ADVICE INFORMATION

Mr Derx

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Ms Durning
Mr Wilson
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Mr Fair
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Mr Seaman
Mr D B Smith
Mr Wake
Mr Emmett
Mr Derx
Mr Galbraith
Mr Hillier
Mr D Lewis
Mr C Tucker
Mr Billen
Mr McClelland
Mr Kenny
Mr Robin

and/or draft reply by

TRADES UNION CONGRESS

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DEPARTMENT
Secretariat

The Rt. Hon. James Prior, M.P.,
Secretary of State for Employment,
Department of Employment,
8 St. James's Square,
London, S.W.1.

July 30, 1979.

Dear Mr. Prior,

Proposed Industrial Relations Legislation

Thank you for your letter of July 4 and its accompanying working papers on the Government's proposed industrial relations legislation in the areas of picketing, the closed shop, and finance for ballots.

These have now been fully considered by the General Council and I attach a document which sets out the TUC's views. The General Council reacted very strongly and reject the claim that the proposals are 'limited'. The proposals, if enacted, would be a major incursion into the existing basic rights of workers and their trade unions. Moreover, they appear to be part of a wider programme being followed by the Government in the field of industrial relations law. The Government are already altering the provisions on unfair dismissal and redundancy consultation and we know that the Government are also examining, separately from the proposals in the working papers, union 'immunities' in trade disputes and also provisions in the Employment Protection Act.

The Government's proposals in the picketing paper would introduce further major constraints in civil law in addition to the existing civil and criminal law provisions. Even more important, the proposals in this paper go much wider than 'picketing' and could significantly weaken the general framework of workers' and unions' rights in trade disputes to the extent of making them liable when industrial action induces breaches of commercial contracts, as it frequently does.

The proposals in the paper on the 'closed shop' could disrupt longstanding union membership agreements between employers and unions and cause industrial relations difficulties in companies and industries where the present arrangements have

Contd ...

operated satisfactorily and where there is no wish by the parties to the agreements to have them changed. As you know, an Independent Review Committee was established in May 1976 and since then has dealt with appeals from individuals who have been dismissed from their jobs, or to whom notice of dismissal has been given, as a result of being expelled from, or having been refused admission to, a union when trade union membership is a condition of employment.

The General Council accept your invitation to meet them and at the meeting which will take place on August 22 at 3 p.m. they will be expressing their opposition to these proposals and seeking to persuade you that the legislative interference foreshadowed in the working papers is not the way to promote good industrial relations.

We believe that further improvements in industrial relations can best be brought about by continued action which has the support of workers, unions and managements. The TUC has a key role in this and, as you know, has issued Guides on Negotiating Procedures, the Conduct of Disputes, and Union Organisation. Progress by these methods could be set back by the legislation outlined in the Government's working papers.

Yours sincerely,

Lionel Murray.

General Secretary.

TRADES UNION CONGRESS

COMMENTS ON THE PROPOSED INDUSTRIAL RELATIONS LEGISLATION

1 This document comments generally on the Government's proposals, and then comments in detail on points in the three working papers.

I GENERAL COMMENTS

2 With regard to the Government's stated aim (to enable trade unions to play their indispensable role in furthering the interests of their members responsibly and representatively) the implementation of these proposals would not have this effect but the opposite one. The proposals are irrelevant to the basic issues of improving industrial relations and promoting improvements in productivity, real earnings and job and income security. Worse, they would make it more difficult to achieve progress on these issues because they would introduce highly contentious laws into industrial relations - laws which could be exploited, as was the Industrial Relations Act 1971, by unscrupulous employers and eccentric individuals seeking to disrupt established customary arrangements and to inflame feelings in already difficult disputes.

3 The Government claim the proposed changes are "limited". They may indeed be limited in relation to the 170-section Industrial Relations Act, but particular proposals have far-reaching implications (see below). Moreover it is important to note that they represent only one part of a wider programme that the Government have in mind with regard to industrial relations legislation. Already, the Government are increasing the qualifying period of unfair dismissal from 26 to 52 weeks and are reducing the period for consultation and notification in advance of redundancy from 60 to 30 days in respect of redundancies of less than 100 employees. Moreover para 12 of the working paper on picketing makes clear that the Government are engaged in a review of the law on trade union immunities. It seems that the Government intends to introduce amendments to the Employment Protection Act, including changing Schedule 11. The Government may be disclosing its intentions quietly and in stages but the Movement cannot regard the proposed changes as "limited". Indeed, the implications for trade unions and industrial relations are immense.

