



PRIME MINISTER

THE EUROPEAN COURT OF HUMAN RIGHTS
COMPENSATION FOR CLOSED SHOP VICTIMS

1. As you know the European Court of Human Rights at Strasbourg have found that the dismissal of 3 Railmen in 1976 without compensation in a closed shop under the last Government's legislation was in breach of the European Convention on Human Rights. The changes in the law made in the Employment Act 1980 (soon to be reinforced by the proposals agreed at E on 10 November) ensure that, were such dismissals do occur now, there would be a legal right to compensation. Under these circumstances, I am satisfied that no further closed shop cases could be successfully brought unless the Court were to rule that the closed shop itself was in breach of the Convention. The Court specifically declined to rule on this general issue in the British Rail case.

2. The urgent question now is that of compensation. There are two aspects to this. The first is the question of compensation for the 3 Railmen and for the 6 former employees of Hull City Corporation who were dismissed in 1977 in comparable circumstances and whose case is before the European Commission of Human Rights. We are now endeavouring, through the Commission, to reach a friendly settlement with the 3 Railmen. This can then set the pattern for a settlement in the Hull City Corporation case.

3. The second and more difficult question is that of other closed shop victims who were dismissed in the same circumstances under the last Government's legislation but who have not taken their case to Strasbourg. To begin with there are some 40 other former British Rail employees who were dismissed under the same closed shop agreement. However, there are also an unknown number



of other people (some estimates have put it as high as 400 but there is no way of knowing precisely how many there are) who were dismissed in comparable circumstances in other occupations between 1974 and the coming into force of the Employment Act in August 1980. There is of course no legal obligation on the Government to compensate any of these other closed shop victims. Such a legal obligation could derive only from proceedings by them in Strasbourg and, while I understand that the Freedom Association believe that such proceedings might still be possible, I am advised that proceedings based on their dismissal are no longer open to them. However, I believe that in the light of the British Rail case and of our consistent opposition to the last Government's closed shop legislation there is a moral obligation on us to offer some compensation to these people. Political considerations point to the same conclusion: there is already some pressure for this from our backbenchers and from the Freedom Association and this pressure is likely to grow once a settlement of the 3 Railmen's claim is reached.

4. I have considered whether an offer of compensation could be limited to the other former British Rail employees dismissed under the same closed shop agreement but my conclusion is that we could not justify this. If we were to compensate other former British Rail employees on the grounds that the case brought by the 3 Railmen was a "representative action", we would have to concede that the Hull City Corporation case constituted a similar precedent. There are bound to have been other dismissals in strictly comparable circumstances under closed shop agreements drafted in terms very similar to the British Rail and Hull agreements (modelled on the 1976 Act): it would be difficult to defend a refusal of any compensation in other cases once we had conceded it in these cases. I see no alternative therefore to offering compensation to anyone dismissed in a closed shop



in the same circumstances as the 3 Railmen between 1974 and 1980.

5. I am of course mindful of the danger of setting a precedent for cases on other subjects which have or may in the future come before the Commission and Court at Strasbourg. There are about 100 individual applications against the UK Government currently before the Commission. Some recent adverse judgements of the Court (eg detention on grounds of mental disorder and homosexuality in Northern Ireland) have received considerable publicity and other cases likely to attract publicity (eg corporal punishment in schools, compensation for airport noise and the effect of recent changes in the immigration rules) are in the pipeline and may also go against the Government. Clearly we should take every possible step to ensure that the action I propose in relation to the closed shop cannot be used to justify claims for similar schemes of general compensation in other cases. I believe that a distinction can be drawn between the British Rail and other Human Rights cases on the grounds that this breach of the Convention resulted from a particular piece of legislation, very recent in its enactment and politically controversial in nature which, moreover, was repealed before the case was heard by the Court and well before the judgement was delivered. The breach of the Convention related to a specific six year period in the past and would not have occurred under current legislation. On this basis I believe that we can make it clear that the action we are proposing in this case does not bind us to offer compensation in any other case where people claim that they have grievances which are comparable with those which have been found by the Court to constitute a breach of the Convention.

6. I realise that claims for comparable treatment in other cases may still be made if we proceed as I propose. Nevertheless,

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I believe that the difficulty of resisting such claims, if they are made, will be much less than the difficulty we would face if we were to refuse in this case to provide any compensation - on the grounds that we were under no legal obligation - to a group of people whom our supporters and many people in the country will see as highly deserving.

