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19 November 1979

CABINET

INDUSTRIAL RELATIONS LEGISLATION

Memorandum by the Secretary of State for Employment

INDUSTRIAL RELATIONS LEGISLATION

1. I set out below my legislative proposals on amendments to the employment protection legislation, on the Society of Lithographic Artists, Designers, Engravers and Process Workers (SLADE), on the closed shop conscience clause and on the handling of general union immunities.

2. The consultations on the employment protection proposals are not completed, but, if I am to introduce the Employment Bill as intended on 6 December for Second Reading before the Recess, we must take decisions now. We have sufficient knowledge of industry's views to do that.

AMENDMENTS TO INDIVIDUAL EMPLOYEE RIGHTS

3. The comments on these consultative proposals so far received from the Confederation of British Industry (CBI) informally and from some other employers' associations, including those of small businesses, have been generally favourable. Together with the two Orders now in operation which increased the qualifying period for applications for unfair dismissal and modified the requirements in regard to consultation on redundancies, the measures have been accepted as going a long way to meet the main concerns about the employment protection legislation voiced by employers.

4. The Trades Union Congress (TUC) have not yet been able to let me have their views (their Employment Policy Committee meets on 21 November). They have, however, been publicly hostile to the proposals which they represent as helping the bad employer and constituting a sell-out by the Government to the CBI.

5. I now propose to go ahead with all the proposals on which I have consulted, subject to the case of the maternity provisions to:-

i. placing the obligation on the mother to provide the additional notification of intention to return to work only if the employer so requests it and 9 weeks (not 6 weeks) after her confinement. These modifications have been suggested by employers' representatives.

ii. Dropping the proposed exemption for firms with less than 20 employees from the obligation to reinstate or re-engage the mother if it is not reasonably practicable to do so. This suggestion was put forward in my working paper in a more tentative fashion and at the request of the Secretary of State for Industry. It has evoked more protest than any of the other proposals, and the criticism has come from both sides of industry, and also from sections of our own Party. The main objection is that (unlike my other proposed exemption for small firms in the first two years of trading) it would create two classes of employee on a permanent basis. From the employer's point of view, the concession may prove in any event to be of limited value since the onus will be on him to show - if necessary at a tribunal - that he qualified in all respects for the exemption.

My legislative proposals are listed in the Annex.

UNION RECOGNITION DISPUTES

6. The Council of the Advisory, Conciliation and Arbitration Service (ACAS) have made clear that they cannot satisfactorily operate the existing statutory requirements for dealing with union recognition disputes (Sections 11-16 of the Employment Protection Act 1975). The two practicable alternatives are either to repeal these requirements or substantially modify them so as to try to make them workable. The modifications required would be to give ACAS greater discretion and/or greater powers. I am not prepared to contemplate modification in the latter regard and I do not think that the former would provide an effective procedure or solve ACAS' problems. I therefore propose to repeal the statutory provisions which is the course favoured by the CBI. The TUC will oppose this and will in addition argue that legislation in this area now would be premature; but I do not expect them to come up with a generally acceptable alternative.

STATUTORY EXTENSION OF TERMS AND CONDITIONS OF EMPLOYMENT

7. Most criticism of Schedule 11 of the Employment Protection Act 1975 has centred on the provision which enables the "general level" of terms and conditions in the local trade or industry to be imposed on the employer. The CBI have urged repeal of this provision on the grounds that awards can disrupt company pay structures and damage industrial relations. Some employers would like us to go further and repeal the whole Schedule, ie. including the first leg which enables industry-level agreements to be extended to other employers within the industry, and Part II which was intended to provide additional protection in Wages Councils Industries but which has very rarely been used. At present the CBI are divided on this.

8. Repeal of the whole Schedule would be consistent with our belief that employers should be free to make their own agreements in the light of their own circumstances. On the other hand, it would maximise TUC opposition and would upset some employer associations. On balance, I am inclined to repeal the whole Schedule.

9. Similar treatment of the Fair Wages Resolution (FWR) would be logical but would raise argument about the principle of fair competition for Government contracts. As the CBI recognise, the scope for change is inhibited by International Labour Organisation Convention 94 which the United Kingdom has ratified. We cannot in any event deal with the FWR in the Bill and I propose that we leave it for further consideration in the light of debate on the Bill.

SLADE

10. I propose to afford a legal defence against SLADE-type recruiting activities in the form of the proposal on which I consulted. This will be by removing immunity from civil action where industrial action is called or threatened by persons not employed by the employer in dispute for the purpose of coercing his employees into joining a particular trade union. A provision in these terms will focus on the offensive aspects of SLADE's behaviour and should prove difficult for the TUC to attack convincingly. The CBI whom I have consulted informally support this proposal.

TRADE UNION IMMUNITIES

11. It has become clear that the CBI's own review will not be concluded until early next summer. We shall then have to consider further legislation and the CBI have strongly advised that we should not deal with immunities generally in the present Bill. However, the House of Lords now seem likely to overturn the Court of Appeal in Express Newspapers v MacShane and in the process overturn the view that the immunity for industrial action given by Section 13 of the Trade Union and Labour Relations Act 1974 (as amended in 1976) probably did not go beyond the first customer, supplier and provider of services. Preparatory work has been done on how to restore the position, but it is a tricky business and we are already going to be very hard pressed to get the Bill ready for introduction by early December without this added complication.

