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14 January 1982

Dear Ian.

Thank you very much for your letter of 22 December, enclosing your comments, which you emphasise are forwarded in your capacity as a Parliamentary colleague, on the proposals for industrial relations legislation agreed at E.

I feel that your detailed comments deserve a detailed reply. I have therefore set out fairly fully my views on your various proposals in the attached Annexes which relate to the Annexes in your letter.

I am copying this letter and the Annexes to the recipients of your letter - Michael Havers and Ian Gow - and in view of Annex 2 to Michael Heseltine.

Yours

LAY-OFF

I have a good deal of sympathy with your views on how to deal with selective action. I am only too well aware of the disproportionate impact that the industrial action of a few key employees can have. As you know, I have already given particularly careful consideration to the proposal to introduce a new right of lay-off, particularly in response to continuing representations from the EEF. And, in the light of your letter, I have had another look at the issue.

I have to say that I still believe it would not be right to adopt this proposal now. As I see it, the legislation would make great inroads into the law of contract. I do not share your optimism that, as the basis of lay-off (without pay) is already accepted, the legislation could be readily portrayed as a clarification or extension of the present situation. The concept of lay-off is accepted only insofar as it reflects collective agreements or individual contracts of employment. The effect of legislation of the kind you propose would be altogether different. Essentially, it would enable employers to override individual contracts of employment or collective agreements, freely entered into by both sides, without providing any compensation to the employees concerned. This seems very far from how things stand at the moment.

I am fortified in this view by the strong reservations expressed by colleagues when this proposal was under consideration on an earlier occasion. Michael Havers said then that as a general principle it could not be right to enable employees to be deprived of their legal right to pay in circumstances where no breach of contract had occurred and their conduct might be blameless in every other respect. Quintin Hailsham and James MacKay made similar comments.

There are of course other difficulties with the proposal. The Institute of Directors, in writing to me with their views on our legislative proposals, went out of their way to argue strongly against lay-off legislation. They made two main points. They see it as being particularly important to encourage the observance by employees of collective agreements and the law of contract, and lay-off legislation would take us in the opposite direction. Secondly, they see the legislation as being certain to alienate those very employees whose cooperation with management is essential to defeat selective action. I can think of no measure more calculated to give a major boost to white collar trade unionism.

And this brings me to the question of whether the need for such legislation, or indeed the demand for it, is sufficiently clear. The use of selective action is still relatively uncommon, and of the major employer organisations it is only the EEF who have pressed for this change. A great deal more support than this would be needed before we could embark on such a radical step.

There is also the political consideration that the white collar workers who might be persuaded that their interests could be adversely affected by such a proposal, even if they were doing their best to frustrate the industrial action, are mainly our supporters!

THE CLOSED SHOP

You suggest that union members should be protected by statute from being disciplined by their union, or disadvantaged by their employer, for not taking part in industrial action where certain conditions applied - eg that the action had not been approved in a secret ballot. I should say straightaway that I have a great deal of sympathy with this suggestion. My doubts about it are purely practical ones: I am not at all sure what such change could achieve beyond the protection that already exists.

We have of course already done a good deal to protect the union member in a closed shop from threats of expulsion by his union in the kind of situation you describe. The new right which we provided in Section 4 of the Employment Act allows any member working in a closed shop to complain to a tribunal that he has been unreasonably expelled or excluded from one of the unions that he is required to join. Where a tribunal upholds such a complaint it will make a declaration to that effect and, on a subsequent application, either the tribunal or the EAT can award compensation. In the extreme case such compensation could amount to nearly £17,000, ie the same overall maximum as currently applies to compensation for unfair dismissal.

