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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn 3201

1 October 1979

The Rt Hon Lord Soames GCMG-GCVO CBE
Lord President of the Council
Civil Service Department
Whitehall
LONDON S W 1

Dear Christopher.

INDUSTRIAL ACTION IN THE CIVIL SERVICE

Prior to the first meeting of E(CS) on 3 October I am writing to advise on certain legal questions to which I understand colleagues need an early reply from me.

2. These questions were raised inter alia in a request for a joint Opinion of the Law Officers and Treasury Counsel and I enclose a copy of this Opinion, which has now been delivered to the Treasury Solicitor with a copy of this letter. The Opinion draws the following broad conclusions.

(A) Advice is requested on the lawfulness or otherwise of "TRD". This is the procedure for sending home without pay Civil Servants who are in substantial breach of their contracts, coupled with an undertaking that employees may return to their jobs on full pay when they indicate that they are willing and able to resume normal working. The advice is that if such a procedure were litigated the courts would be likely to accept its legality.

(B) Advice is also requested on the lawfulness or otherwise of sending home without pay employees who have committed no breach of contract but are prevented from doing useful work by the industrial action of other employees (assuming, of course, that there is at the time no specific contractual term allowing this). The advice is that if such a procedure were litigated the courts would almost certainly hold that it was unlawful.

(C) Finally, advice is requested on whether the Crown can unilaterally vary the terms and conditions of employment of its employees so as to give itself the power to apply the procedure described in (B) above. In the absence of agreement by the employee to be bound by a new term conferring the power (in which case it could not, of course, properly be described as unilateral)

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the advice is that the chances of the courts upholding it in modern circumstances are poor. (I do not recommend this course of action but should the Government for any reason decide to adopt it, the Opinion suggests a way of minimising the legal risks).

3. I should mention that Patrick Jenkin wrote to me on 27 July for legal advice on a cognate but not identical problem involving industrial action by PTB staff in the NHS. A further Opinion is being prepared and on this I will write separately to colleagues on E(CS) in the next few days.

4. You will note that the enclosed Opinion deals only with the law of England. The Lord Advocate will be advising separately on the law of Scotland.

5. The law in this area is of great complexity and has required much careful thought. I should be grateful therefore for an early indication from colleagues of what further questions if any will call for legal advice.

6. This letter and its enclosure are copied to the Prime Minister, all members of E(CS), the Lord Advocate and Sir John Hunt.

Yours ever.

Michael

THE STATUS OF CIVIL SERVANTS

JOINT OPINION

1. In the Instructions recently submitted to us we are asked to advise on a number of questions relating to the status of civil servants. From these we have identified three issues which appear to be of central importance and to require an immediate answer.

TRD

2. The first issue raised in this extensive and difficult area of law is that of the lawfulness or otherwise of what is known in the Civil Service as temporary relief from duty ("TRD"). In our opinion TRD is a legally acceptable stance for the Crown, as an employer, to adopt. We think that there is justice, common sense and, indeed, useful (though, it must be conceded, not binding) authority in support of it, and that apparently contrary authority can be distinguished. Accordingly, we are on balance of the opinion that if this matter were litigated the courts would accept the legality of TRD. It is important to point out however that TRD cannot give the legal security which dismissal coupled with an offer of re-engagement would provide, but we recognise that the latter is a counsel of perfection and not a realistic line for management to adopt.

3. TRD involves an assertion of the principle of concurrent obligations. It is a principle well established in the field of commercial law (see Chitty on Contracts, 24th Edn., para 1501 and the cases there cited). We see no reason why the same principle should not apply to the field of employment. Applying that principle to that field the employer would be saying to his employee: "You may come to work and you will be paid therefor if and when you agree to perform your obligations as an employee but not otherwise". The following passage from the judgment of Winn L J in Denmark Productions Limited v Boscobel Productions Limited [1969] 1 Q B 699 at p.732 is in point:-

"..... if B elects.....not to treat the contract as at an end, he may require A to perform any contractual obligations as they fall due in the future (provided that he himself performs any simultaneous or precedent obligation), including, as a particular example, the making of payments for which the contract provides..... in its simplest form this proposition may be illustrated thus: A, having contracted to supply by instalments goods complying with a specification, intimates that he does not intend to make any further deliveries complying with that specification:: B requires him to fulfil the contract: if B subsequently finds that A's goods whenever they may have been delivered do not comply with the contract description, he may then refuse to take any more or to pay

the contract price for them and he may obtain adjustment of any price he has already paid.

B's rights, in the hypothetical situation stated, do not depend, on analysis, on there having been any repudiation by A which he might have but did not treat as entitling him to determine the contract: he is able to assert immunity simply because A has not performed the contract and, therefore, cannot enforce it. For my own part, I do not regard a contract of employment as sui generis, but as a type of bilateral contract to which the same principles apply".

