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The Rt Hon Norman Tebbit MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
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27th October 1981

Dear Norman,

E(81)103

Thank you for copying the above paper to me.

I am concerned that your proposals, set out in paragraphs 14 and 15 of Annex 1 to the paper, to allow a dismissed person to sue the union, and to allow an employer to include the union as a party at any stage in the proceedings, may not meet your criterion of being readily explicable and defensible on clear grounds of principle.

The basis of the present action by a dismissed person against his employer is that the employer has acted unfairly in dismissing his employee. Section 10 of the 1980 Act recognised that an employer might have been forced into this action by the conduct of a trade union with whom he had concluded a union membership agreement, and it gave the employer a right of relief against such a union in circumstances where the union had sought to enforce that agreement by improper means, such as by calling or threatening to call a strike. This is unexceptionable from a legal point of view, and fits easily into the existing practice in Scotland and (I believe) England.

Your new proposal seeks to short-circuit the process by giving the dismissed person a right to sue the union as well as the employer. The basis for this right of action, as against the union, is not contractual, for there is no agreement of any kind between the employee and the union. It is not an action in delict (or tort) because there is no requirement for the dismissed person to prove any delict (or tort). All he has to prove is that there is a union membership agreement between the union and his employer, and that the union has consented to the employer's honouring that agreement. This raises two major problems. The first relates to what the tribunal is to do when a dismissed person has established the facts mentioned above? Unless you provide in the statute that a union which has consented to the operation of a union membership agreement is thereby to be liable at least to some extent to compensate

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the victims of it, the tribunal will have no basis upon which to fix any part of the blame for the dismissal on the union, which has not breached any rule. If you say nothing in the statute, I cannot see how the tribunal could attribute any particular share of the blame to the union. If the union's degree of responsibility is to be fixed by reference to the evidence given by the employer, the employee would only succeed against the union if the employer did give evidence, and it would seem pointless in that situation to give a right to the employee to call the union as a party.

So far as your second proposal is concerned, we already allow an employer to bring a union into an action at any stage before the hearing of the evidence (1978 Act, section 76A(1), as inserted by section 10 of the 1980 Act). This corresponds with the present procedure in ordinary litigation in Scotland, where a defender can call in a third party at any stage up to the hearing of the proof on the merits. The reason for not allowing the calling in of a third party after that stage is that natural justice requires that the third party should hear all the evidence, and be permitted to cross-examine witnesses where appropriate: if he is called in after evidence has been led I can see no alternative to the Tribunal's re-hearing that evidence, which has obvious disadvantages in terms of expense, delay, and conflict of testimony.

I am sorry to have gone into these matters at some length, but both of these proposals would in my view provoke general opposition upon legal, as opposed to political, grounds, and it would be unfortunate if your final policy "package" were vulnerable to attack in such a way.

I am copying this letter to the other members of "E", the Lord Chancellor, the Secretaries of State for Scotland, for Wales, and for Social Services, the Attorney-General, and Sir Robert Armstrong.

Yours ever,

James