As you know, the 1980 Act does not specify the circumstances in which an expulsion from a union is to be regarded as unreasonable under Section 4 but it does make clear that tribunals must determine the question of reasonableness on the merits of each case and not merely have regard to whether the union has complied with its own rules in excluding or expelling the person concerned. In addition, the Act makes clear that tribunals and courts must take into account any provisions of the Code of Practice on Closed Shop Agreements and Arrangements which appear to them to be relevant to any case before them. A tribunal hearing a

complaint against a union under Section 4 would therefore have to take account of the guidance in the Code of Practice on the taking of disciplinary action by a union against a member. As you say, this guidance forms the basis of what you would like to see in statute.

So far there have been very few cases brought under Section 4 of the Act so it is difficult to be certain how much weight tribunals will give to the Code of Practice. However, in the one case to date known to me in which the Code was clearly relevant the tribunal did give weight to it in reaching its decision that the complainant had been unreasonably excluded from membership. I would certainly expect that, save in an exceptional case, tribunals would consider any action by a union in expelling a member which breached the Code of Practice to be unreasonable. If this interpretation is correct then the protection which you seek is, in essence, already in existence.

I should add that I am in fact proposing to strengthen the protection afforded by Section 4 in the forthcoming Bill by providing that where a union member has been awarded a declaration by a tribunal that his exclusion or expulsion from a union has been unreasonable any subsequent dismissal from his job for not being a member of the union concerned will be automatically unfair and will attract compensation at the new enhanced rates.

A further safeguard (which, of course, already exists) is a union member's right of action in the ordinary courts if he considers either that any disciplinary action taken against him by his union is contrary to the union's rules or that in disciplining him the union has broken the rules of natural justice. The courts seem prepared to take a fairly broad view in such cases. You may have seen the recently reported decision of the Scottish Court of Session in Partington v. NALGO (IRLR 1981 537) where the union's action in disciplining its member was found to be "ultra vires" in that the union rules as applied

required a breach of a collective agreement to which the union was a party. This case suggests that any attempt by a union to discipline a member who refuses to take industrial action on the grounds that agreed procedures have not been exhausted will be wrong in law and void. If this view is right it meets one of your main concerns.

My conclusion is that the protection now afforded by Section 4 of the 1980 Act, in conjunction with the Code of Practice, and by the ordinary courts would not be significantly increased by a specific provision of the kind you suggest. My proposal for strengthening Section 4 will reinforce the existing protection further. Having said that, I would have no objection to making the protection more explicit by spelling out the circumstances in which an expulsion would have to be regarded as unreasonable, if I did not believe that there are a number of substantial risks in the course you suggest.

The most important of these, I think, is the risk of such a provision proving counter-productive. There is already some evidence that unions are beginning to reform their internal procedures - for example the more widespread use of ballots by the AUEW and CPSA - and we do not want to do anything to jeopardise this process. There does seem to me to be a real risk - given the contentious nature of some of the other proposals which we must take through - that any substantial legislation on internal union procedures might provoke so much hostility that in the end fewer rather than more unions would seek approval for industrial action by secret ballot.

The other major difficulty that I foresee is that it could prove very difficult during the passage of the Bill to confine the grounds on which expulsion from a union would automatically be found unreasonable to a manageable number. There would, I think, be pressure to add to the grounds so as to provide that expulsion from membership would be unreasonable in a wide

variety of circumstances. There must be a limit to how far we can plausibly go down this road while still maintaining that we want to see unions exercise more authority over their members so as to restrain them from taking unofficial, unconstitutional and, above all, unlawful industrial action.

Turning to the specific points you make on my closed shop proposals, I am intending to make a number of modifications to the existing proposals in relation to the proposed level of compensation and to contributory fault. As far as the point in para 4.1 of Annex 2 to your letter is concerned, I think that my proposals largely meet the suggestions that you put forward earlier to David Waddington. In particular I intend, as you know, that unions should have to pay their share of the compensation direct to the dismissed employee and that tribunals should retain the discretion to award whatever share of the compensation against the union they consider appropriate - up to and including a 100%. I think this is the right way to proceed rather than to impose an automatic 50/50 division as between the employer and the union or unions concerned.