In Laurie v British Steel Corporation, an unreported Scottish case in 1978, it was held that TRD constituted a sound defence in law to a claim for salary arrears.

4. In short the practical question is whether the individual would, in the event of his being temporarily relieved from duty, succeed in a claim to be entitled to be paid wages or damages in a like sum for the period of absence from work. It is plain that he cannot recover wages because he has not done the work (see generally the notes to Cutter v Powell in Smith's Leading Cases Vol II at p.54-55). It seems to us to be strongly arguable that the individual would fail if he claimed damages on the basis of a contention that the Crown by requiring him to leave the premises prevented him from doing his work. That is because the individual

would only be expressing a willingness to work on his own terms, i.e. in breach of his obligations, which was not acceptable to the Crown. The Crown's defence would be that its obligation to permit the individual to enter the premises was concurrent with the individual's obligation to be willing and ready to perform his side of the contract. If the individual is unwilling to perform in accordance with his obligations the employer's obligation does not arise (cf. [illegible], Smith's Leading Cases ibid., at pp. 9-10; it is significant that that discussion appears in the notes to Cutter v Powell which supports the view that the same rules apply to employment contracts). In the event of litigation the Crown would plead by way of its defence that the employee was not willing and ready to perform his obligations and that therefore no claim for damages could succeed. The employee would then have to prove that he was so willing and ready (the Supreme Court Practice 1979 paras. 18/17/10 and 11).

5. We turn now to the authorities which it has been suggested run counter to the lawfulness of TRD.

(a) Hanley v Pease [1915] 1 K.B. 698 seems to us, on proper analysis, to have nothing to do with TRD. The word "suspension" as used in that case is inapplicable to the treatment of the employee inherent in TRD. That case involved punishment of the employee who was prevented from working for a day on which he was prepared to work in

accordance with his contractual obligations.

(b) Gorse v Durham County Council [1971] 1 W.L.R. 775 is at first blush more in point. But we take the view that it can properly be distinguished on the footing that it was decided exclusively by application of clause 11 of the relevant contract of employment. The only issue raised in that case was whether the employers had or had not suspended the teacher within the meaning of clause 11; if they had, then it followed from the provisions of that clause that upon reinstatement she was entitled to be paid during the period of such suspension. It seems to us that, even if the defendant had argued its case on the basis of concurrent obligations (i.e. on the footing envisaged in support of the concept of TRD), such an argument would not have availed it since TRD itself could well be said to constitute suspension within the meaning of clause 11 of that particular contract. We know of no comparable provisions affecting Crown servants. We would add that even if Gorse were not properly distinguishable, it is only a decision at first instance and was decided before Lord Denning expressed the views that he did in Secretary of State for Employment v ASLEF (No.2) [1972] 2 Q.B. 455 at p.492.

6. In our opinion TRD would only be justifiable in the same circumstances as would have justified summary dismissal by a private employer. Very considerable care would be needed

before TRD was operated in any given case. In particular it should be made clear to the employee that TRD was not being applied as a disciplinary measure. This is very desirable so as to reduce the possibility that employees could claim that prescribed disciplinary procedures ought to have been followed or the rules of natural justice observed. It should also be made clear that the Crown was ready willing and able both to permit the employee to perform his obligations and to remunerate him for such performance.

7. Even if the views we have expressed were held to be wrong, it seems to us that little would have been lost by invoking TRD. In considering this point it should be borne in mind that the only clear alternative to TRD is some form of dismissal with re-engagement (conditional or otherwise). Any variant of dismissal is recognised to be industrially provocative and administratively cumbersome. If the employees' conduct would not have justified dismissal, then it is difficult to see how the Crown could be worse off as a result of determining not to dismiss the employee than as a result of dismissing him. Rather it seems to us that the Crown would have the advantage of being able to argue with reasonable prospects of success that there was no dismissal (not even constructive dismissal) so that no question of wrongfulness (at common law) or unfairness (under statute) arose. At common law, moreover, the employee could in any event have no claim for wrongful dismissal because the Crown can dismiss at will (such position being inferentially preserved by s.138 of the

Employment Protection (Consolidation) Act 1978). Further, even if TRD was treated by the employee as dismissal and found by the Courts to be unfair dismissal, such dismissal would only entitle the employee to the minimum basic award of 2 weeks pay plus whatever compensatory award the tribunal found the employee had not disqualified himself from by reason of his misconduct. Moreover, whatever award was made under the statute, it would be no higher following TRD than following outright dismissal.