4 The Government apparently hopes that voluntary action to deal with the problems associated with picketing and the closed shop will continue along the lines of the proposed legislative changes. But an increased role for the law would affect the role that trade unions would be prepared to play. In particular, a changed legal framework would

make it necessary for the TUC to issue new guidance to affiliated unions, particularly on the conduct of disputes and union organisation.

II THE WORKING PAPERS

PICKETING

5 In order to justify their proposals to change the law on picketing, the Government say that there has been a tendency to use picketing to bring pressure to bear on companies not directly involved in the dispute, that picketing has become more effective, and that there are indications of an increasing use of intimidation (paras 3 and 4). The importance of voluntary guidance is stressed (para 5).

6 The Government propose (para 6-8) to limit the right to picket lawfully to

(i) those who are party to the trade dispute which occasions the picketing, and

(ii) to the picketing which they carry out at their own place of work.

7 To picket outside those limits would not be a criminal offence (para 6) but one approach suggested (para 10) is that anyone who picketed outside the limits would not be protected if that picketing induced breaches of contract. It is also suggested that the immunity conferred by section 13 of the Trade Union and Labour Relations Act on all industrial action might be amended so that the immunity the section confers is limited to breaches of contracts of employment (para 11).

8 The proposed legislation would provide a power for the Employment Secretary to draw up a code covering all aspects of picketing and for this to be submitted to Parliament. He would only make use of this power in the absence of voluntary action which satisfies the Government. It is also suggested that one possibility might be for ACAS to draw up such a Code, subject to Government approval (paras 13-14).

Comments

9 The General Council have encouraged affiliated unions to give advice to their officials and members about the law and the effective organisation of picketing. The General Council also sought, unsuccessfully, to persuade the Labour Government to give trade unionists the legal right to communicate effectively with persons in vehicles. Indeed

while the Government complains about picketing having become more effective, there is no doubt that the increased use of motor vehicles has made it less effective in many circumstances.

10 The Government clearly consider that action by the TUC and unions is not sufficient to control picketing nor do they acknowledge the problems of pickets communicating with persons in vehicles. Moreover, the Government's assertion of an increasing intimidation on picket lines needs to be challenged. The fact is that the vast majority of pickets are conducted wholly peaceably: in the past, just as now, there have only been isolated incidents where violence has occurred and this has never been condoned by unions.

11 The existing legal constraints on pickets are considerable with the police having powers to deal with pickets because of crimes of obstruction and pickets could be liable at civil law for nuisance - two legal wrongdoings which can cover a wide range of circumstances.

12 It is not wholly clear whether the two legislative approaches on picketing suggested in paras 10 and 11 are alternatives or additional to each other. The opening sentences of para 11 give the impression they are alternatives but para 12 gives the clearer impression that the Government have in mind to introduce both approaches.

13 In the first approach - described in para 10 - they are seeking to allow employers to sue pickets, deemed to be acting unlawfully under the proposal, for inducing breaches of contract.

14 This proposal is intended to prevent a union giving full support to a group of members in dispute. Usually the presence of union members not employed at the workplace where the dispute is taking place is designed to show solidarity give encouragement and boost the morale of the members on strike, and provided such outsiders accept instructions from the person in charge of the picket line, difficulties rarely occur. Now it is proposed that union members showing such solidarity would be acting unlawfully. Besides being objectionable in principle, the proposal raises many practical problems including the following:

