Advisory, Conciliation and Arbitration Service

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29 June 1979

Rt Hon James Prior MP PC
Secretary of State for Employment
8 St James's Square
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Dear Mr Prior,

In its annual report for 1978 the Council commented on the operation of the statutory provisions for dealing with trade union recognition issues. The Council said that the Service's essentially voluntary role in conciliation and the provision of advice did "not sit easily with the statutory duties in Sections 11 - 16 of the Employment Protection Act". A number of factors contributed to this view and there have since been developments which have deepened the Council's uneasiness. The Council considered the matter further at its meeting on 27 June and desired that I should write to you to draw your attention to its views.

The Service has always approached its duties under the statutory provisions in the generally held belief that the best means of resolving industrial relations problems is by voluntary agreement. In fact, over 80 per cent of the references on which ACAS action has been completed have been settled voluntarily, ie the reference has been withdrawn and no report issued under Section 12. As a result of such settlements by 31 December 1978 some form of collective bargaining has been extended to over 40,000 employees. This compares with the total of just over 10,000 who have obtained the benefits of collective bargaining through the 20 per cent of references which have gone through the full statutory procedure and resulted in reports published under Section 12.

During the same period, considerably more recognition issues were referred to the Service under the voluntary provisions of Section 2 of the Act than were referred under Section 11 (although some Section 2 references do in fact become Section 11 references where the trade union fails to secure recognition through the former). The table below shows the comparative figures from February 1976 to 31 May 1979.

	Section 2	Section 11
1976	769	461 (in 11 months)
1977	677	577
1978	539	279
1979 (in 5 months)	205	99

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In seeking to promote the settlement by agreement of recognition issues referred under the statutory provisions the Service has acted in the belief that ACAS was invested by Parliament with considerable discretion as to how it conducted its affairs. The Council understood that its constitution reflected Parliament's intention to bring together the collective wisdom of both sides of industry with a view to enabling the Service to carry out its general duties under Section 1(2) of the Act. This belief is reinforced by the provisions in the Act relating to the Service's functions of conciliation, arbitration, advice and inquiry and the preparation of codes of practice, all of which allow the Service to exercise discretion in carrying out its duties.

The statutory provisions on trade union recognition also allow for the Service to exercise an element of discretion in carrying out its duties. Under these provisions the Service has to consult all parties who it considers will be affected by the outcome of a reference and to "make such inquiries as it thinks fit". The Service has also to ascertain the opinions of workers to whom an issue relates "by any means it thinks fit". The Service was therefore intended to have a considerable degree of discretion in carrying out not only its general duties under Section 1(2) but also its specific duties under Sections 11 to 14 of the Act.

A body such as the Council of ACAS requires this discretion in order to function properly. To reconcile the conflicting approaches of the two sides of industry to a matter like trade union recognition the Service has to find ways in which compromises can be reached. This essential discretion is now seen, as a result of judicial decisions, to be much narrower than the Service originally understood was Parliament's intention. The Council has become increasingly conscious of the growing incompatibility between some of its statutory duties and the actions it would have preferred to take on the grounds of good industrial relations practice. Finally, the continued operation of the Council has been brought into question as a result of judicial comment on the role of Council members, requiring it to adopt a much more constrained legal procedure.

(1)

The Council, it should be clear, is not here commenting on the substance of the judicial decisions but on their effect on the practical operation of the Council and the Service. The Council is, however, concerned that its effectiveness in developing the voluntary approach to industrial relations problems is being undermined by the impression which is created by the number of cases under Section 11 in which we are involved in the Courts.

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The Council believes that some of the duties imposed on the Service by the provisions of Sections 11 - 14 are not necessarily compatible with its duty to promote the improvement of industrial relations. For example, the Service has a duty to pursue and complete any reference made to it in respect of any group of workers that a trade union cares to define. In some instances, for the Service to proceed with these duties will be injurious to good industrial relations. The Service, however, has no discretion not to proceed however much it believes that its intervention would be harmful. This is particularly so in cases of competitive claims by unions which the Act appears to have encouraged. Examples have been seen in the water industry and amongst polytechnic teachers where the Act has been used as a vehicle for outside unions to challenge those already recognised by the employer through existing collective bargaining machinery.

