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Tim Lankester Esq
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2 July 1980

Dear Tim,

EMPLOYMENT BILL: CLAUSE 17

You asked for comments on the letters from Sir John Stebbings (18 June), Mr Peter Taylor QC (25 June) and Mr Thomas Morison QC (25 June) on this subject and for draft replies for the Prime Minister to send.

The letters from Sir John Stebbings and Mr Taylor make the same points. They appear to have been written in a personal, not a representative, capacity. They are unclear in a number of respects. For example, both letters seem to confuse picketing (covered by Clause 16) with other forms of secondary action, such as blacking and sympathetic strikes (covered by Clause 17). Their criticism of Clause 17 takes the same line as several recent letters to the Times and presents the case for a quite different policy (namely, limiting immunity to primary action alone) as if it were simply a matter of producing a clearer draft of the Clause. On one point the letter from Sir John Stebbings is plainly wrong; the test of "likely effect" in subsection 3(b) is objective, not subjective. Both letters, while disclaiming any wish to comment on matters of policy, endorse the amendments tabled at Committee Stage in the Lords by Lord Orr-Ewing and others, the effect of which would be to cut immunity back to primary action alone.

The draft reply to Sir John Stebbings has been approved by the Lord Chancellor and incorporates amendments suggested by him. As Mr Taylor's letter makes no additional points, it is suggested that the Prime Minister should reply to Mr Taylor in the terms of the attached draft, enclosing a copy of her letter to Sir John. The draft letter to Sir John Stebbings also takes account of comments just received from the Law Officers.

The letter from Mr Morison contains more detailed points, but he has already raised most of these with Ministers here at earlier stages in the preparation of Clause 17 and we do not believe that his criticisms are well founded. However, the Secretary of State has asked Mr Mayhew to arrange an urgent meeting with Mr Morison to discuss the points in his letter. Accordingly, I enclose a shorter draft reply for the Prime Minister to send to Mr Morison.

The Secretary of State has also asked Mr Mayhew to meet Sir John Stebbings and Mr Taylor later this week in order to explain the Government's approach in this Clause in greater detail before the Report Stage in the Lords next week. So if the Prime Minister approves the draft replies it would be helpful if they could be despatched quickly.

I am sending copies of this letter to the private secretaries to the Lord Chancellor, the Attorney General and the Lord Advocate.

Yours ever

Richard Dykes

R T B DYKES
Principal Private Secretary

DRAFT LETTER FROM THE PRIME MINISTER TO SIR JOHN STEBBINGS, PRESIDENT OF THE LAW SOCIETY

Thank you for your letter of 18 June on Clause 17 of the Employment Bill. This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Perhaps I may take the points in your letter in the order in which you make them.

First, you refer to the law being held up to public ridicule in the sphere of picketing. I imagine that you are referring in particular to the excesses of secondary picketing which accompanied the strikes of the winter of 1978-79 and of which the more recent Steel and Isle of Grain disputes have afforded further examples. Much that was seen to occur on these occasions was, and remains, contrary to the criminal law already. But it is not the case, as your letter seems to suggest, that the Employment Bill does nothing to tackle secondary picketing. On the contrary, Clause 16 of the Bill specifically withdraws immunity from all picketing which does not take place at the picket's own place of work. It thus effectively makes all picketing other than at the picket's own place of work - including flying pickets - unlawful. Clause 17 is concerned primarily with other forms of secondary action - particularly blacking and so-called "sympathetic" strikes.

Secondly, you ask whether Clause 17 is intended to grant rights or limit immunities. The rights are already available at Common Law provided the immunities are successfully restricted. I am sure that I do not need to point out that it is the present statutes whose implications were spelt out so clearly in the MacShane and Duport Steel cases, which unfortunately confer a virtually unlimited immunity for

industrial action, however remote from the original dispute and however slight its connection with it. It is that licence to spread industrial disruption far and wide "in contemplation or furtherance of a trade dispute" which is restricted by our Clause 17. The clause will enable employers to claim the protection of the law against damaging secondary action if they are not themselves parties to the original dispute or in a direct and active business relationship with the employer in that dispute. Moreover, in future, secondary action will have to be directed at business which is actually being carried out during the dispute with that employer. Thus, even employers who supply goods to or receive goods from the employer in the course of the dispute will be protected against secondary action which is not targeted on their actual business with the employer in dispute. This represents a very considerable restriction of the existing immunity. The drafting is unavoidably (though not unusually) complex, but the Parliamentary debates on the Bill and the reports of recent trade union conferences have indicated that the full extent to which clause 17 draws back the present immunity is being more widely recognised. I therefore cannot accept that it "endorses the right to indulge in secondary action of the widest nature".

