CONFIDENTIAL

cc WSS/sa
Hookyns
Whitmore
Ingham

PRIME MINISTER

WORKING PAPER ON IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

I enclose a copy of the working paper that I intend to publish on Thursday 7 February (subject to surrounding events) and to send to the CBI and TUC for their comments.

The working paper puts forward the policy proposal agreed by E Committee on 15 January. I have discussed it in draft with the Lord Chancellor and the Solicitor General and have also taken account of the views of the Lord Advocate and Attorney General. I have also had the advantage of John Methven's views. In the light of all this the two methods of achieving the proposal are put neutrally in paragraph 9. I was initially attracted to the second method as seeming to offer greater clarity, but it is beginning to appear that the "general tests" approach may prove the more acceptable.

I must tell you that John Methven and my two industrialist advisory groups are emphatic that at this stage we should go no further than these proposals.

At your meeting on 28 January the question was raised again whether we should in this Bill attempt to amend or repeal Section 14 of TULRA 1974, which provides immunity for trade unions as distinct from their officials. This was in fact discussed in E Committee on 15 January when the proposal that is now in this working paper was approved. We concluded then that there would be disproportionate opposition to any such attempt in the present Bill. I am sure this was right. Any such move would have immense symbolic significance for the trade union movement who would see it as returning the law to the Taff Vale situation. By requiring the courts to decide when a union was responsible for acts done by its officials it would bring the law back into questions of internal trade union organisation. This, you will remember, was the basic issue in the trade unions' sustained campaign to undermine the 1971 Act.

Whatever we may decide to do ultimately - and I think it is important to see what the current CBI review produces later in the year - I am

absolutely certain that we cannot afford to go in this Bill beyond broadly the pre-MacShane position. My Second Reading reference to further action was confined to that and it would be quite wrong for us to react to any one single dispute and rush forward with instant solutions on matters so delicate and difficult. Our aim is to start the process of putting industrial relations in Britain on a sound legal footing for the future. That is a prize which, as a nation, we simply cannot afford to lose through over-hasty action.

Four weeks is the absolute minimum for consultation, given the need for both the TUC and the CBI to consult their member organisations, and even that is likely to be criticised by both of them as inadequate to the importance of the proposal. It is essential that we do carry the major employer organisations with us: any change in the law on immunities will be worthless if employers are not prepared to make use of it. Moreover, I should like to allow the Standing Committee the benefit of two intervening weekends before we debate the amendment. So if the necessary amendment is to be carried in time for the Bill to move from Committee by the Easter Recess, we ought to issue the working paper next week.

I therefore propose to make known next Wednesday by answer to a written question that the paper will be available on the following day. I have undertaken to let the Standing Committee have it in advance of publication on Thursday.

I see no need to defer publication in consequence of the case of Duport Steels v Sirs. The Court of Appeal judgements seem to have turned on the prior question whether there was a "trade dispute" that the action was intended to further, rather than whether it was properly "in furtherance", which is what the Lords judgements in MacShane were concerned with.

I am sending copies of this minute and the working paper to other members of E Committee, the Lord Chancellor, the Paymaster General, the Solicitor-General and Sir Robert Armstrong, the Attorney General and the Lord Advocate.

J P
February 1980

IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

The Government have under review the operation of the law on immunities stated in the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976. The Government have already consulted on the appropriate limitation of the immuniites in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrates the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

2. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without such immunity that person would be at risk of being sued every time he called or threatened a strike. It is also of great importance to everyone else, because the effect of the immunity is to remove from those persons who are injured by that action the right that they would otherwise have to obtain from the court such relief as may be appropriate to the injury being suffered.

3. The practical effect of the operation of the immunity should be made clear. First, people who sue union officials for inducing breaches of contract are very seldom concerned with getting damages. They want the action complained of stopped at once by an injunction from the court. It is most unusual for legal proceedings to be pursued to a final judgement for damages. Even if damages are sought, there is a duty in law on the plaintiff to do all he reasonably can to mitigate the loss that is being wrongfully done to him and he will get damages awarded only for loss which he could not reasonably have avoided. Secondly, the courts will not normally grant an injunction unless very serious loss is being suffered which cannot be compensated for in money.

4. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute"- and in such case neither party to the contract had any remedy against him, however great the damage suffered.

5. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and ultimately enacted in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It would be unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute, and it would be dangerously wide for the rest of the community which would be unable to protect itself against industrial action taken against people who were not parties to the trade dispute or had any immediate commerical concern in its outcome, and going well beyond those parties.

6. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13, even as extended in 1974 and 1976. For a time it appeared that the extent of the immunity would be governed by the application of tests, such as whether the action taken was too far

removed from the original dispute or too lacking in effect to be reasonably regarded as furthering the dispute. The way these tests were applied by the Court of Appeal in the cases which came before them suggested that the immunity under Section 13 would normally extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, but would not extend much beyond that.

There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

7. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is subjective ie it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the genuine belief that it will in some way further an imminent or existing "trade dispute". Thus, it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity were shown by the Lords judgement to be justified.

8. The Government believe that the statutory immunity should now be amended to restore a more widely acceptable balance of interests. In the case of secondary picketing, where the immunity has been much abused, Clause 14 of the Employment Bill now provides for the immunity to be restricted to acts done in the course of picketing undertaken by employees at their own place of work. In the case of other secondary industrial action, like blacking, the Government think it right at this point in time to bring the position on immunity broadly into line with that suggested by the Court of Appeal decisions before the House of Lords judgements in Express Newspapers v MacShane (ie as indicated in paragraph 6 above). The Government accordingly propose that the immunity should continue to extend to action breaking or otherwise interfering with the performance of contracts where it is taken by the employees of the party in dispute or, in furtherance of that dispute, by employees of his first suppliers and customers, but that it should not extend to action beyond that if it involves interference with commercial contracts.

9. There are two main ways of approaching this in statute:

(i) by laying down general tests of the kind adopted by the Court of Appeal (see paragraph 6 above) which have to be objectively applied and which would be intended to have the effect of limiting the extent of the immunity as proposed.

General tests of this kind are, of course, in the nature of guides rather than clear and precise indications to employers and unions in dispute whether action is "in furtherance". On the other hand, this approach allows flexibility in the application of the law to the varied situations which arise. Another approach would be

(ii) by expressly defining the scope of the immunity. This could be done by providing that the Section 13 immunity should continue to apply to inducements to break, or interfere with, contracts where the action, threatened or actual, is taken in furtherance of a trade dispute by

(a) employees of the party in dispute

(b) employees of his first suppliers or customers (who might be identified as someone who was not a party to the dispute but was in commercial contractual relationship with such a party);

but that the Section 13 immunity should no longer apply to such action in furtherance of the dispute by the employees of any other employer if it involves interference with commercial contracts. In the case of such an employer inducements to break his employees' contracts of employment would continue to attract immunity if in furtherance of the dispute, but there would no longer be immunity for any inducement to break his commercial contracts, whether directly, or indirectly through breach of the employment contracts.

This method would be more specific, although possibly more arbitrary in effect, depending on the nature of the commercial relationships of the party in dispute.

10. Views are invited on the proposal in paragraph 8 above and on the ways of providing for it in legislation set out in paragraph 9. In the light of the consultations, the Government propose to introduce the necessary amendment to the Employment Bill, currently before Parliament. Although this limited action is what the Government consider at this stage to be appropriate, their review of trade union immunities will continue.