(i) the proposals use the term "picketing" but section 15 of the 1974 Trade Union and Labour Relations Act (which is quoted in para 7 of the working paper) does not mention picketing at all. Picketing is not a legal term. In law there is a right in Section 15 to attend at or near a place for the purpose only of peaceful information or persuasion. It is this right to attend at or near a workplace which the Government is proposing to

li[illegible]t and attendance - the only legal right there is - is not explained. It is not clear, for example, whether a group of workers 500 yards from the factory where the dispute arises would be acting lawfully or not or how near they would need to get before it became unlawful. Presumably the Government have it in mind to leave this to the Courts and, if so, the whole area of picketing will become even more uncertain than it is now;

(ii) the next question is who is 'party' to the dispute. Some disputes have many parties and many places of work. In the Trade Union and Labour Relations Act (Section 29(b)), it is made expressly clear that workers employed by an employer not party to the dispute can be "parties". But the working paper implies that in future only workers at one place of work will be regarded as "parties". It is also not clear whether a group of workers who have been dismissed and are no longer employees of the employer would be acting lawfully if they picketed;

(iii) what is a "place of work". In National Insurance decisions it has been held that a large site owned by one company counts as one place of work. The working paper seems to imply that if one plant on a multi-plant site were to be owned by a different company - even if it was an associated company or subsidiary - then that would be a separate place of work which could not be picketed by workers from the other plants. And it is certainly clear from the working paper that if, for example, workers from Ford Halewood picketed Ford Dagenham it would be unlawful;

(iv) although the working paper states that it would be for the employer concerned to initiate legal action, it appears that it would also be possible for suppliers and customers of the employer in dispute to bring actions against all or any of the pickets for inducing breach of contract and seek injunctions and possibly damages;

(v) full-time officers or any other officers of the union visiting a picket line would be particularly vulnerable to the imposition of injunctions and being sued for damages because they are likely to be better known. And employers would be encouraged to pick them out, no doubt believing that the union would indemnify officers for payment of costs incurred in any legal action including any damages.

15 The second approach - described in para 11 - would involve limiting 'immunity' to inducing breaches of contracts of employment (ie not commercial contracts) not simply in

relation to picketing but covering all industrial action. Ostensibly this proposal is directed at other forms of secondary action (eg blacking) as well as picketing and it is said that the effect of this would be to reduce the extent to which S13 of the Trade Union and Labour Relations Act protects interference with commercial contracts.

16 This is a very dangerous proposal. The effect of the Government legislating on this basis would make unlawful not just secondary action (a term which is in any case very difficult to define), but also primary action where it interferes with a commercial contract (as it is likely to do in most cases). The Trade Union and Labour Relations (Amendment) Act gives trade unionists protection for actions in tort for inducing breach of contract in contemplation or furtherance of a trade dispute. From the Trade Disputes Act 1906 to the 1960s protection in trade disputes against interference with employment contracts seemed to be sufficient to establish trade union rights. But the judges in the 1960s developed a new liability for interference with commercial contracts. It is difficult to conceive of circumstances in which workers would retain the right to strike or take other industrial action against their own employer, or his customer, supplier or other related party without incurring legal liability if liability for interference with commercial contracts was resurrected. If the Government make this change in the law, they will have pre-empted their review of trade disputes 'immunities' because there would be little effective protection left for trade unionists.

17 The final proposal is for a code of practice on picketing. Unlike guidance provided by the TUC or by an affiliated union which is designed to be applied flexibly with regard to particular circumstances, a code which is to be taken into account by courts would undoubtedly place further restrictions on picketing in addition to the existing extensive range of criminal and civil offences and the proposed new civil offences. For ACAS to be given this task would have implications for the continuation of the TUC's strong commitment to, and support for, the Service.

THE CLOSED SHOP

18 The working paper on the 'closed shop' presents proposals not only on the closed shop but on arbitrary exclusion or expulsion from a trade union. These are separate issues and are summarised and considered separately below.

19 The Government states that there has been widespread public concern on the 'closed shop' issue and that the UK legislation is to be tested before the European Commission

on Human Rights (para 2). The Government recognise that employers and unions have long had practical reasons for entering into such agreements but aim to ensure that closed shops are only established with the wholehearted support of the workers concerned and that there is a remedy for abuses of individual rights.

