

Ref. A05825

PRIME MINISTER

Industrial Relations Legislation

(E(81) 103 and 108)

BACKGROUND

The Government published a Green Paper on Trade Union Immunities in January 1981 (Cmnd 8128). The period of consultation ended on 30th June, and on 27th August the then Secretary of State for Employment circulated to all members of the Ministerial Committee on Economic Strategy, and other interested Ministers, a summary of the views expressed.

2. The Secretary of State for Employment's paper, E(81) 103, sets out his proposals for legislation in the coming Session, as a further instalment of industrial relations reform to follow the Employment Act 1980.

3. The Lord Chancellor in E(81) 108 comments on certain of these proposals (closed shops, "union labour only" requirements in contracts, and the immunity of trade union funds); he argues that they may be difficult to enforce, and insufficiently acceptable to public opinion to survive future changes of Government.

4. The Secretary of State's paper proposes legislation on the following matters:

- (a) A range of measures on the closed shop providing for greater protection to individuals (through higher compensation for unfair dismissal, the possibility of action against the trade union as well as the employer, and payment of wages during the period before a case comes to the Tribunal) and supplementing the 1980 Act provisions on ballots for new closed shops by a requirement for periodic ballots on existing closed shops.
- (b) Measures to make "union labour only" requirements unlawful in contracts, in seeking tenders and in awarding contracts, and to remove immunity from industrial action which interferes with the performance of contracts primarily on grounds of union membership or non-membership.

- (c) The alignment of immunity of trade union funds with the immunity for individuals, subject to a limit on the damages which can be awarded.
- (d) Restrictions on the definition of a trade dispute, to exclude, inter alia, cases where the employer is not in dispute with his own employees (e. g. the "Nawala" case).
- (e) A provision for selective dismissal of strikers in certain clearly defined circumstances.
- (f) An extension of the availability of funds to ballots on wage offers (this would require only Affirmative Resolution under the 1980 Act).

5. In addition we understand that the Secretary of State for Employment will mention orally, because of its political sensitivity, a proposal relating to the political levy paid by trade union members. Under legislation dating from 1913, which was repealed in 1927 and restored in 1946, trade union members have to "contract out" of the political levy; the proposal would be that they should instead have to "contract in".

6. Action is not proposed on the following matters:
- (a) "No-strike" agreements.
 - (b) Enforceability of collective agreements.
 - (c) Secondary action (although the redefinition of trade disputes will have the effect of further restricting immunity for secondary action).
 - (d) Picketing.
 - (e) Compulsory secret ballots.
 - (f) "Cooling off" periods.
 - (g) Lay-offs of employees in a strike.
 - (h) Replacement of immunities by positive rights.

MAIN ISSUES

Far enough or too far?

7. The most important issue for Ministers is whether the Secretary of State's package of proposals for trade union reform does not go far enough, goes too far or is about right. In his paper he accepts the need to maintain a balance between keeping up the momentum of change and going so far ahead of industrial and public opinion that it would be difficult to defend the reforms and

make them stick. It is probable that his predecessor would have been unwilling to go much beyond the proposals on closed shops and "union labour only" requirements in contracts. Mr. Tebbit has however proposed action on two highly contentious issues - the immunity of trade union funds and industrial action which interferes with the performance of contracts on "union labour only" grounds - apart from any proposal he may make for action on the political levy. The Lord Chancellor has reservations on these proposals, and also about some of the less contentious proposals. On the other hand the Secretary of State has not proposed action on two proposals which have found considerable favour - compulsory secret ballots and lay-off of employees in a strike. He will probably argue that he could not add significantly to his package without running the risk of excessive confrontation. He may be prepared to jettison one or two items, if Ministers feel that the package goes too far - perhaps the provision about interference with the performance of contracts on "union labour only" grounds.

Closed shops

8. With the exception of the Lord Chancellor, there is unlikely to be major disagreement with the proposals for action on the closed shop. Although they may have little effect in reducing the bargaining power of trade unions, they give better protection to individuals and they are likely to attract popular support, especially in the light of the recent European Court judgment. As the consultations on the Green Paper indicate, few people believe that it would be practicable to go further and outlaw the closed shop completely. The Lord Chancellor argues that it is not right to pay higher compensation to those dismissed unfairly on closed shop grounds (and also on grounds of trade union membership or activities) than to those dismissed unfairly on other grounds. He also thinks that the proposal for joining the trade union as well as the employer in proceedings is likely to be ineffectual.