Finally, as regards the possibility of councillors being surcharged in a Sandwell type case it is of course already within the power of a District Auditor to apply to the courts for a declaration that any item in a Council's accounts is contrary to the law because it is expenditure which no reasonable local authority could have incurred. In such cases, as you know, the court may order the person or persons responsible to repay all or part of the expenditure concerned. One problem has been that a District Auditor would be unlikely to initiate such action where only a small sum is involved (in the case of Joanna Harris compensation might have been no more than a few hundred pounds even if she had taken her case to a tribunal). The enhanced scales of compensation now proposed for closed shop dismissals should make it much more likely that

in the future a District Auditor would intervene where a local authority was involved in an unfair closed shop dismissal. In the light of this, I do not see any need to move further in this area at present but I am sending a copy of this letter and yours to Michael Heseltine in case there is any further action he is considering taking in this area.

ANNEX 3

IMMUNITIES

Let me first make two general comments.

First, I have always tried to present my proposals for restricting trade union immunities as a modest and moderate step forward because that is what I intend and what I believe is sensible. But this does not mean that the changes I am proposing are either unimportant, or, as you suggest, a "soft option".

In particular I cannot agree with what I take to be the implication of your comments that there is no point in restricting the immunities for trade unions so as to bring them into line with the existing immunities for individuals. In my view it is essential that we begin the process of bringing the trade unions back within the law by making them liable in the same circumstances as their individual officials. This will help to reinforce the other restrictions on immunities we are proposing and those which have already been made in the Employment Act. It will also help to combat the widely held and damaging view that trade unions are above the law and free to do whatever they wish, regardless of the consequences.

My second general point concerns the forthcoming House of Lords judgment in the Hadmor case. I entirely agree with you about its potential importance and that if the House of Lords confirm the Court of Appeal's view that there is a separate tort of interference with business by unlawful means, there may well be a call to extend the immunity in Section 13 of TULRA. As you can imagine, I am not anxious to introduce such a major amendment to Section 13 in the Bill unless the House of Lords demonstrates it to be necessary. But clearly, because of the timing of the judgement, that possibility must be left open.

At this stage it is impossible to predict what the House of Lords may decide and, for that reason, it is difficult to prepare for it on anything other than a contingency basis.

As you know there were many different and conflicting strands in the Court of Appeal's judgement and differences of view between Lord Denning and the other members of the Court. It is, for example, by no means certain that the House of Lords will follow Lord Denning in attaching such importance to Section 17 of the Employment Act, given that the main finding of all three judges was that there was no trade dispute.

We must obviously await the outcome of the Hadmor case. But neither the Court of Appeal judgement in that case nor in the more recent case of Marina Shipping Ltd v Laughton and Shaw support the view that section 17 allows wide scope for secondary action. In both those cases the injunction was granted in favour of the employer and against the union officials taking secondary action. Furthermore in the latter case the Court of Appeal (without Lord Denning) seem to have had no difficulty interpreting and applying section 17.

Turning to your specific comments in Annex 3 the purpose of the proposed amendments to the definition of trade dispute is to put outside the law what most people would regard as totally unreasonable and unjustifiable industrial action. Such industrial action may be relatively rare but this does not mean we should continue to tolerate those instances which do occur.

The question of when a trade union should be vicariously liable for the acts of their officials and members was very fully discussed in my memorandum to E Committee (E(81)103) - see particularly Annex 1. Your suggestion that a union should be prima facie liable for the actions of its members unless it could show that it had taken positive steps to stop them was one of the options considered. It was rejected partly because it was difficult to reconcile it with the well established principle, derived from common law and enunciated by Lord Scarman in the General Aviation Services case, that an organisation should not be held liable for action which it has not authorised or ratified; and partly because it seemed to run the risk of making trade unions liable to be sued for damages in every case of unofficial action, even where they

were clearly not responsible. Incidentally I am not sure of the relevance in this context of the fact that 90% of industrial action is unofficial. Most industrial action is, of course, primary action and would not be affected by our proposals, whatever the definition of vicarious liability.

