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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

TRADE UNION IMMUNITIES

Memorandum by the Secretary of State for Employment

Last October I proposed (E (79) 44) to limit trade union immunities in the case of specific abuses of secondary picketing and union recruitment, but not to make more general amendments unless the House of Lords were to overturn the Court of Appeal in Express Newspapers v MacShane. That eventuality has now occurred.

2. I propose therefore to restore the law to what it was generally thought to be before the Lords judgement and to do this by amending Section 13 of the Trade Union and Labour Relations Act 1974 (as amended in 1976). This Section provides the main immunity for individuals from being sued in tort for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. I propose to redraw this section so that immunity is limited to action in the primary dispute and, in the case of secondary action, to action taken at the first supplier, customer or supplier of services but not beyond. This is effectively where the Court of Appeal were drawing the line. (The Annex explains the background on immunities and my present proposal).

3. Through the Employment Bill we are already limiting the S. 13 immunity to block specific abuses:

(1) Clause 14 limits the S.13 immunity for inducing breaches of contract in the course of picketing to those picketing at their own place of work. This will be a very considerable reduction of the existing immunity and will enable an employer or employee whose business or livelihood is threatened by secondary picketing which is unlawful or induces breaches of contract to seek an injunction to restrain that picketing and damages for any loss he suffers.

(2) Clause 15 also limits the S.13 immunity so as to provide a legal remedy against any repetition of SLADE-type recruitment practices.

If, as I propose, the Bill were additionally to provide that the neral immunity did not extend beyond action taken at the first stomer, supplier or provider of services, the effect would be to make lawful any form of industrial action (including blacking and blockading) sulting in breaches of contracts which is undertaken in furtherance the original dispute but at firms which have no direct contractual lationship with the employer in dispute.

I have considered whether it would be right to go further than storing the position to what it was before the MacShane judgement d to give a right of action to anyone who is not a party to a imary dispute. However, there are three compelling objections to ducing the immunity to that extent:

(1) it would prevent trade unions taking action against any employers who give material support to an employer in dispute (and this would be criticised as going further than the 1971 Act);

(2) it would have the practical effect of removing immunity from any sympathetic secondary action which may be the only means of action available in some circumstances (eg where an employer sacks all his employees who are on strike and replaces them) and which is deeply rooted in trade unionism;

(3) it would be represented as a major attack on trade unionism and "the right to strike" and would therefore be likely to provoke a campaign of trade union resistance to the legislation as a whole comparable with that following the 1971 Act.

I believe therefore that the restriction to S.13 that I am now oposing, buttressed by the other measures outlined in para 3, represents e right balance and the correct approach. As I put it in my earlier per (E (79) 44).

"Our aim must be to succeed in tipping the balance of power away from the unions by such legal changes as are likely to be used by employers against secondary action, be supported by the public (including trade unionists) as reasonable restrictions of union and worker activity and which will not re-unite the unions in such active opposition as to render the changes ineffectual. We cannot afford to introduce another round of industrial relations legislation which is made unworkable by trade union opposition. It would be too damaging to our political system and to the reputation of this country abroad. As at present advised, I believe that if we take the action that I recommend we can honestly present this as a considered judgement of what is needed to deal with secondary action in the area most in the public eye and which is most disruptive. I think we can then succeed in holding and improving our advantage over the TUC in the battle for public support and stand a better

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chance of pulling off some legal restriction which will survive and on which we can later build".

The correctness of this assessment has been confirmed by the further discussions I have had with industrialists and others.

7. The approach I am proposing also has the support of the CBI, who are conducting their own study in depth of trade union immunities. This is not likely to be completed before the summer at the earliest. Sir John Methven has expressed the view to me that it would be wise to introduce an amendment at Committee stage to restore the legal position to what it was before the MacShane judgement but that it would be a mistake to go further now. I understand that this view has now been fully endorsed by both the CBI Employment Policy Committee and the President's Advisory Committee.

8. I propose to proceed therefore by means of a new clause to the Employment Bill re-drawing the immunities in Section 13, to be introduced at Committee stage. There are problems in finding a statutory formulation which is clear, precise and comprehensive. Work is proceeding on this. I would propose to consult on this proposed change as I have on all the other proposals but not to do so until after the conference of trade union executives which the TUC are calling for 22 January. This would allow time for consultations and enable the new clause to be tabled thereafter. In introducing the amendment I intend to make it clear that whilst this is as far as we think it right to go in the present Bill, there is always the possibility of further legislation on immunities should this prove necessary.

