will normally hold the constructive dismissal to be unfair. The chances of avoiding such a decision are greatly increased if the employer can show that a large majority of the staff affected have accepted the change.

14. Given that the terms and conditions of service of civil servants cannot be materially changed unilaterally, the question arises whether there is any stage (other than termination of the employment relationship) which could provide an "entry point" for Departments lawfully to require a civil servant to accept a material change. Promotion might afford an opportunity - particularly if the correct legal analysis of promotion is that it necessarily entails the formation of a new contract, because that would enable the employer to require the employee to accept other terms (not arising out of the promotion) which were not in the previous contract. In legal terms if it is the case that a new contract is formed then none of the terms of

the previous contract retain their effect except to the extent that they are expressed or implied in the new contract. Although there are judicial decisions which deal with promotion the issue in these cases arose in entirely different contexts, and different judges have taken different views, so that it can be said that the decided cases have not produced any ruling principle of general application. It is, however, considered that a tenable test is whether the change necessitated by the promotion is great enough to have altered the whole nature of the employment, so that only if it has will a new contract be regarded as having been formed. If this test is applied to the majority of civil service promotions the answer will usually be in the negative because where eg an Assistant Secretary is promoted to Under Secretary (even if posted to another Department) he will still be employed as a civil servant administrator albeit at a higher rank. Also relevant is that as a matter of civil service practice an officer on promotion is not treated as if he is entering into a new contract; he is not eg given on promotion a fresh letter of appointment in terms similar to his original letter of appointment. Generally, it is considered on balance that the sounder (and the more realistic) view is that promotion usually amounts to a consensual variation of the original contract of employment and not the replacement of the original contract by a new contract.

15. A possible "entry point" of a different kind is where, although the existing contract continues, there is a proposal by the employer to make a change which is beneficial to the employee and which the employer is not obliged to make, eg individual promotion or a general salary increase - so that the employer may say: "I am considering conferring this benefit on you (which I am not obliged to confer) but I will do so only in return for your agreeing to accept the following change in your general terms and conditions of service". Where the employee accepts the change in his general terms and conditions of service (in return for the benefit) the contract will have been varied consensually and the employer will therefore be

able to invoke the change which he has achieved. But if the employee refuses to accept the change and the employer withholds the benefit the employer could, depending on the actual circumstances, be vulnerable to a claim of unfair constructive dismissal if the employee leaves in protest. This is because, in a case of refused promotion the courts (on the grounds that it is reasonable to do so) may well infer a term into the contract of employment that a person recognised by management as otherwise fit for promotion shall not be deprived of it on entirely extraneous grounds ie for refusing to accept an unrelated variation which the employer could not lawfully impose in other circumstances. A great deal would depend on the question whether the change sought by the employer could be reasonably said to be related to the promotion, and to be a reasonable change ie one which could be justified by the employer on reasonable grounds. Although it could be argued that it would be reasonable to make it one of the conditions of his promoted employment that a civil servant should be willing to carry out his "ante-promotion" duties when necessary, it would be difficult to maintain that the same argument applied where the change sought by the employer was that the employee should cease to be entitled to be paid any salary for any period after his promotion when there was no work for him to do because of industrial action by others.

16. Although different considerations arise where the occasion was a general salary increase there would still be a degree of risk where the change sought by the employer is not accepted by the employee. The Employment Appeal Tribunal has in at least two cases (Pepper & Hope v Daish 1980 IRLR 13, and F C Gardner Ltd v Beresford 1978 IRLR 63) stated that where an employee leaves his employment because he has not been given a general increase in salary paid to his colleagues, this can amount to unfair constructive dismissal. In the earlier case

the Tribunal formulated the general proposition that it would be reasonable in most circumstances to infer a term into the contract of employment to the effect that "an employer will not treat his employees arbitrarily, capriciously or inequitably in matters of remuneration". Although a condition that a detrimental change should be accepted by all civil servants eligible for a general pay increase would be clearly distinguishable from the two cases mentioned above, it is not inconceivable that a Tribunal would hold that the test quoted above nevertheless applied and that the denial of a general pay increase to staff who refused to accept the change was inequitable and, accordingly, amounted to a breach of the implied term - at least where the change sought by the employer was fundamental, extraneous (ie unrelated) to the pay increase, and not justifiable on other grounds considered by the Tribunal to be reasonable. A genuine package deal eg a gratuitous salary increase coupled with abolition of certain allowances is clearly permissible. The same would apply where the change was otherwise related to the increase eg insistence on increased productivity to help pay for the increase. But denial of a general increase to staff who refused to accept a new term of service under which they could be laid off without pay where there was no work for them as a result of industrial action by others might well be held to amount to arbitrary, capricious or inequitable treatment so as to bring about a constructive dismissal where the employee left in protest. Here again a great deal would depend on the particular circumstances and, in particular, on the general response of the staff involved.

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Note by the Lord Advocate's Department)

1. This note sets out the general legal position in Scotland, which management must take into account when considering any variation in the terms and conditions of service of civil servants.

2. For the purposes of this note it is assumed that the relationship between the Crown and the civil servant is contractual.

3. The content of any contract must be agreed between the parties at its commencement.

4. Any alteration to the contract, whether proposed by the employer or the employee, must be agreed by both parties, either expressly or impliedly.

5. Every agreed variation is a new contract. In offering such a new contract, (e.g., in conjunction with a salary increase or on promotion), the employer can propose whatever changes he wishes. Provided (a) that every employee is treated on the same basis as all other employees in a similar position and (b) that any employee is entitled to continue in his existing job on the existing terms, this is a legitimate way for the employer to proceed.

30 JUN 1980

Grey Scale #13

A	1	2	3	4	5	6	M	8	9	10	11	12	13	14	15	B	17	18	19

Blue Cyan Green Yellow

Colour Chart #13

Centimetres