On the advantages of being able to proceed against a trade union rather than against an individual official it has been represented to me on several occasions that employers are often much more reluctant to sue an individual than they are a trade union, for fear of personalising the dispute. Moreover the ability to sue a trade union rather than an individual reduces further (though it does not remove altogether) the chances of an individual being able to achieve martyrdom.

I recognise, of course, that most employers are more interested in injunctions than in damages, but it seems to me a considerable advance that it will be possible in the future to seek injunctions against unions when they are clearly backing unlawful action, as well as against individual officials. Furthermore some employers may want to seek damages from the union for the loss they have suffered as a result of an unlawful action. The possibility that such damages will be sought should act as a deterrent to unions from organising such unlawful action in the first place.

Turning to your specific proposals in paragraph 12(b) of Annex 3, I have already said something above about section 17 of the Employment Act and the importance of awaiting the House of Lords judgment in the Hadmor case.

On paragraph 12(b)(iv) your proposal would appear to outlaw all unofficial action, which includes, as I mentioned above, a great deal of primary action. That is surely going too far and would be regarded as such by our supporters in Parliament and indeed by the vast majority of ordinary people in the country who have been consistently shown to support our proposals.

On paragraph 12(b)(v) if I understand the nature of your proposal aright, it would, among other difficulties and problems, operate very much to the advantage of the large general union and against the small union. It may be that the proposal to restrict trade disputes to disputes between an employer and his own employees will go some way towards meeting your point.

On paragraph 12(b)(vi) these proposals were examined in some detail in my memorandum E(81) 103. E Committee endorsed my conclusion that it would not be right to go as far as you propose in restricting immunity at this stage.

Addendum on immunities

You raise a number of detailed questions in your addendum on immunities. On (a) the intention is that the limit on damages should apply to any single proceeding before the Court. If there are several cases arising from a single unlawful act it will be possible for the Court to award up to the maximum damages in each case. On (b) I accept there is no strong case in logic for limiting damages, but without such limits we should have no answer to the argument that our proposals might lead to the bankruptcy of a trade union in a single court case. On (c) we are considering the possibility of preventing a plaintiff suing individuals for damages once the liability of the union has been established. On (d) the representations I have received from the Conservative Trade Unionists have been that the limits represent too high a proportion of the annual income of many smaller unions with the risk that a single claim will bankrupt them. For this reason I am proposing that the limits on damages for unions with fewer than 5,000 members should be reduced from £12,500 to £10,000 and for unions with between 5,000 and 24,999 members from £62,000 to £50,000.

UNION LABOUR ONLY REQUIREMENTS

Finally your comments on union labour only requirements. The answer to the question in your paragraph 1 is "yes". On your paragraph 2 (paragraph 27 of the consultative document) we have in mind here the situation where workers in a local authority or company take industrial action (including primary action) to persuade their employer not to award a contract to a non-union firm. We were advised that the removal of immunity from such industrial action would probably follow from a provision which outlawed union labour only clauses in contracts and discrimination against non-union firms; but I believe it is desirable to have a specific provisions to this effect in order to put the matter beyond doubt.

Finally on your paragraph 3 (para 28 of the consultative document) I am very much aware of the dangers of removing immunity from industrial action which takes the form of refusal to work alongside non-union employees. Those dangers were discussed in my memoranda to E and of course are also referred to in paragraph 28 of the consultative document itself. Because of the possible dangers E Committee agreed that comments should be sought on this proposal before firm decisions were taken on whether to go ahead.

However, the consultations have shown that the majority of employers (including the CBI) are in favour of including a provision of this kind in the legislation. They take the view that, without it, the other provisions on union labour only requirements might be frustrated. I therefore propose to provide in the Bill for a restriction of immunity for industrial action in these circumstances. I am still considering the possibility of delaying the commencement order for this part of the union labour only requirement provisions until there is evidence that it is needed.