

CONFIDENTIAL



01-405 7641 Extn 3201

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

28 November 1979

The Rt Hon Patrick Jenkin MP
Secretary of State for Social Services
Department of Health and Social Security
Alexander Fleming House
Elephant and Castle
LONDON SE1 6BY

Dear Patrick,

*R
27/11*

HANDLING OF INDUSTRIAL DISPUTES IN THE NHS

I refer to your letter of 22 November to Christopher Soames enclosing a draft circular and guidance on this subject. You kindly extended to close of play today the time limit for comments on these drafts.

On these documents I have a number of drafting suggestions which mainly reflect points made in the joint Opinion of 22 October, sent with my letter to you of 23 October. In the time available it has not been possible for all of these to be taken up at official level, as would normally be desirable in matters of detail, but if any of my suggestions cause difficulty on your side no doubt this can be resolved between the Solicitor to your Department and my officials prior to issue of the documents. I do not think it should be necessary to revert to colleagues on E(CS).

Circular

Para 2. I think it should be made clear that what is in issue is all forms of industrial action. In the first sentence I suggest replacing "if they strike" by "in the event of industrial action, whether or not amounting to a strike".

Para 5. I am unable to advise on the legal position in the area of bonus payments or overtime or shift allowances, or in relation to the other matters dealt with in paras 4, 5 and 8-16 of the guidance - this was accepted at the outset. On the face of it what is said on these topics is entirely reasonable.

Para 5(ii). I think a more accurate description of the management responses here would be "sending staff home without pay or stoppage of pay" rather than "suspension of staff or withholding of pay".

/Para 5(iii).

CONFIDENTIAL



CONFIDENTIAL

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-405 7641 Extn

Para 5 (iii). For "the strike" substitute "industrial action" (see comment on para 2, above).

Para 5(iv). I think the object here may be to point out that it is undesirable for staff who refuse to work normally, or at all, to be paid as if they were working to contract, but not to criticise those who are deprived of useful work by the industrial action of others. If that is correct I suggest instead the words "apart from the legal position, that it is undesirable for staff to be paid for work which they have refused to carry out".

Para 5(v). At this point I think it is extremely important to stress the need for legal advice. See, especially, paragraph 5 of my letter to you of 23 October. It might well seem to management in a particular case that the law is clear, when further enquiry would reveal that it is not. It will also be vital to establish, for any outbreak of industrial action, that it does amount to conduct that is in substantial breach of contract, since that is the premise on which the joint Opinion of 22 October, and now the NHS guidance, is based. To meet these points I suggest that this sentence be redrafted as a separate paragraph to read -

"In addition to the four points listed above, it will be essential for the authorities to bear in mind and (whenever time permits) to take advice on the exact legal position of the staff or groups of staff who are involved. In particular the authorities should satisfy themselves that in taking industrial action those staff are in substantial breach of contract and hence properly the subject of one or more of the management responses suggested in paragraphs 2-7 of the Annex."

Para 6. To my knowledge the NHS guidance is not issued under any statutory powers. Assuming this to be correct, there is still a danger that the authorities might seek to hold your Department responsible in a particular case where their response to industrial action, alleged by them to have been based on the guidance, failed to have the desired results. To guard against this I suggest that the last sentence be strengthened to make it clear that the guidance is nothing more than advice on the options to be followed by the authorities and that the responsibility in individual cases rests with them. The exact wording is, I think, a matter for your Department.

/Annex

CONFIDENTIAL



01-405 7641 Extn

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

Annex

Para 1. For much the same reasons as those stated in my comments on paragraph 5(v) of the circular, I suggest deleting the words "in general" at the start of the last sentence, and adding the words "such as would have justified his dismissal at common law" at the end.

Para 3. If I understand this correctly it deals with two distinct cases, where the management responses are also distinct. Therefore it might be better if this paragraph were split. One case dealt with is where there is a single "lightning" strike, to which the appropriate response is stopping pay for the period of the strike. The other case dealt with is where short stoppages take place frequently over a period, and here it appears you are suggesting the response known as "TRD" (temporary relief from duty) in the Civil Service. It is also possible, but not clear, that TRD is the response suggested in paragraph 6(ii). To the extent that TRD is to be used in the NHS I think it is important that the TRD procedures suggested in the joint Opinion of 1 October (on the status of Civil Servants), designed to give the maximum security to this response within the Civil Service, should also be followed - with adaptations where called for - in the NHS. To this end I think the guidance, and probably also the circular, needs to be amplified by reference to these procedures and the Civil Service TRD guidance in Annex B to E(CS)(79)(8), with its two appendices, would be the starting point. We considered and approved this material at E(CS) on 21 November, for use in the Civil Service.