"Union labour only" requirements

9. Most of the proposals about "union labour only" requirements (i. e. those concerned with seeking tenders, awarding contracts and drawing up contracts) are likely to attract widespread support. The Lord Chancellor suggests that

some of the proposals may have little practical effect, but Ministers may nevertheless think that they are presentationally and politically desirable. The difficult question, which the Secretary of State discusses in paragraphs 8 and 9 of his paper, is whether to go further and remove immunity from industrial action which interferes with the performance of a contract. The argument against doing this is that such practices are very common, for example in the docks and on construction sites, and are unlikely to be readily abandoned; this may not be the most favourable ground on which to test the workability of the new legislation and particularly the important provisions on immunity of trade union funds. The argument for going ahead is that the other proposals on "union labour only" requirements fail to tackle the main problem; this would no doubt be brought out when the Bill was before the House and the Government would have to justify its reluctance to deal with the problem.

Immunity of trade union funds

10. The proposal to bring immunities for trade unions in line with those for individuals is, as the Secretary of State concedes, his most contentious proposal. This is because it would put the trade unions back in the position they were in between the Taff Vale judgment of 1902 and the Trade Disputes Act of 1906. They would be liable for the unlawful acts of their officials and damages might be awarded against them, to be paid from their funds (other than their provident and political funds) up to certain limits set out in paragraph 24 of Annex 1 of the paper (e.g. £250,000 for a union with more than 100,000 members). The Lord Chancellor argues that it may be undesirable politically to legislate on trade union immunities. But, if the Government decides to do so, he sees difficulties of principle in limiting the damages.

11. In the consultations on the Green Paper many respondents favoured action on this issue, but some of them felt that it was a major step which could be achieved only in the longer term. Many major employers (e.g. Ford, Reed Investment, GKN, Unilever and Shell) and some employer organisations (e.g. the Clearing Bank Employers) were opposed to action of this kind as likely to disrupt industrial relations. The argument for going ahead is that the Government can in this way demonstrate most clearly its determination to bring

the trade unions, as institutions, within the law. The argument against is that the trade unions will be likely to oppose the legislation, and its implementation, to the limit of their strength. A half-way position, not favoured by the Secretary of State, would be to introduce these powers on the basis that they came into effect only after an interval of two years, and thus after a General Election; it is however difficult to argue that such changes are desirable but can be postponed for two years.

12. The discussion of this issue in the Green Paper (especially pages 30-32) drew attention to the practical difficulties in establishing how far a trade union had "vicarious liability" for the actions of its officials. It is proposed to meet these difficulties by a series of tight definitions set out in paragraph 23 of Annex 1 of the Secretary of State's paper. In effect the trade union is rendered liable unless it repudiates the unlawful action by word and by deed. The Lord Chancellor has expressed doubts about the effectiveness of these provisions and the Attorney General may also wish to comment on them.

Definition of "trade dispute"

13. The Secretary of State for Trade, in a letter of 2nd October, pressed strongly, like his predecessor, for legislation to remove immunity from industrial action where there is no dispute between an employer and his employees. This was prompted mainly by the "Nawala" case where a Panamanian vessel at Redcar was blacked in furtherance of the International Transport Federation's world-wide campaign against "flag of convenience" shipping. Although there was no dispute between the shipowner and crew, the House of Lords held that the blacking was not unlawful. It has been argued that the possibility of such action in British ports is harmful to our trade and commerce. The proposals in the Secretary of State for Employment's paper to restrict further the definition of a trade dispute should meet these concerns. They also have much wider implications for the restriction of trade union immunities. There was considerable support for most of the various changes now proposed in the consultations on the Green Paper.

Selective dismissal in a strike

14. Ministers will wish to consider whether the proposals on selective dismissal in a strike go far enough. On the one hand it seems unreasonable that an employer cannot dismiss employees remaining on strike without dismissing also the employees who have returned to work. On the other hand it may be undesirable to allow an employer complete freedom to pick and choose (as, for example, the EEF would have wished). The proposals in the paper would enable an employer to give notice to all employees on strike of his intention to dismiss any who had not returned to work by the end of the notice period.

Ballots

15. The only proposal included on ballots is for an order under the 1980 Act to extend availability of funds for ballots on wage offers. The Secretary of State argues against compulsory secret ballots both for strikes and for elections (paragraphs 7 and 9 of Annex 2). Compulsory ballots have attracted considerable public support. Some argue that such provisions would have an important effect on the longer term in improving the way in which trade unions operate. There are however some practical problems. As the paper explains there is the danger that mandatory strike ballots may sometimes strengthen a trade union's hand. So far as union elections are concerned, there is the difficulty that many unions have few elected officials (the TGWU elects only its General Secretary). There are objections to the Government's becoming involved in prescribing the detailed internal arrangements of trade unions. There are also problems of enforcement since the most obvious sanction would be loss of immunity and this could make trade unions vulnerable to legal action in the course of their normal and proper duties. The Secretary of State suggests that it is preferable for the trade unions to be encouraged, through public and political pressure, to put their own house in order, although he leaves open the possibility of action on union elections in the future.