20 At present, the Employment Protection (Consolidation) Act 1978 allows an employer to dismiss fairly an employee who refuses to be or become a member of a trade union under a union membership agreement. There is one exception - where the employee can prove that he or she genuinely objects on the grounds of religious belief to belonging to any trade union whatsover, in which case the dismissal is automatically unfair.

21 The Government proposes (para 7) to widen this exception to include:

(a) existing employees at the 'operative date' of the union membership agreement who are not members of the union concerned; and

(b) those with a deeply held personal conviction to being a member of any trade union whatsoever; or perhaps to those who object on grounds of deeply held personal conviction to being a member of a particular trade union or those who object on reasonable grounds to being a member of a particular union as in the 1974 Act (this last provision was deleted by the Labour Government in the 1976 Act).

22 In applications for unfair dismissal in 'closed shop' situations it is suggested that employers (but not applicants) could be able to join unions as co-defendants so that compensation could be apportioned between the employer and the trade union as the tribunal thought reasonable (para 9). A new 'closed shop' agreement would only provide an employer with a defence against unfair dismissal where it had been introduced following a secret ballot in which an overwhelming majority had voted in favour (para 10). Detailed guidance on the ballots and on the introduction of closed shops would be contained in a Code of Practice which could be drawn up by ACAS or by the Secretary of State (paras 11 and 12). The Code might also contain provisions for reviewing existing agreements (paras 11 and 12).

Comments

23 The first category of workers who would obtain unfair dismissal compensation if dismissed as a result of a union membership agreement would be existing employees who did not want to join the union. A large number of union membership agreements (eg Post Office) already exclude some (eg those with long service) or all existing employees. But to turn what is sensible in particular situations into a general legal rule would create the following difficulties:

(i) some circumstances would make it virtually impossible for a union to establish an effective union membership agreement, for example, in areas of employment with a low turnover of labour (conversely in areas of employment with high labour turnover, it would be difficult for unions to obtain an 'overwhelming majority' for an agreement in a vote by secret ballot - see para 24 below);

(ii) the protection for existing employees would cover those who insisted upon belonging to, or maintaining activity on behalf of, a different union from that or those signatory to the UMA. This could be disruptive of collective bargaining arrangements.

24 The second category of workers who would be able to claim unfair dismissal compensation would be those with a deeply held personal conviction to being a member of any union whatsoever. A number of practical questions arise as follows:

(i) would a deeply held personal conviction that the union subscription rates were too high count as an argument for compensation for dismissal?

(ii) would a 'political' dislike of unions be sufficient to warrant compensation for dismissal?

25 If the conviction was to be widened to those who object to being a 'member of a particular union' this would encourage persons to refuse to belong to a signatory union and to join another. The effect, again, would be to disrupt established bargaining arrangements.

26 A further obstacle to establishing a union membership agreement is proposed. The Government propose that a new agreement must have the support of an overwhelming majority of the workers involved voting for it by secret ballot. The details of this proposal would be contained in a code of practice which could also cover the circumstances in which applications could be made to review existing agreements. The following practical questions arise

(i) why is an overwhelming, and not a simple, majority of those voting required before an agreement could be concluded?

(ii) who would determine the scope of the bargaining unit, who would count the votes and would there be any right for individuals, unions and employers to challenge the conduct of the ballots?

27 The cumulative effect of all these provisions, if they were widely observed, would be to make it very difficult for unions to establish effective new membership agreements. The need for a ballot and the scale of the exclusions would be such as to make the whole exercise pointless in many circumstances. Areas of employment like retail distribution and textiles where membership agreements are sometimes regarded by employers and unions as the only way to protect bargaining arrangements could be particularly affected if employers were to insist on carrying out the intention of these proposals.

28 It is suggested that the code could contain a provision allowing for existing agreements to be reviewed. While there is no evidence that significant numbers of workers are dissatisfied with existing compulsory membership arrangements, it can be predicted that this proposal would give opportunities for dissatisfied individuals and groups to disrupt organisational and bargaining arrangements.

29 On past experience it can also be predicted that although these provisions may be widely ignored in industry there will be occasional and no doubt well-publicised cases where individual non-unionists insist on their legal rights and other workers refuse to work with them. The other area of possible flash-point is where individuals apply to have an agreement terminated. There is every prospect in these circumstances that this proposed legislation would, like the Industrial Relations Act, make small local issues become large industrial relations problems with serious and far-reaching consequences.