8. It seems to us that the only basis upon which an adverse finding on the issue of TRD could even arguably involve the Crown in greater financial liability than if it were to dismiss the relevant employee, would be upon the footing that the Crown was liable for the employee's wages - alternatively damages to the extent of such wages for depriving the employee of the right to earn them - during the period of TRD. As already stated, we would expect the claim to fail on the grounds that the Crown was entitled to insist upon his agreeing to perform his concurrent obligations (namely to work properly for his salary) i.e. he would be unable to establish that he had been ready, willing and able to work properly. Even if that is wrong, however, it is further arguable:

(i) that his claim for damages is in truth valueless because the work which he would in fact have carried

out would not have entitled him to any payment because he would not have substantially performed his contract, or alternatively

(ii) that his misconduct would have given rise to a counterclaim for damages.

Laying off of innocent civil servants

9. The second issue which arises is whether civil servants who are not in breach of contract can be laid off in circumstances where they cannot do useful work because of industrial action by other civil servants.

10. This postulates that the Crown would not exercise its right of dismissal but would not provide any work for, nor would it pay, the employee so laid off and that this would be done in the absence of a specific contractual term authorising the procedure. In our opinion such action would be inconsistent with the basic terms of employment and could be treated by the employee as constructive dismissal. It will be appreciated that the employee in such circumstances would be faced with an indefinite period without pay. More likely the employee would sue for, and in our view would probably succeed in obtaining, remuneration for the period he was laid off. Although there is authority for the proposition that where an employer fails to provide work due to circumstances beyond his control, he is not liable to pay the wages of

employees (see Browning v Crumlin Valley Collieries Ltd 1926 1 K.B. 522 and Encyclopedia of Labour Relations Law 1-216), that proposition is dependent on implying a term to that effect in the terms of employment. It is obviously easier to do so in the case of employees remunerated on a piece-work basis and in an industry where there is a custom of such lay-offs (as in the Browning case); furthermore we think it improbable that, in the case of the employment of a civil servant who would reasonably expect security of remuneration whilst he performed and was ready to perform his duties properly, it would be held that the intention of the Crown and the employee was such as to satisfy the criteria for the implication of this term - see for instance Chitty, 24th Edn., para 2573. (In our understanding the categories of civil servant to which our Instructions are directed are not paid on a piece-work basis or in an area where there is a custom of lay offs, but if there are any relevant employees in this class then for them the possibility of such a term being implied is of course greater). In summary, we would view with considerable unease the prospect of an innocent employee suing for his remuneration during the period he was laid off, as he would be likely to engage the sympathies of the Court whose decision in such circumstances might have wider repercussions on the legal relationship between the Crown and its employees.

Unilateral variation of contract

11. We now turn to the third question which we have found to be of very great difficulty. It is whether the Crown has any right, without the agreement of its employees, to vary their terms and conditions of employment so as to give a right to lay them off without pay in circumstances where they are not in breach of contract but cannot do useful work because of industrial action by other civil servants (the situation described in paragraph 9 above).

12. The Crown claims that by reason of its constitutional position it has the right to alter any terms of service unilaterally and it appears from modern letters of appointment with which we have been supplied that civil servants are now expressly informed of this claimed right from the commencement of their employment.

13. There is no lack of authority from cases not relating to the Crown for the view that where there is an express power given by contract for the employer to introduce a particular variation or variations of that contract at some time in the future, if the employer later introduces a variation within the scope of that power then it will be valid, no matter how extensive it is. But that authority is distinguishable on the ground that the Crown's claimed right

of variation is wholly unspecific in its terms. In Howard v Department of National Savings (1979 IRLR 231), which did relate to the Crown, there are passages from the judgement of the Employment Appeal Tribunal which tend to support the validity of the claimed right to vary the terms of service. But in that case it had been conceded that the terms of service could be changed.

14. It is arguable that a right to vary terms of service at will is a right concomitant with the Crown's well established right to dismiss the employee at will, both rights being based on the need for the Crown to be free to act in whatever manner is expedient in the public interest. But whilst it follows from the Crown's ability to dismiss its employees at will that it must also be able at any time to offer further employment on different terms, it does not follow that it could unilaterally impose those terms, at any rate when the new term would fundamentally alter the nature of the employee's rights, as would be the case with a variation of the kind we are considering. The employee must in our view have the opportunity to refuse further service on the new terms; we think it unlikely that any modern court would hold an employee against his will to continue in service on less favourable terms.