Para 6. It would be a more accurate statement of the law if the second sentence read -

"An employee is not entitled to his remuneration for any pay period unless he can prove substantial performance of his contractual obligations during that pay period."

Para 6(i). The first sentence is a little unclear and I suggest the following redraft -

"if less than the full range of duties is acceptable to management in the sense that it is willing to accept specific but limited services, the staff concerned should at the outset of the action be given notice (say 24 or 48 hours in advance of the sanctions being applied) that while they refuse to undertake normal working they are in breach of contract and are not entitled to full contractual pay."

/I



01-405 7641 Extn

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

I have three other drafting points on this paragraph -

- (i) delete "ex gratia" in line 6;
- (ii) delete "is" in line 15 and substitute "should be expressed to be"; and
- (iii) add "while the industrial action continues" after "stopped" in line 19.

Para 6(ii). Similarly I suggest altering the first sentence to read -

"if less ... (say 24 or 48 hours in advance of the sanctions being applied) that while they refuse to undertake normal working they are in breach of contract and will not be paid; and their pay should then be stopped on the expiry of the notice."

I am sorry this letter is a long one but I have necessarily had to go into matters of detail. Copies go to all the recipients of your letter to Christopher Soames.

Yours truly,
Michael

29 NOV 1979

9 11 12 1
8 7 6 5 4 3 2

Copied to:

✓ The Prime Minister
10 Downing Street SW1

The Lord President of the Council
Civil Service Department
Whitehall SW1

The Secretary of State for Wales
Welsh Office
Gwydyr House
Whitehall SW1

The Secretary of State for Northern Ireland
Northern Ireland Office
Great George Street SW1

Sir Robert Armstrong
Cabinet Office
Whitehall SW1

The Secretary of State for Defence
Ministry of Defence
Main Building
Whitehall SW1

The Secretary of State for Employment
Caxton House
Tothill Street SW1

The Secretary of State for Scotland
SCOTTISH OFFICE
Dover House
Whitehall SW1

~~The Secretary of State for Social Services
Dept of Health & Social Security
Alexander Fleming House
Elephant & Castle SE1~~

The Financial Secretary
HM Treasury
Parliament Street SW1

SECTION 1
 SECTION 2
 SECTION 3
 SECTION 4
 SECTION 5
 SECTION 6
 SECTION 7
 SECTION 8
 SECTION 9
 SECTION 10
 SECTION 11
 SECTION 12
 SECTION 13
 SECTION 14
 SECTION 15
 SECTION 16
 SECTION 17
 SECTION 18
 SECTION 19
 SECTION 20
 SECTION 21
 SECTION 22
 SECTION 23
 SECTION 24
 SECTION 25
 SECTION 26
 SECTION 27
 SECTION 28
 SECTION 29
 SECTION 30
 SECTION 31
 SECTION 32
 SECTION 33
 SECTION 34
 SECTION 35
 SECTION 36
 SECTION 37
 SECTION 38
 SECTION 39
 SECTION 40
 SECTION 41
 SECTION 42
 SECTION 43
 SECTION 44
 SECTION 45
 SECTION 46
 SECTION 47
 SECTION 48
 SECTION 49
 SECTION 50
 SECTION 51
 SECTION 52
 SECTION 53
 SECTION 54
 SECTION 55
 SECTION 56
 SECTION 57
 SECTION 58
 SECTION 59
 SECTION 60
 SECTION 61
 SECTION 62
 SECTION 63
 SECTION 64
 SECTION 65
 SECTION 66
 SECTION 67
 SECTION 68
 SECTION 69
 SECTION 70
 SECTION 71
 SECTION 72
 SECTION 73
 SECTION 74
 SECTION 75
 SECTION 76
 SECTION 77
 SECTION 78
 SECTION 79
 SECTION 80
 SECTION 81
 SECTION 82
 SECTION 83
 SECTION 84
 SECTION 85
 SECTION 86
 SECTION 87
 SECTION 88
 SECTION 89
 SECTION 90
 SECTION 91
 SECTION 92
 SECTION 93
 SECTION 94
 SECTION 95
 SECTION 96
 SECTION 97
 SECTION 98
 SECTION 99
 SECTION 100

29 NOV 1979