Arbitrary Exclusion or Expulsion

30 The Government proposes to introduce a right for any person, whether in a closed shop or not and whether in employment or not, not to be arbitrarily or unreasonably excluded or expelled from union membership (para 13). The suggested test would possibly be similar to the "unreasonableness" test on employers in the unfair dismissal provisions and would not be "just on the basis of particular union rules". An alternative might be to lay down detailed criteria. The Government proposes that the aggrieved person should apply to the High Court (para 15).

Comments

31 The issue was extensively discussed during the drafting of the Trade Union and Labour Relations Act 1974. At that time the General Council firmly opposed the inclusion of these provisions on grounds that most unions had extensive appeals machinery to deal with these matters and the General Council strongly objected to the term "arbitrary" in this context. The TUC had no objection to individuals continuing to have recourse to the ordinary Courts if they were determined to pursue a grievance against a union, but it

did not favour a system which would facilitate and encourage disaffected individuals to initiate cases.

32 At present a member under common law can take a union to Court on the ground that the union's rules have not been adhered to and/or the principles of natural justice have not been observed. However, it is questionable whether there is any existing provision for redress in cases of exclusion (ie refusal of admission) as distinct from expulsion. ("A person who is eligible for membership has no legal or equitable right to be admitted even if membership of an association is essential before he can earn his living in his trade or occupation" - Citrine's Trade Union Law; although Lord Denning would say that this proposition is no longer the law).

33 There are a number of practical problems with the Government's proposals. For instance, what would be the position of individuals seeking promotion or transfer within a company to a department or section where there is a 'closed shop?' What account would be taken of professional or technical standards? What account would be taken of the suitability of the applicant to work with other union members without causing industrial strife? Would 'oversupply' of labour be a justifiable reason for refusing admission to a union in certain circumstances?

34 More importantly, however, it would be anomalous that, while an individual worker has no redress against an employer who refuses to engage him because he is a union member or for any other reason, a non-unionist should have the right of action against a union.

35 There is a reference in para 15 to the "long standing principle of common law that a man should not be prevented from practising his trade or selling his labour". It is doubtful if in fact there is any such long standing principle. This particular view had been discredited until revived by Lord Denning in the last two decades. Trade unionists generally hold to a different concept of the right to work namely that of the right of workers to be able to obtain employment on terms agreed with the employer.

36 In sum, this proposal would give the judges a free hand to decide which union rules were arbitrary or unreasonable and which were not. The TUC could not agree that judges are sufficiently qualified to give reasonable and practical decisions on these matters.

SUPPORT FROM PUBLIC FUNDS FOR UNION BALLOTS

37 This working paper proposes legislation to remove major financial constraints on unions holding important ballots. The scheme would initially cover elections to full-time office or union governing bodies, changes to union rules and the calling and ending of strikes (para 4). A trade union could seek reimbursement of at least the cost of

using the cheapest postal method and at the discretion of the Certification Officer of the cost of using the first class post (para 5). Views are sought on whether public funds should be available to cover the administrative costs of postal ballots (para 6) or the costs of secret ballots at the workplace (para 7). The Certification Officer would be the public official responsible for administering the scheme.

Comments

38 Affiliated unions employ a wide range of voting systems in relation to elections, rule changes and the calling and ending of industrial action, including postal ballots and secret ballots at the workplace. Only these last two methods might qualify for State aid.

39 Unions would have a choice whether to apply for public funds. But if they do so, they must recognise that financial help will not be given from public sources without public accountability. This would have implications for union autonomy if - as appears possible - it led to the Certification Officer developing procedures (which might need to be incorporated in unions' rules) and also supervising aspects of the ballots. Individuals would no doubt have the right to challenge the union and/or the Certification Officer in the courts if they considered that the conduct of the ballot did not comply with the statutory requirements. These issues need to be clarified, and affiliated unions would need to recognise very clearly the implications for their autonomy of accepting money from public sources.

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July 25 1979