"No strike" agreements

16. When Ministers discussed the CPRS Report on Pay on 22nd September you particularly asked the Secretary of State for Employment to examine the question of "no strike" agreements in the context of his proposed industrial

relations legislation. His conclusion is the same as that which has been reached whenever the issue has come up before - that such agreements could be reached only at a price which the Government would be unlikely to want to pay (e.g. pay indexation and unfettered arbitration). There may be a few special cases where a bargain of this kind might be thought worth while, and the issue has been posed for the non-industrial Civil Service in the Government's evidence to the Megaw Inquiry. This approach would not however seem suitable for general application. Lay-offs of employees in a strike

17. These proposals were not included in the Green Paper but were made by the Engineering Employers' Federation (EEF). They are that:

- (a) Employers whose business is disrupted by industrial action by some of their employees should be empowered to lay off other employees without pay.
- (b) Employers should be freed of all contractual and statutory obligations to their employees if they are laid off because work cannot be provided as a consequence of industrial action by the employees of other employers restricting supply of defined essential goods and services (e.g. electricity, coal, transport).

Earlier this year work was done on proposal (a) as a contingency measure for dealing with selective industrial action during the Civil Service strike. You asked the Secretary of State for Employment to look at this particularly at your meeting on 22nd September, and the Chancellor of the Exchequer has been in favour of action on these lines.

18. There are two main arguments for the proposal. First, it could be presented as putting white-collar workers on the same footing as blue-collar workers and as consistent with the policy of removing such outdated distinctions. Secondly it might help to discourage selective industrial action by a few white-collar workers who can often (e.g. because of the computerisation of modern office activities) cause widespread disruption while the main body of white-collar employees has to receive normal salary.

19. When the proposal was considered earlier this year, both the Lord Chancellor and the Attorney General argued that (outside the Civil Service where it might be held that there was no actual contract between employer and employee)

the legislation would breach an important principle by overriding private contracts. It could also be argued that the proposal would not necessarily improve industrial relations. Employers often rely on their white-collar employees to help them to maintain operations. The legislation would tend towards further alienation of white-collar employees from management. White-collar employees who were opposed to industrial action but had no means of preventing it (e.g. because they were not union members at all, or not members of the union taking the action) would resent being penalised. Moreover there are ways open to an employer of dealing with selective action, for example by suspending employees who refuse to take on certain tasks. It is also possible that, even if there was new legislation on the lines proposed, white-collar unions would devise other forms of harmful industrial action, for example a series of one-day stoppages, which could not trigger the lay-off provisions.

20. Proposal (b), which would lead to the lay-off of white-collar employees generally in a major national emergency, is of a different character. Ministers are likely to agree with the Secretary of State that there might be a case for it in certain circumstances but that it would be better not to legislate until those circumstances arose and the degree of public support could be assessed at the time.

Political levy

21. We understand that the Secretary of State may propose that the change to "contracting in" should take effect only after a delay of two years, so as to avoid any implication that the Government is seeking to influence the outcome of the next General Election. Ministers will obviously wish to consider the political aspects of this proposal very carefully. There is also the argument that inclusion of this item may make it easier for the Opposition to present the legislation as a whole as a partisan measure, rather than a genuine attempt to improve industrial relations.

Implications for legislative programme

22. It is important to minimise so far as possible the difficulties which this legislation will cause for the Parliamentary timetable. The legislative programme for 1981-82 will include a number of other measures which will be

particularly difficult in Parliamentary terms - for example the Bill on Local Government Finance and (probably) the Bill on the Canadian Constitution. There are two other major and contentious measures, the Transport Bill and the Petroleum and Gas Bill, which are not at present expected to be ready for introduction before January, and unless the timetable for those two Bills and for the industrial relations legislation can be improved on it seems inevitable that there will be a lengthy spillover in the autumn of 1982. The Secretary of State may be asked whether there is anything he can do which would enable the Bill to be introduced before the Christmas Recess, for example by publishing his proposals before the Debate on the Address is concluded or by compressing the timetable for consultations.

HANDLING

23. When the Secretary of State for Employment and the Lord Chancellor have introduced their papers, you might invite comments on the overall balance of the proposals particularly from the Chancellor of the Exchequer and the Secretary of State for Industry. The Secretary of State for Northern Ireland will probably wish to comment also from this point of view. The Attorney General should be asked to comment on the legal issues. The Lord President and the Chancellor of the Duchy of Lancaster may wish to comment on the timetable for the Bill and the implications for the legislative programme.

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CONCLUSIONS

24. In the light of the discussion you will wish to reach conclusions on the following points:

- (a) Whether industrial relations legislation for introduction in the next Session should be drafted on the basis of the proposals made by the Secretary of State for Employment in E(81) 103, with any specific additions, subtractions, or modifications.
- (b) Whether the legislation should contain (depending on what the Secretary of State says at the meeting) a provision on the political levy and, if so, in what form.

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- (c) Whether the proposals should be published as a basis for consultations after the Debate on the Address, with a view to introducing the Bill next January.

RA

ROBERT ARMSTRONG

28th October, 1981

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