Clause 17 represents the Government's considered view of how far it is right and practicable to go in this Bill in restricting secondary action. It reflects the outcome of the extensive consultations on the Working Paper which preceded the drafting and resulted in a considerable strengthening of the original proposals. The principle is clear and straightforward. Industrial action should have immunity only in so far as it is aimed directly at the business of the employer in the original dispute. This is a principle easily understood in industrial

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terms and in the vast majority of cases it is employers and trade unionists - not the courts - who will have to apply the legislation. We believe that as drafted this clause will ensure that there is adequate protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern. As you know, we have undertaken to publish in the autumn a Green Paper on the whole question of trade union immunities and we do not close the door on further legislation if it is found to be necessary.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft but the policy they embody is quite different. The Government have stated in the House of Lords that in their view this would in effect restrict immunity to industrial action by employees of a party to the dispute, that is, to primary action alone. Whatever may be argued for that - and the Green Paper will enable an informed debate - there is no doubt that a total ban on secondary action would directly conflict with the strong tradition of sympathetic action and would give rise to a real danger of a concerted campaign to make the Bill unworkable. Nothing is more likely to bring the law into disrepute than for it to be flagrantly disobeyed or if the remedies it provides are not used by those people it is designed to help, as happened with the 1971 Act.

Turning to your specific criticisms, you fear that it will easily be evaded and suggest that the tests of purpose and of likely effect in subsection 3 are both "subjective", in the sense that the courts will simply rely on the honest belief of the trade union defendant. In fact, the test of "likely effect" has been drafted so as to make it clear that it is to be treated objectively. It will not be possible

for a defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. And the test of "likely effect" will require the court to reach an objective view of the likely effects of the action. The operation of the clause therefore depends on the interaction of the tests of "purpose" and "likely effect".

It is, of course, quite common for the courts to have regard to the likely effects of a particular course of action when deciding whether to grant an interim injunction. Indeed the granting of an injunction often depends (as in the recent case of Express Newspapers v Keys) on the court's assessment of what damage would otherwise be caused to the plaintiff. We do not believe that Clause 17 will be easily evaded or that it will set the courts an impossible task or ask them to decide questions which are different in kind from those they have been asked to decide in the past.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.

I hope that I have been able to set at rest your fears about the way in which Clause 17 will operate in practice. Jim Prior (to whom you sent a copy of your letter) would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR PETER TAYLOR QC FROM THE PRIME MINISTER

Thank you for your letter of 25 June about Clause 17 of the Employment Bill.

I enclose a copy of the letter that I have written to Sir John Stebbings explaining the Government's approach to this issue and why we believe the fears expressed about the drafting and effectiveness of Clause 17 are misplaced. I hope that this explanation will allay the concerns you mentioned in your own letter.

Jim Prior would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR THOMAS MORISON QC FROM THE PRIME MINISTER

Thank you for your letter about Clause 17 of the Employment Bill on secondary action.

This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Clause 17 requires secondary action which interferes with commercial contracts to be targeted very precisely on the supply of goods or services going to or from the employer in dispute. It provides no immunity for secondary action beyond the employees of the customer or supplier who has a current contract with the employer in dispute at the time of the dispute; and even action by employees of such first customers and suppliers must have as its principal purpose and likely effect directly preventing or disrupting the supply of goods or services during the dispute between the employer in dispute and his customer or supplier.

The Clause is not therefore intended to allow secondary action whose purpose is to give moral support to the employees in dispute or to prevent the making of a contract. Such action would fail the test of principal purpose set out in subsection (3) of Clause 17 and, if it interfered with commercial contracts, would have no immunity. Our advice is that the courts are very unlikely to take as narrow a view as you suggest of whether the test of "purpose" has been satisfied. But even if they did, the test of "likely effect" should ensure that they look beyond the test of "purpose" and consider objectively, on the facts before them, whether that purpose is likely to be achieved.