12. Much more important, however, is the delay in the Lords judgment. Judgment is now unlikely to be handed down until December and in my view it would be quite wrong - and a very damaging tactical error - to undertake such an important change in immunities without first considering the Lords judgment carefully and giving ourselves the opportunity of consultation. This is an issue so sensitive that it would be folly to rush into legislation. I have been making warning noises about a further measure and to leave the unions uncertain of our proposals on this matter could act as a brake on their activities.

13. I therefore intend to include in the Bill as introduced only those changes on immunities relating to picketing and to SLADE-type recruitment tactics. But on Second Reading I would say that we are reviewing the law on immunities in the light of the Lords judgment and that, when we have reached a considered view, we will take whatever action seems necessary to restore the position either by amendment to the Bill in Committee or in a later separate Bill. This will give us a chance to get the provisions right and to act with the advice and support of the CBI. I shall put a further paper to the Committee after I have fully reviewed the implications of the Lords judgment.

CLOSED SHOP - CONSCIENCE

14. On the closed shop we have still to decide the precise scope of the protection to be afforded to those with conscientious grounds against union membership in the closed shop situation. On 18 October (CC(79) 17th Conclusions, Minute 4) I was invited to consult with the Lord Chancellor and other interested Ministers and with the help of Parliamentary Counsel to report back with revised proposals. The Lord Chancellor and I have since agreed on a statement of the objectives to be covered by this provision and I now submit for the agreement of colleagues Parliamentary Counsel's preferred formulation, namely "on grounds of conscience".

CLOSED SHOP - EXCLUSION OR EXPULSION FROM A TRADE UNION

15. I earlier proposed that the right of appeal should be general. But the concern over the question of whom unions will or will not have in membership is in fact concentrated on the circumstances of the closed shop. There is much less justification for examining their internal procedures in this respect where people's jobs are not at stake, little merit in exposing the courts to unnecessary interference in union affairs, and some risk to participation by employee representatives in industrial tribunals. I conseqently propose on further consideration, that the provision for a right of appeal for those excluded or expelled from union membership should be limited to the circumstances of the closed shop, as originally proposed in the Manifesto.

CONCLUSIONS

16. I seek my colleagues' agreement to the inclusion in the Bill (in addition to the provisions we have already agreed on picketing, the closed shop and public funds for union ballots) of the following provisions:-

a. The amendments to the employment protection Acts and other measures set out in the annex to this paper (paragraphs 3-5).

b. The repeal of Sections 11-16 of the Employment Protection Act 1975 (recognition provisions) (paragraph 6).

c. The repeal of Schedule 11 of the Employment Protection Act 1975 (terms and conditions of employment) (paragraphs 7-9).

d. The provision to remove immunity from SLADE-type recruitment tactics (paragraph 10).

e. The formulation "on grounds of conscience" as the definition of the scope of the protection for those objecting to union membership in a closed shop (paragraph 14).

I also seek colleagues' agreement to the introduction of this Employment Bill early in December with a view to a Second Reading before the Christmas Recess.

J P

Department of Employment

19 November 1979

ANNEX

ROPOSED AMENDMENTS TO THE EMPLOYMENT PROTECTION ACTS: INDIVIDUAL RIGHTS

nfair Dismissal provisions

a) To remove from the employer the onus of proof in unfair dismissal ases whereby at present he is required to show that he acted reasonably n carrying out a dismissal.

b) To permit an employee to waive his right to complain of unfair ismissal on the expiry of a fixed term contract of one year or more.

c) To make the following changes to the legislation concerning the asic award of compensation for unfair dismissal:

(i) to repeal the provision that a minimum basic award of 2 weeks' pay must be given;

(ii) to empower tribunals to reduce below the present minimum, or extinguish, the basic award in cases of contributory fault on the part of the employee;

(iii) to empower tribunals to reduce the basic award if an employee has unreasonably refused an offer of reinstatement;

(iv) to give tribunals discretion to reduce or extinguish the basic award in cases where misconduct on the part of the applicant has come to light between the date of dismissal and the date of the hearing.

d) To require that industrial tribunals should take into account the ircumstances - for example, the size and resources - of the firm when onsidering whether or not an employer had acted reasonably in carrying ut a dismissal.

e) To exempt small firms with under 20 employees from the unfair ismissal provisions during the first two years of trading, provided hat the employer has notified the employees of the exemption.

dustrial Tribunal procedures

f) To make the following changes to the procedural rules of tribunals subject to the views of the Council on Tribunals) in order to reduce egalism and discourage unmeritorious cases:

(i) to give tribunals explicit authority to conduct proceedings in whatever manner they consider most suitable, while avoiding formality and without being bound by the stricter rules regarding admissibility of evidence as applied in the courts;

(ii) to enable tribunals to advise either party that his case appears to be weak and that costs may be awarded against him if he chooses to pursue his contentions to a hearing;

(iii) to widen the rule on costs, so that costs may be awarded against a party who brings or conducts a case "unreasonably".

Maternity Provisions

(g) To improve the administration of the maternity pay scheme to relieve the burden on employers, while maintaining the principle of employer liability for payment.

(h) To require employees to provide in writing the current notifications of intention to return to work, and to provide the second notification at least 21 days before the intended date of return, instead of the present 7 days.

(i) To require employees to provide an additional confirmatory notification of intention to return, on employer request, 9 weeks after confinement.

(j) To provide that, where it is not reasonably practicable for the employer to make available the original job, the employee shall be offered suitable alternative employment.

Guarantee Pay provisions

(k) To provide that guarantee pay should be calculated on a rolling period of 3 months rather than the present quarterly period.

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