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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

INDUSTRIAL RELATIONS LEGISLATION

Memorandum by the Lord Chancellor

1. I have a number of comments which I should record before a discussion in E Committee takes place on the Memorandum by the Secretary of State for Employment (E(81)103).
2. The objectives to which we must adhere are set out with admirable clarity in paragraph 3 of the Memorandum where it is explained that we must avoid measures which could be rendered ineffective by the concerted opposition of trade unions or the widespread reluctance of employers to seek the remedies provided. It is essential that, if we are to build on the foundation of the Employment Act 1980, we adopt measures which will be seen to be right as a matter of legal principle, which can be enforced without straining to breaking point the machinery for ensuring obedience to the law and which, in political terms, will accord sufficiently with public opinion to stand a good chance of surviving future changes of Government. The Employment Act satisfies this test. However, I have grave doubts whether the same can be said of all the present proposals.

Closed shop

3. The closed shop is, to my mind, objectionable in principle

but it is important to bear in mind the political realities. It is now proposed that there should be considerably enhanced compensation in cases where dismissal occurs as a result of the closed shop, some additional interim relief available in these circumstances and a right, for the former employee, to "join" the trade union in his action for unfair dismissal before the industrial tribunal. While it is right that those who engineer dismissals should be made to pay substantial sums, I doubt whether we can justify singling out the employee who is unfairly dismissed in these circumstances for better treatment than all other unfairly dismissed employees. This proposal is not, as has been claimed, readily defensible even if it is applied equally to unfair dismissal on grounds of trade union membership or activities. Similarly, objection can be taken to making the present maximum award the minimum in closed shop cases. This takes no account of the requirement of the general law that a plaintiff must mitigate his loss as far as possible, and it is therefore punishing the employer unreasonably. Nor do I think that additional interim relief will act as a deterrent against dismissal where employers are, for one reason or another, determined to maintain the closed shop. The same is true of the proposal that the employee can "join" the trade union in the action. This is quite unobjectionable in principle but is likely to prove ineffectual. While the employee can still go directly against the employer, he is not likely to wish to waste his shot on the more difficult task of pursuing the trade union at the same time. The net result may well be that employers will simply pay more in order to maintain the status quo.

Union only requirements in contracts

4. I doubt whether it is possible to destroy this objectionable practice by legislation of the kind envisaged. The present proposals certainly seem unlikely to be effective for two reasons. Firstly, the mere fact that the "union labour only"

clause is void does not render the rest of the contract ineffective. Consequently, the amendment is unlikely to bring about any substantial change in the rights or remedies available to those affected by the practice. Secondly, the proposal that immunity under section 13 of TULRA 1974 should be withdrawn in cases where there is discrimination by those offering, placing or making contracts is likely to prove worthless where there are no torts committed on which an action against a trade union or its members could be based. It is not clear who could take advantage of the change in the law proposed, nor is it immediately apparent, even where a right of action may arise, how the damage could be readily assessed. Often, any damage will be either too remote or very difficult to establish, such as the possible loss of profits of unsuccessful tenderers.

Immunity of trade union funds

5. There is a strong case in logic for getting rid of the wide immunity enjoyed by trade unions. However, as the Secretary of State for Employment readily acknowledges, any return to the "Taff Vale" position is fraught with difficulty and will be bitterly opposed in Parliament and elsewhere. I am most concerned that the present proposals represent an unfortunate compromise between the current position, which is logically indefensible, and the full removal of the section 14 immunity, which is politically impracticable. If immunity is to be withdrawn, why should trade unions not be liable to the same extent as individuals and other bodies? The proposal that there should be a limit on the amount of damages which could be awarded against them, graded according to the size of the union, seems to me to be quite wrong in principle. In practice, it would mean that very damaging action might result in almost negligible awards if a small union was involved and this might act as a deterrent. Moreover, it may well be extremely difficult for a plaintiff to establish that a trade union will be liable in the circumstances mentioned in paragraph 23 of Annex 1. The complexities of union rule-books are likely

to prove daunting and there will be ample opportunity for trade union officials to escape their liabilities. My view is that it may be undesirable politically to tackle section 14, despite the abuse to which it gives rise at present, but, if we do, much closer attention needs to be given to the details of the proposals.

Enforcement

6. I have a direct concern, as the Minister responsible for the machinery for enforcement of civil judgments, in ensuring that we do not create circumstances in which there will be regular, and very damaging, conflicts between those who have to enforce judgments and the trade union movement. Those who seek to restrain trade union excesses will wish to go for injunctions; disobedience to orders of the court will lead either to fines, which will be difficult to enforce or, in rare circumstances, to the committal of contemnors to prison. It is at this point that the issue of martyrdom arises and the public often see the law as having failed rather than succeeded in its purpose.

7. If we are to cut down on trade union immunities and narrow the definition of trade disputes, which in general terms I would support, we must avoid the kind of confrontation and conflict which has been seen in the past and which can only bring the civil law into disrepute.

H of StM

27th October 1981

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