The Grunwick case established that the Service has a mandatory duty to ascertain the opinions of workers to whom a recognition issue relates. The statute provides for no discretion, so that even where an employer or a union refuses co-operation, the Service is left with a duty it cannot perform. The procedures are therefore statutorily binding on ACAS whilst leaving employers and unions free to co-operate with the Service on a voluntary basis. In some cases this has resulted in ACAS being unable to report under Section 12 of the Act, (as with the Michelin and Grunwick cases).

The Court of Appeal in the UKAPE/W H Allen case, in addition to the matters discussed below, has said that the Service is obliged to make findings on a whole series of matters which it may consider irrelevant or unnecessary and in some cases harmful to industrial relations. For example, the Service could be required to pronounce on the appropriateness of a trade union for a particular group of workers. This would be quite contrary to the normal traditions of British industrial relations where trade unions organise on the basis of spheres of influence rather than on imposed structural criteria. Similarly, the Service could be required to pronounce on the appropriateness of a particular bargaining group even in cases where it does not intend to make a recommendation. This could prejudice the emergence of a more appropriate grouping in future.

On the other hand, the Act gives ACAS no guidance as to the criteria to be adopted in determining a bargaining group or the level of support which it should consider appropriate in

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deciding a recognition issue beyond the general formulations in Section 1. Nor has it been possible for the Council to agree on any such criteria which would be generally applicable. The absence of criteria has made the decision-making duty of the Council increasingly difficult, and one which can only be carried out at all by the exercise of a wide discretion. As time passes without criteria, the risk increases of the Council making apparently conflicting decisions on similar facts which may lead to the Council appearing to outsiders to be inequitable or partisan to the detriment of the impartial traditions of the Service in other areas such as conciliation and advisory work. There is also the risk of the Council being unable to reach, in some cases, agreed conclusions.

(2) The Council accepts that the exercise of any discretion invested in ACAS by Parliament can be subjected to scrutiny by the Courts but such legal decisions are now having a serious effect on the way in which the Service carries out its duties. Thus, in the UKAPE/W H Allen case, ACAS was held to have failed to take into account a number of factors which the Court considered to be relevant and moreover took the view that ACAS had exercised its discretion unreasonably by taking into account certain other factors, such as threats of industrial action. If this decision is upheld by the House of Lords, the Service will be further inhibited in exercising its industrial relations judgment in recognition cases. It might lead to the Service being required to recommend the break-up of existing negotiating machinery or the fragmentation of the existing grouping of an employer's work-force and could reduce the Service to the role of a balloting agent.

Similarly, in the recent case brought against the Service by the Engineers' and Managers' Association, the discretion which the Service believes it possesses to defer proceeding with its inquiries whilst there is a relevant unresolved issue being considered through the TUC's Bridlington procedures (or any other established procedures) was removed. This could undermine those voluntary procedures by providing an alternative route for dealing with the problem. This development runs counter to the general approach to industrial relations problems, both by ACAS and by its predecessors in the Government Service since 1896, that issues should be settled by the parties through the various agreed voluntary procedures before third parties intervene. This loss of discretion to defer carrying out part of the statutory procedures also seems likely to apply in all cases where the Service would prefer on industrial relations grounds to await the outcome of other relevant developments before proceeding.

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The Courts have now confirmed that ACAS is to be regarded as a tribunal when considering recognition issues. All the legal rules and principles of tribunals should be applied. There is therefore a risk that many decisions of the Service might be challenged because Council members have taken part in decisions in which, it might be alleged, they have a vested interest. Given the nature of the constitution of the Council, which the statute intends should draw experience from both sides of industry, it is clearly unrealistic to expect some of those same members not to take part in the deliberations on an important industrial relations matter. In the view of the Council it would be contrary to the intentions of Parliament expressed in Schedule 1 to the Act that certain members should be disenfranchised. Should that remain the position the Council could not continue to function.

The experiences of three years of operation of the statutory procedures have shown the difficulties of operating without criteria and the damaging effect on industrial relations which can result from the Courts' interpretation of the statute. The Service's ability to exercise its own judgments in recognition matters has always been circumscribed by the legislation. The discretion of the Council has been further limited by the decisions of the Courts which have made it progressively more difficult for the Council to exercise its industrial relations judgment in reaching decisions on recognition issues. Even the functioning of the Council is likely to become impracticable as a result of its being deemed to be acting in a judicial capacity. The Council therefore wishes me to advise you that in the light of the increasing difficulties which it is encountering it cannot satisfactorily operate the statutory recognition procedures as they stand.

Yours sincerely

J E Mortimer