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9 May 1983

CABINET

TRADE UNION LEGISLATION

Note by the Secretary of State for Employment

I attach for consideration by the Cabinet a copy of a minute which I sent to the Prime Minister and certain other colleagues on 6 May 1983 on the arguments for and against making immunity of industrial action dependent upon the honouring of procedure agreements.

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Department of Employment

9 May 1983

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PRIME MINISTER

STRIKES IN ESSENTIAL INDUSTRIES

We are to meet on 11 May to resume the discussion at E Committee on 28 April on the outstanding legislative issues, including possible constraints on strikes in essential services. It may be helpful if I sketch out the possibilities and the arguments for and against making immunity dependent upon the honouring of procedure agreements which I see as the option most worthy of consideration.

As background, I see little prospect of establishing no-strike agreements. In any case they would be expensive and probably ineffective. I would not advise using the criminal law. The criminal sanctions still in force under the Conspiracy and Protection of Property Act 1875 are not applied. Going further would create more problems than it would solve, not least of enforcing sanctions against would-be martyrs in large or small numbers. We should not contemplate making it a criminal offence for an employee to refuse to work beyond the expiry of the notice he can currently give to end his employment.

This leaves the possibility of extending the scope of civil action. Here the proposal we have already agreed to remove immunity in the absence of pre-strike ballots, together with the restriction of union immunity in the 1980 and 1982 Employment Acts, will do much to reduce the propensity to strike in essential industries as elsewhere. Beyond this, the possibilities are

- to remove immunity for organising industrial action in essential industries;

- to make procedure agreements enforceable at law.

I do not believe the case for removing immunity for organising industrial action in essential industries is strong. The very definition of "essential" would be difficult; but more important this step is likely to be ineffective. Ordinary consumers, in most cases, would have no cause of action, (eg NHS patients have no contractual right to treatment). The decision whether to sue unions for organising strikes would therefore normally fall on the employers concerned. For the removal of immunity to be effective, trade unions would have to believe that employers were willing to sue, and that must be in doubt. And it is difficult to see how immunity could be withdrawn without providing arrangements (eg unilateral access to arbitration) which would always resolve disputes without the threat of recourse to industrial action.

However, the principle that agreements once made should be honoured is irrefutable. We have always stressed the importance of bringing greater order and predictability into industrial relations and the need to deter precipitate strike action. Legislation to give the observance of procedure agreements the force of law would therefore be fully in accord with our general approach. The idea did not arouse wide enthusiasm from employers in their responses to the 1981 Green Paper, but it has had the support of the CBI and the Institute of Directors and it has recently gained greater support following the refusal of the unions in the water dispute to honour the agreement to accept unilateral reference by the employers to binding arbitration.

If we decide to legislate on this issue there seems no good reason to confine ourselves to the difficult-to-define essential industries. The principle is of universal application. The questions we need to consider are the form legal enforceability might take and the effects it might have in practice.

Enforceability might be achieved in two ways. The more direct way would be to deem procedure agreements to be enforceable at law by either party, just as if they were legally binding contracts, irrespective of the intentions of those who originally entered into them. Alternatively, observance of agreed procedure could be made a condition of immunity for inducing breaches of contract in furtherance of a trade dispute.

It is clear that employer opinion strongly favours the latter approach. If procedure agreements were deemed to be binding contracts, it would provide opportunities for trade unions to take or threaten legal action against employers whilst the employers' remedy would be at best uncertain, particularly against unofficial strikers. The immunities approach does not have this disadvantage. Strikes in breach of procedure now have immunity, but immunity is irrelevant to an employers decision whether or not to break a procedure although he may of course face a lawful strike if he does so. Removing immunity from strikers in breach of procedure could therefore be seen as restoring the balance. I have no doubt that the immunity approach would be preferable.

The effect of legislation on these lines would be that a union which organised a strike in clear breach of an agreed procedure would do so without immunity and therefore at risk to its funds. In such a case the attractions of legislation are clear. The problem lies in assessing how often such cases would actually occur, given the nature of most procedure agreements. It has to be remembered that most employers do not have anything that can be termed procedure agreements governing negotiations on annual or major pay claims. In the main, their agreements deal with matters such as grading claims, grievances and disciplinary matters. Procedure agreements covering annual pay negotiations are more common in the public than in the private sector, but even there they often provide for no more than the agreed forums in which negotiations are to take place. Agreements providing for successive stages for negotiations

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and finally for the involvement of third parties (particularly as arbitrators) are relatively rare. The effect of legal enforceability on disputes over major pay issues would therefore be limited, unless agreements provided for binding arbitration as a final stage and our policy is to avoid reference to arbitration except on the agreement of both parties.

Many procedure agreements are too vague and imprecise to lend easily themselves to judicial interpretation. There must be a risk that the courts would decide that some agreements included mere expression of intent and had no precise meaning and hence that immunity was not lost despite employer complaints of a breach. There is also the risk of a concerted campaign by trade unions to withdraw from existing procedure agreements and to refuse to enter into new ones, similar to the successful TUC campaign not to enter into legally binding collective agreements under the 1971 Act. The CBI has recognised this risk. A number of possible ways of countering this threat or of providing alternative mechanisms in the absence of procedure agreements (including binding arbitration and compulsory arbitration by ACAS) have been suggested but I do not believe any would be satisfactory. My conclusion is that the risk of a successful campaign to withdraw from procedure agreements would simply have to be faced. Formal withdrawal from procedure agreements would nullify the legislation and also present greater opportunities for militants. It would undoubtedly alarm those employers who currently operate under generally effective procedure agreements. But in practice, trade unions might be found to value existing procedure agreements sufficiently to retain them or at least tacitly to observe them.

I am sending copies of this minute to the Home Secretary, the Chancellor of the Exchequer, the Secretary of State for

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Scotland, the Chief Secretary, the Secretary of State for Social Services, the Chancellor of the Duchy of Lancaster.

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6 May 1983