



HOUSE OF LORDS,
SW1A 0PW

19 July 1983

The Lord Bellwin
Minister of State for Local Government
Department of the Environment
London S.W.1

My dear Irwin:

Abolition of GLC and the Metropolitan County Councils PK. 15

I have read with interest your memorandum MISC 95(83)1 on the abolition of the GLC and the MCCs. This letter is concerned only with the point mentioned in paragraph 13 of your memorandum: the extent to which Council Directive 77/187/EEC - the acquired rights Directive - would apply to transfers of employees consequent upon the dissolution of the GLC and MCCs. This is a question which, as I have seen from subsequent correspondence, has also troubled other Ministers.

The paper by officials of your Department which accompanied your memorandum came to the conclusion (paragraph 4.3) that the Directive might have to apply wherever "the transfer of any identifiable group of employees within its own specific responsibility and a separate internal organisation" was involved. This conclusion was said to be based on an opinion of the Law Officers. The conclusion in fact reached by the Attorney General, the Lord Advocate and Professor Jacobs in paragraph 16 of their opinion was that "HMG should treat the transfer of any identifiable group of employees with its own specific responsibility and a separable internal organisation as the transfer of an undertaking".

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While not much may turn on these small differences of wording, I question whether reliance should be placed on an opinion which, as is admitted in your officials' paper, was given in a wholly different context. The Law Officers were considering, first, whether the Directive could as a matter of principle apply to Crown servants who do not have contracts of employment, and secondly, assuming an affirmative answer to the first question, whether the Directive would apply to Crown servants transferred to the private sector following legislation privatising nationalised undertakings. They concluded (paragraph 9) that the European Court was likely to find that the Directive does apply to Crown servants, and furthermore (paragraph 14) that any undertaking which is to be transferred from the public to the private sector is *ex hypothesi* an activity of an economic character and thus falls within the scope of the Directive. I see no reason to disagree with either of these conclusions.

But the question you are facing is, I think, a very different one. What has to be decided is whether local government employees, even though they may fall into a readily identifiable group such as the police, the fire service or the education service, are covered by the Directive. The legal basis of the Directive is Article 100 of the EEC Treaty, which allows the Council to issue Directives for the approximation of such laws as "directly affect the establishment or functioning of the Common Market". While no one could seriously argue that the reorganisation of local government in this country affects the establishment or functioning of the Common Market, whether directly or indirectly, I am prepared to concede that an argument based on *vires* would be unlikely to find favour with the European Court.

I think however that we are on stronger ground if we look at the text of the Directive itself. Article 1(1) provides that it applies "to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger". The term "undertaking" is not defined in the Directive,

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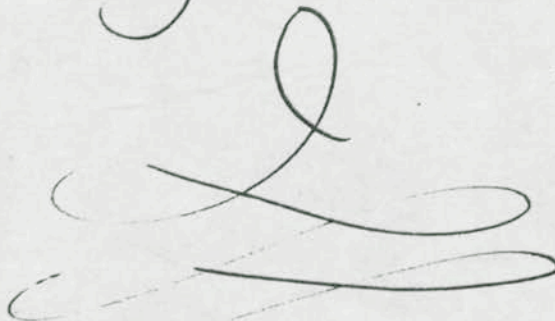
but in our implementing Regulations - the Transfer of Undertakings (Protection of Employment) Regulations 1981 - "undertaking" is defined as including any trade or business, but as not including any undertaking or part of an undertaking which is not in the nature of a commercial venture. To the best of my knowledge the Commission have not taken exception to this definition, and indeed it seems to accord with the sense in which the word "undertaking" is used in Articles 85 - 94 of the EEC Treaty, and also with the Commission decision quoted in paragraph 9 of the Law Officers' opinion, where it is stated:

"The United Kingdom Post Office and British Telecommunications are public corporations and economic entities carrying on activities of an economic nature. As such they are undertakings within the meaning of Article 86 of the EEC Treaty".

For all these reasons I think that, to put it at its lowest, there is considerable doubt whether the Directive will apply to the transfers of local government employees which you envisage. If the Directive were indeed applied it would add considerably to the expense of such transfers, and it seems to me therefore unwise to start with the assumption, based on an opinion given in a different context, that the Directive does apply. I suggest that, if you have not already done so, you should refer this question to the Law Officers for them to consider the point which is in issue.

I am sending copies of this letter to the other members of MISC 95, to the Attorney General and to the Lord Advocate.

Yrs :

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

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From the Minister for the Arts

The Rt Hon The Lord Mackay of Clashfern QC
Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1

31 August 1983

Ben James,

ABOLITION OF THE GREATER LONDON COUNCIL AND THE METROPOLITAN COUNTY COUNCILS: ACQUIRED RIGHTS DIRECTIVE

will request of rep'd

Thank you for your letter of 12 August, and for your helpful explication of where we stand in relation to the Acquired Rights Directive.

I have noted that the position of the Royal Festival Hall might require further consideration should we decide to deal with it in a way that would turn it beyond doubt into an "economic activity".

I do not think we need pursue this specifically at this stage, but presumably if the problem needs to be dealt with in the case of the municipal airports, then the conclusions would apply to any other similarly affected local authority staff. Should we decide to deal with any of the arts institutions in a way which seems to bring the Directive into play we shall of course seek legal advice in good time.

I am copying this letter to recipients of yours.

*Yours,
T. J. G.*

LORD GOWRIE

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