Nor in our view will someone organising sympathetic strikes or other supportiv action at second, third or fourth suppliers be able to avoid liability under the clause because of any difficulty in establishing the connection between secondary action and interference with commercial contracts. Most secondary action has as o

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of its main aims interference with the commercial business of the employers concerned.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft, but the policy they embody is quite different. For all practical purposes they would remove immunity from all but primary action. Whatever may be argued for that - and the Green Paper will enable an informed debate - that is not the policy that the Government have decided to adopt in this Bill.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.

MR. GOW

to its responsibilities and then we can truly earn the headline which was prominent last week and we can say: "Lords to the Rescue". I beg to move.

10.8 p.m.

Lord SPENS: I want to support this amendment. I hope to claim some credit for its construction. When our group were thinking about what we should do about Clause 16, it was rather opportune that a letter appeared in *The Times* signed by Mr. Alan Campbell Q.C. which, if I may quote from his introduction, said:

"An examination of the complex provisions of Clause 16 of the Employment Bill reveals an intention to reflect the 'first supplier first customer' concept; to entrench the legality of all industrial action within this ambit; also to legalise the 'repercussive' effect of such action against third parties".

That is a letter of 27th May. That letter confirmed the views that I had taken about this clause, that it is much too complicated as it has been drafted and, much more than that, I dislike the way that it appears to entrench positively in statute law immunities for the trade unions. I do not believe that they have been so far entrenched positively before. If one looks at subsection (3) it says:

"Secondary action satisfies the requirements of this subsection if . . ."

and subsection (4) is similar. Subsection (5) is similar. These entrenchments are being made by a Conservative Government, and that to my mind means that—

The Earl of GOWRIE: If I may, I should like to make the point that the kind of immunities the noble Lord referred to have been entrenched in law ever since the Liberal Government of 1906.

Lord SPENS: Yes, I realise there have been entrenchments, but what worries me is that these entrenchments are about to be made by a Conservative Government, because once a Conservative Government has made these positive entrenchments it is going to be extraordinarily difficult ever to get them altered. No future Labour Government will want to alter them, and it is going to be very difficult to find a future Conservative Government who will want to alter them. Therefore it seemed to me that this entrenchment of immunities was a dangerous thing and so I set about trying to draft a much simpler clause and I gave it to my noble friend Lord Orr-Ewing. At the same time he was having similar thoughts on the subject, and together we produced the amendments that are now before your Lordships.

If I may just indicate the effect, Clause 16 will now read:

"Nothing in Section 13 of the 1974 Act shall prevent an act from being actionable in tort on a ground specified in subsection (1)(*a*) or (*b*) of that section in any case where—

(*a*) the contract concerned is not a contract of employment, and

(*b*) one of the facts relied upon for the purpose of establishing liability is that there has been secondary action as defined, and

(*c*) the person claiming the benefit of this section is not a party to the dispute".

Subsection (2) we leave as it is; and we take out, or hope to take out, subsection (3), (4), (5) and (6).

Having tabled these amendments and I was delighted to read a letter on Tuesday of this week in the *Daily Telegraph* from Edward Grayson, saying:

"These amendments to Clause 16 provide with the most admirable simplicity and clarity that Section 13 of the Trade Union Relations Act 1974 will not apply, and a person will therefore be able to pursue his common law rights when he is

(*a*) suing for interference with a contract other than a contract of employment (e.g. a commercial contract);

(*b*) relying upon secondary action as defined in subsection (2) of the existing Clause 16, and

(*c*) himself not a party to the dispute".

So we have got a positive acclaim from Mr. Grayson that we have done what we had hoped in the form of making Clause 16 simple and also, I think, more effective than the present Clause 16 will be. I therefore support the amendment.

Lord HANKEY: I should like to support my noble friends in putting forward these amendments. I see great difficulty in the present text of Clause 16. I have had to spend years of my life arguing with foreigners about the meaning of various texts of treaties and so on. My experience is that people are confused whenever anything is very complicated. In particular, the French always make rings round everybody else, and so do the Russians. It is true that we do not deal with the French and the Russians, but when you mislead a lot of people by the