15. If the Crown wished to vary the terms of employment in a way adverse to the employee (such as by introducing a term

permitting what is now suggested) we think that express notice should be given to each employee of the intention of the Crown to exercise the right to vary the conditions of service by the introduction of the new term at a specified future date, so that those unwilling to serve on that term could leave the service. We fear that any such action would not be acceptable to employees but any who in fact continue in service might be taken to have assented to the variation. However we must warn that quite apart from the obvious administrative difficulties in seeking to introduce what may well be thought a controversial term capable of working great hardship, the prospects of the Crown being successful in litigation are poor should the validity of the claimed right to vary the conditions of service in this way, without dismissal, be challenged. Nevertheless should the Crown wish to proceed on these lines in spite of these difficulties, what we have suggested would at least put the Crown in as favourable a posture for resisting a challenge as is possible in the circumstances.

16. In this Opinion we have assumed against the Crown that the relationship between the Crown and its employees is basically contractual such that a claim in contract by the employee cannot be defeated in limine. In the light particularly of Kodeeswaran v A.G. of Ceylon 1970 A.C. 1111, we believe that assumption to be correct though the contrary is

certainly arguable. It will be for consideration in any given case whether the Crown should as a matter of policy take the point, unattractive though it is to modern eyes.

17. This Opinion relates only to the law of England. We understand that the Lord Advocate will be advising separately on the law of Scotland in this area.

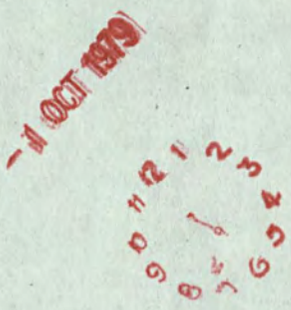
M.H.C.

J.P.

T. Bingham

Simon Brown.

Anthony Grabiner.



1 October 1979

THE STATUS OF CIVIL SERVANTS

JOINT OPINION

Attorney General

Solicitor General

Peter Gibson

Simon Brown

Anthony Grabiner

Treasury Solicitor

LIMITED CIRCULATION ANNEXES

~~Mr. Whitmore~~ Alexander
Mr. ~~Cartledge~~
Mr. Lankester
~~Mr. Sanders~~
Mr. Pattison
~~Miss Stephens~~

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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

LIMITED CIRCULATION ANNEX
E(79) 8th MEETING, MINUTE 3
THURSDAY 20 SEPTEMBER 1979 AT 10.30 am

CONFIDENTIAL

3. CURRENT INDUSTRIAL DISPUTES

THE PRIME MINISTER said that recent developments in Civil Service pay negotiations had revealed a weakness in managerial response to selective industrial action. Under the law as it now stood, it appeared impossible for Departments to lay-off non-industrial staff who were unable to work as a result of selective action undertaken by a small number of key people. This made it impossible to put pressure on unions and strikers through the majority of their members. It seemed probable that, depending on the terms of contracts of employment, there were similar difficulties in many private sector employments. She had already asked for the position as it affected the civil service to be investigated urgently.

THE SECRETARY OF STATE FOR EMPLOYMENT said that the current dispute over the National Engineering Agreement was developing in a very dangerous way and no early solution was in sight. Rolls Royce, with the support of other members of the Engineering Employers Federation, had taken the extreme step of laying off employees involved in the recent two-day a week strikes. There was a chance that other major companies would follow their lead and that, despite a period of disruption, this would prove to be the correct solution in the long run.

In discussion, there was considerable criticism of the reported action of the Department of Health and Social Security, in making special arrangements for the payment of supplementary benefit to the families of the strikers locked-out by Rolls Royce. It was argued strongly that the Department was wrong to anticipate a long strike in this way, or to make special arrangements to help those affected. Against this, it was pointed out that the present law had to be administered fairly, and that the families of strikers were entitled to supplementary benefit once they had exhausted their immediate resources. The object of the special arrangements made was to ensure that strikers and their families did not crowd out other and more deserving cases at local social security offices. It was also suggested that polls had shown that the strike action did not command general support among the workforce, who were being intimidated by the threat of losing union membership. The Government's proposal for dealing with the closed shop would help to solve this problem in the longer term but meanwhile there was a case for challenging the union to say whether they intended to penalise any members who refused to take part in strike action.

THE PRIME MINISTER, summing up a brief discussion, said that the Committee invited the Secretary of State for Social Services to review the special arrangements being made for the families of strikers at Rolls Royce and in other locations. The Secretary of State for Employment should consider, in consultation with the Attorney General, what might be said publicly to reassure those members of the workforce at Rolls Royce who wished to continue working without the risk of losing their union membership. The Committee noted that a new Ministerial Sub-Committee had been established to consider the threat of industrial action in the civil service, including the state of physical preparedness in Departments. The Secretary of State for Employment, in consultation with the Secretary of State for Social Services, should bring forward urgently his paper on Supplementary Benefits for Strikers.

The Committee -

Took note, with approval, of the Prime Minister's summing up of their discussion and invited the Ministers concerned to proceed accordingly.

Cabinet Office
21 September 1979