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CONFIDENTIAL

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ROYAL COURTS OF JUSTICE,  
LONDON, WC2A 2LL

01-405 7641 Extn 3407

sub  
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12 December 1984

The Lord President of the Council  
Privy Council Office  
Whitehall  
LONDON SW1

*John Hithie*

THE NEWCASTLE SHIFT DISPUTE

*- in Cabinet folder*

1. At the meeting on 4 December I was invited to advise on the legal position of the Government in the event of a successful challenge, either in an industrial tribunal or in the courts, to a unilateral variation of the strikers' contracts.

REMEDIES FOR UNFAIR DISMISSAL

2. If an employee succeeded in a claim for unfair dismissal, either because he has been dismissed or for constructive dismissal, the industrial tribunal could make an order of reinstatement, or of re-engagement, or an award of compensation.
3. The industrial tribunal has no power to compel the Crown to comply with either an order of reinstatement or of re-engagement, and if it failed to comply the employee would then be entitled to the basic award and the compensatory award referred to in paragraphs 4 to 9 below, and, in addition, to an additional award of between 13 and 26 weeks' pay.

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4. If the industrial tribunal did not order reinstatement or re-engagement, but simply ordered compensation, the compensation would be calculated on the following principles. The employee would be entitled to a basic award calculated by reference to his age, length of service and pay (subject to a maximum of £145 per week). The maximum basic award is £4,350.
5. The basic award would be calculated as follows:-
  - (a) For each year of continuous employment in which the employee was not below the age of 41, one and a half week's pay;
  - (b) for each year of continuous employment in which the employee was not below the age of 22, one week's pay;
  - (c) for each year of continuous employment in which the employee was below the age of 22, half<sup>a</sup> week's pay.
6. Deductions are made for the extent to which the employee contributed to his dismissal, the amount of any redundancy payment, any other amount of money paid by the employer and accepted by the employee and referable to the basic award, and in respect of conduct prior to dismissal which makes it just and equitable to reduce the award to any extent.
7. In addition he will be entitled to a compensatory award determined by reference to the amount the tribunal considers just and equitable, having regard to the loss sustained by the employee in consequence of dismissal, in so far as that loss is attributable to the employer's action. The maximum compensatory award is at present £7,500.

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8. The compensatory award would be calculated under the following heads:-
- (a) Loss of earnings to date of hearing. This will be based on take home pay, including regular overtime and bonus earnings. Net earnings from any new employment would be deducted.
  - (b) Estimated future loss of earnings. The starting point is the employee's take home pay. Account must be taken of prospective changes in earnings had he stayed in employment, and a deduction must be made for any earnings likely to be received in a new job. An average figure for loss of earnings per week is thus arrived at, and this can be multiplied by the number of weeks which the tribunal estimates as the probable period of unemployment caused by the dismissal, after taking into account any failure by the employee to mitigate his loss. There may also be a discount in respect of the accelerated receipt of earnings.
  - (c) Loss of statutory industrial rights. A small conventional amount is awarded in recognition of the fact that it will take the employee at least 52 weeks to obtain protection against unfair dismissal in any new employment.
  - (d) Loss of pension rights.
  - (e) Expenses, including expenses in looking for new employment.
9. From the above would be deducted any amount in respect of contributory fault of the employee, and any remaining excess of a redundancy payment over the basic award.

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DAMAGES AT COMMON LAW

10. If the employee does not accept the variation, remains in employment and successfully brings an action for damages at common law, damages will be assessed on the principle that he is entitled to such money to cover his loss as arises naturally in the ordinary course of things from the breach. The damages would be the difference between his pay before the variation and after it.

CONSEQUENCES OF A DECLARATION IN FAVOUR OF THE STRIKERS

11. The remedy of a declaration simply determines the rights of the parties, without any order of the court for their fulfilment. The consequence is that the DHSS would be faced by a declaration that its purported variation of the contract was unlawful. No order of specific performance could be made against the DHSS. The DHSS would have to decide whether to accept the position, to persuade the employee to vary his contract of employment, or to dismiss him. If it were to dismiss him, it would face a claim for unfair dismissal, and would be in the disadvantageous position of having dismissed an employee who had had a declaration made in his favour that the variation of his contract was unlawful.

SUMMARYINDUSTRIAL TRIBUNAL

12. Basic award plus compensatory award: no enforceable obligation to re-employ (the employees would have either been first dismissed or have thrown up their jobs).

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COMMON LAW - DAMAGES

Proven lost earnings: employee continues in employment, but with DHSS no longer able to contend entitlement to vary terms of employment.

COMMON LAW - DECLARATION

In practice this would be coupled with a claim for damages. DHSS no longer able to contend entitlement to vary terms of employment.

13. I am copying this letter to the Prime Minister, the Secretaries of State for Social Services and Employment, the Minister for Social Security, the Minister of State (Treasury) and Sir Robert Armstrong.

*Lawrence,  
Patrick*

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