9. There is a further, but less important issue, arising from the recent House of Lords judgement in NWL Ltd v Nelson and Wood. I have received representations from shipping interests who wish me to limit the application of "trade dispute" in the context of foreign registered shipping visiting the UK; and I am shortly expecting to hear from the unions. However this may ultimately be resolved, I think that it would be wrong to try to deal with this by a specific provision in the Employment Bill. Special limitations to trade union immunities are only justified in my opinion where, as in the case of picketing and SLADE-type recruitment practices, there have been manifest abuses which have caused public concern and require rectification. The NWL situation does not fall in this category. Indeed I am not at present convinced that there is a case for it on merits. It would be represented as giving ship owners statutory protection for paying off British crews and taking on Asiatic crews, without there being any lawful means of protest open to the seamen or their representative bodies. But in any case we could not present this as a restoration of the law before the Lords decision. In the NWL case, unlike the MacShane case, the House of Lords upheld the Court of Appeal and the judgement did not flow from any extension of immunities in the 1976 Act.

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Conclusion

10. Accordingly I invite my colleagues to agree that a new clause to the Employment Bill should be introduced at Committee Stage to restrict the immunity given by Section 13 of TULRA 1974 (as amended in 1976) to action taken at the first customer, supplier or provider of services but not beyond.

DEPARTMENT OF EMPLOYMENT JP
11 January 1980

ANNEX

TRADE UNION IMMUNITIES IN THE LIGHT OF THE MACSHANE AND NWL (NAWALA) JUDGEMENTS

1. The nature of the present law on trade union action is _not_ to confer rights to strike or to take other industrial action _but_ to afford those who do so in defined circumstances immunity from civil action in tort. The present law on immunities is set out in the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976.

Section 13

2. S 13 of the 1974 Act (as amended in 1976) attracts most attention. It provides the main immunity for individuals from being sued in tort for acts done in contemplation or futherance of a trade dispute which induce or threaten a breach of contract. It is important because almost any industrial action involves a person, usually a trade union official, inducing others to breach their contracts of employment and without the immunity that person could be sued for damages every time he called or threatened a strike without due notice.

3. The S 13 immunity was significantly extended in 1976. Before that (with the exclusion of the period of operation of the Industrial Relations Act from 1971-1974) S 3 of the Trade Disputes Act 1906 provided immunity only for inducement of breaches of contract of employment. In 1976 the immunity was extended to inducement of breach of any contract - ie particularly commercial contracts. Thus for the first time it was possible for a union official directly to approach a supplier or customer of an employer in dispute and induce him to breach his commercial contract with that employer, without fear of being sued for injunctions or damages.

4. Cases in the 1960s seemed to open up the possibility of action _indirectly_ to induce breaches of commercial contracts. For example, a person could induce the employees of a supplier to an employer in dispute to breach their contracts of employment, and thereby interfere with the supplier's commercial contract, provided he was careful not to use unlawful means. What constituted 'unlawful means' was the subject of a good deal of case law (part of the 'legal maze' to which the Donovan Commission referred in 1968). It was only in 1974 as a result of section 13(3) that it was clearly established in statute that for the purpose of establishing liability in tort a breach (or inducing a breach) of a contract of employment was not an unlawful means of procuring a breach of a commercial contract.

5. Subsequent to 1976 the courts, particularly the Court of Appeal, in a series of judgements (notably Beaverbrook Newspapers v Keys, Express Newspapers v MacShane, United Biscuits v Fall and Associated Newspapers v Wade and Jackson) narrowed the immunity in Section 13 by adopting a restrictive interpretation of what was '_in furtherance of a trade dispute_'. Two important strands to this thinking were: (a) that some action was too _remote_ from the main action to be arguably in furtherance of it; and (b) that some action, wherever it took place, was not _capable_ per se of furthering the main action.

The MacShane Judgement

6. In this judgement on 19 December the House of Lords have reversed by 5 to nil the Court of Appeal and found in favour of the NUJ official. Four of the judgements find that the test of "in furtherance" is subjective (in the words of Lord Salmon that "the person doing the act honestly and reasonably believes that it may further the trade dispute"), though in each case discretion is left for 'objective' correction by the Court should the trade union leader really go too far. The fifth, Lord Wilberforce, is of the opinion that there is an 'objective' element in "in furtherance" which the Court must appraise; but suggests that the Court would be reluctant to substitute its own [objective] judgement for the [subjective] belief of the experienced trade union leaders initiating the action. On this basis the distinction in this instance between subjective and objective tests may be of little practical effect.

Restoring the law

7. What is now proposed is to restore the law to what it was generally thought to be before the MacShane judgement and to do this by restricting immunity so that it is applied broadly to action at the first customer, the first supplier, and the first provider of services, but not beyond. That this is to restate the law as it was generally thought to be can be seen from the following quotation from Lord Denning's judgement in the Court of Appeal in Associated Newspapers v Wade.

> "So immunity is given now when pressure is brought upon a first supplier so as to induce him not to supply goods to the employer - and likewise a first customer. But Mr Alexander submitted that the immunity should not be given any further down the chain of supply. It should not be granted he suggested, to interfere with supplies by the second supplier to the first supplier. Least of all the third supplier to the second supplier or lower down the chain. Mr Goldblatt, QC very fairly acknowledged that these submissions were fairly close to the right answer. I agree".