7. The details of the compensation scheme I propose are set out in the attached note. The cost is unlikely to exceed £2m and in practice I would expect it to be a good deal less. I propose to seek legislative cover for the scheme in the forthcoming industrial relations legislation. The necessary provisions should not be complex and need not delay introduction of the Bill. I would, however, like to be able to ensure that Parliamentary Counsel receives instructions on this matter within two weeks and I would therefore be grateful to know by the end of this week if you or colleagues consider that I should not proceed on the lines I propose so that the issue might then be considered by E on 10 December.

8. I am sending copies of this minute and the attached note to the Home Secretary, the Lord Chancellor, the Foreign Secretary, the Chancellor of the Exchequer, the Secretary of State for Northern Ireland, the Secretary of State for the Environment, the Secretary of State for Industry, the Secretary of State for Trade, the Secretary of State for Transport, the Secretary of State for Social Services, the Attorney General and to other members of E Committee.

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COMPENSATION FOR CLOSED SHOP VICTIMS 1974-1980

Eligibility

The European Court, while not pronouncing on the general issue of dismissal for non-membership of a trade union in a closed shop, gave particular weight to the fact that the three railmen were existing employees when the closed shop agreement was introduced and that two of them had conscientious objections to union membership. We clearly need to reflect these concerns in deciding who should benefit from a wider compensation scheme. I therefore propose that compensation should be paid to anyone dismissed for non-membership of a trade union in a closed shop under the 1974 and 1976 legislation providing either that he or she:

- (1) was an existing employee when the closed shop agreement came in and did not subsequently join a union in accordance with the agreement; or
- (2) had a conscientious objection to union membership (as defined in the 1980 Act).

I appreciate that there may be difficulty in some cases in establishing whether or not there were genuine conscientious objections some years after the event but there are advantages in aligning the criteria with the two major grounds on which dismissal in a closed shop is unfair under the Employment Act. Moreover, it would invite controversy about the implications of the judgement to exclude conscientious objection.

The compensation scheme would exclude (in addition to anyone who could not meet the criteria above):

- (1) dismissals during the currency of the 1971 Act (improbable) or before 1971 when there was no statutory protection against unfair dismissal;
- (2) the rare cases where closed shop dismissals were found to be unfair (eg on religious grounds) under the 1974 and 1976 Acts since there has already been a remedy; and

(3) any dismissals since the 1980 Act came into force.

Level of compensation

As far as the three ex-British Rail employees are concerned, the compensation we offer will need to reflect various factors, which Industrial Tribunals are not always able to consider, eg the actual extent of subsequent unemployment. However, as far as the compensation scheme is concerned, I think it important to relate the rate of compensation as closely as possible to the structure of Industrial Tribunal awards since these would have provided the domestic remedy had one been available. Thus I propose that compensation should comprise (a) a basic award dependent on length of service and subject to the appropriate tribunal maximum (£2,400 in 1976) and (b) a compensatory award calculated according to the actual loss of earnings, pensions etc suffered in the period since dismissal but similarly subject to the appropriate upper limit on compensatory awards (£5,200 in 1976). Interest would be paid on both sums. Total compensation in individual cases would range from a few hundred pounds for a short service employee who found another equally good or better job immediately after dismissal, to around £10,000 (including interest) for a long-service employee who has been unable to find other work.

These amounts will be substantially lower than the sums of compensation which we are likely to pay to two of the three ex-British Rail employees. The distinction can, however, be defended on the basis that it is only the three former railmen who have to face the costs and stresses of fighting a case lasting several years through the Commission and the Court.

Cost

The total cost of compensation under my proposals depends crucially on the number of cases of closed shop dismissals between 1974 and 1980. It has been suggested in the Press that there were over 400 such cases. However, research recently carried out for my Department suggests that the actual figure is unlikely to exceed 400. Assuming 400 cases and

an average compensation payment of £5,000 (possibly on the high side), the total cost would be around £2 million. To the extent that some of those eligible may in the event not come forward the final cost could be lower.

Procedure

The procedure which I have in mind for dealing with these cases is to invite people who think they may be eligible to apply for compensation by a given date. The cases would then be considered by an assessor with a legal background appointed by me who would advise on the payments to be made in individual cases. The payments themselves would be at my discretion.

While it would be possible to make payments of the order anticipated without specific legislative cover, I am advised that the normal practice is to seek legislative authority. I therefore propose to include the necessary provisions in the forthcoming industrial relations legislation. Some 5 clauses may be required.

Department of Employment
1 December 1981

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