8. An examination of recent important cases shows that if the proposed limitation of immunity to action at first customers and suppliers had been in force, the courts would have found in the same way as they did - ie that there would have been no immunity. We have not yet found a satisfactory statutory formulation for this. It is evident from the House of Lords judgement that the approach of subjective criteria does not produce certainty. We are exploring the possibility of an approach based on limiting the immunity for inducing breaches of contract. It may, however, be necessary to remove the immunity from inducing breaches of contracts of employment (not just commercial contracts) to ensure that there is no immunity in cases such as MacShane where no commercial contracts were broken. Further work is being done on this.

The Nawala Judgement

9. The House of Lords judgements in the Nawala and MacShane cases are not comparable. In the Nawala case the House of Lords upheld the

Court of Appeal (whereas in the MacShane case they overturned it) so that an amendment could not be defended on the grounds that it was restoring the law to what it was thought to be before the House of Lords judgement. There is no question of the judgement resulting from a change in the law in 1976: the amendments to the definition of "trade dispute" made in the 1976 Act were minimal and anyway were not relevant to this case. In the House of Lords, the NWL case would probably not have been decided any differently under the 1974 Act or indeed under the law as it was before 1971.

10. However, in the light of the judgement, ship-owning interests are seeking an amendment the purpose of which would be to remove from ITF representatives in this country their ability to make use of immunity from civil proceedings when seeking to enforce "ITF terms" when no dispute exists between the crew and the owners of a vessel.

11. The circumstances of the Nawala case were as follows. The 'Nawala', a ship originally registered in Oslo and manned by Norwegian officers and crew was sold to a company, the beneficial owner of which was a Swedish company. The ship was then registered in Hong Kong although the ship never went to Hong Kong. A crew from Hong Kong was flown to Hamburg to join the vessel. When the International Transport Workers Federation (ITF) found out what had happened to the ship, they considered her to be using the British flag as a "flag of convenience" and to be using the Hong Kong crew as a means of undercutting the pay scales agreed by ITF affiliates. When the ship visited Redcar they sought (ineffectively as it turned out) to have it blacked. In June 1979 the Court of Appeal refused to grant the ship owners an injunction even though they could show that there was no dispute between them and the Hong Kong crew, the latter knowing that if ITF rates were to be paid they were likely to be replaced by a European crew.

12. The shipping arguments for an amendment are that:

(1) The effects of the judgements could have serious consequences in terms of UK shipping policy interests. The UK is committed to the maintenance of a competitive shipping environment within which mobility of capital and labour play a significant role. The judgement however holds out the prospect that the ITF can pursue a trade dispute under UK industrial relations law, the effect of which can be to deter shipowners who do not pay their crews at the level demanded by the ITF from using UK ports. If the law in other countries allowed action of this type, there could be direct damage to the interests of the British fleet (eg the ITF could take action in foreign ports against British ships paying less than ITF rates).

(2) The UK would face a presentationally awkward situation in UNCTAD where we shall shortly be opposing the mechanisms proposed by the UNCTAD Secretariat to eliminate flags of convenience. It will be embarrassing to the UK in UNCTAD if when we seek to defend the principle of the freedom of the seas, others point to the willingness of the UK courts to sanction what amounts to unilateral action in UK ports against certain flags of convenience.

13. One way of changing the law so as to make calling industrial action in such cases unlawful would be by means of a specific exclusion from the definition of trade dispute in S 29 of any dispute which concerned only a ship registered outside the UK. The main objection to this course is that it would be represented as an encouragement to British shipowners to re-register their ships at ports outside the UK as a means of paying off British (or other Western European) crews and taking on Asiatic ones without there being any lawful means of industrial action open to the seamen or their representative bodies. As Lord Denning said,

> "The only weapon at the disposal of the ITF which they can use in order to ensure fair play for seamen is the weapon of "blacking". If it were taken away in the present case, it would mean that it would be taken away in virtually all the cases in which they operate for the benefit of seafaring men".

Such an amendment would also create an invidious distinction between foreign-owned ships and other foreign-owned means of transport inside the UK (eg aeroplanes and lorries).

14. An alternative approach would be a general exclusion from the definition of trade dispute covering the circumstances of the ITF action but this would be bound to have much wider consequences. A general exclusion of disputes where there is no dispute between the employer and his employees would go well beyond what is necessary to deal with a Nawala-type case and would have far-reaching implications for domestic industrial relations. It would involve, for example, other changes in the statutory definition of trade dispute, including the exclusion of disputes between worker and worker which would have the effect of withdrawing the immunity from a wide range of recognition and demarcation disputes.

15. The main argument against any amendment to deal with this situation in the Employment Bill is that in making the specific changes to immunities to meet particular abuses which have caused concern (eg picketing, SLADE and intimidation) the Government has gone as far as it is wise to do so. To go further would be to erode the Government's position and increase the pressure for yet more specific changes to seek to deal with problems in particular fields.

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