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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

INDUSTRIAL RELATIONS LEGISLATION

Memorandum by the Secretary of State for Employment

I invite the Committee to take stock of what we have achieved and to consider what should be our strategy and tactics in the lead-up to the next General Election, not ruling out legislation in 1983/84. Our decision should pave the way for what might appear in the Manifesto for the next General Election and for further legislation in the next Parliament. I believe our first priority now should be to focus the spotlight of public opinion on the trade unions as largely unreformed institutions in our society and to undermine the power of unrepresentative leaders.

What We Have Done

2. We have followed a step-by-step approach, providing practical remedies for acknowledged abuses of industrial power and, by so doing, redressing the balance of power in favour of employers. We have attracted and retained overwhelming public support, including that of most members of trade unions. We have been careful not to get too far ahead of employer opinion. We have been at pains always to consult widely and to give the trade unions themselves every opportunity to participate in those consultations. We have consistently held to the view that the civil law, rather than the criminal law, should be the vehicle for industrial relations reform. Recent events have underlined the wisdom of that view.

3. When the Employment Bill becomes law it will, together with the Employment Act 1980, give more effective protection to individuals threatened by closed shops. We will have provided better protection against coercive union recruitment tactics and attempts to require contractors to employ only union members or to recognise unions. The 1980 Act already provides remedies against secondary picketing and greater protection than before against secondary action such as blacking and sympathetic strikes. The present Bill will have made it more likely that unions will have to pay compensation for individuals dismissed in closed shops, and it will have opened up union funds to the possibility of awards of

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compensation for individuals dismissed in closed shops and to claims for damages in cases of unlawful industrial action. The definition of trade dispute is being narrowed and the inhibitions on the dismissal of strikers eased. (A fuller account is at Annex A).

4. In parallel, the amount of supplementary benefit which could be paid to strikers has been reduced and strikers are now denied income tax repayments whilst strikes continue.

5. These are not inconsiderable achievements. They need to take root and hold. We cannot be sure that we will not be faced by determined challenges to the law both in an attempt to demonstrate opposition to any industrial relations legislation and to foster a wider conflict and such challenges will have to be faced. But with public opinion still with us, the success of our measures so far leaves open the way for further steps to redress the balance of power. I review below the full range of options and make recommendations.

The Future

6. Trade union elections. With the Prime Minister's agreement, I have recently announced the Government's intention to hold early and extensive consultations on whether there should now be legislation to require trade unions to use secret ballots in the election of their leaders. There is no question that the present situation leaves much to be desired; union leaders are often out of touch with the views of their members and the voice of more moderate members often goes unheard as critical issues loom. But we should not underestimate the difficulties and risks in legislating, and it is necessary to remember that a fundamental problem is the sheer apathy of many union members so far as the management of their union and its affairs are concerned. The unions will oppose legislation as an "unwarranted interference in their internal affairs". It will be proclaimed as a first step of State regulation. Every effort will be made by them to evade or frustrate the legislation. A total boycott by TUC-affiliated unions is a probability. Any legislation must therefore be designed to operate in this climate. At the same time it must not be too draconian in character or its effectiveness may well be diminished. The rules of trade unions governing elections vary greatly because they are often designed to meet the particular needs and balance of interests in the individual union. We should not retain public support for our legislation if its effect were to impose inflexible requirement which did not allow the differing needs of trade unions, and indeed their members, to be met. I shall shortly be putting forward to colleagues my proposals for consultation.

7. Strike ballots. An emphasis on the need for greater democracy in trade unions might suggest that we should also legislate on mandatory secret ballots before industrial action. Supporters in both Houses have proposed new clauses to this effect. I believe however that such legislation would be a mistake. As we discovered in 1972, Government or State-imposed ballots (and they would be Government imposed even where they were triggered by a

proportion of the membership or were necessary to secure immunity for industrial action) are likely to be turned into a vote of confidence in the union either in support of a pay claim or in its opposition to the Government. Equally important, the holding of ballots may impede rather than assist the resolution of disputes. There was very little support for mandatory strike ballots from industry in the consultations on the 1981 Green Paper. In my view ballots are better left as a method to be employed, whether on the initiative of trade unions or of managements, rather than as a statutory requirement, and there have been a number of encouraging recent examples of employers balloting their own employees. This of course does not mean that we should not at every opportunity continue to draw attention to the failure of trade unions to consult their membership on important issues and to press them to make greater use of secret ballots, the cost of which the Government is prepared to meet. It may be that we should consider extending State subsidy of ballots to those organised by employers, especially if trade unions continue to boycott public funds for ballots.

8. Contracting-out. I believe that the time is also ripe to review the operation of the Trade Union Act 1913 and in particular to consult about ending the anomalous and increasingly unsatisfactory arrangements for contracting out of the political levy. Only 61 trade unions maintain a political fund and all but 5 of those are known to be affiliated to the Labour Party. Although the proportion of unions maintaining a political fund is small, many of those who do are the larger unions. In 1980 about 8 million union members contributed to political funds. This represents just over 80% of members of unions with political funds (ranging from 99% in the TGWU to 30% in SOGAT). These figures are absurd when set against the actual voting patterns of trade union members at general elections.

9. We could also take the opportunity afforded by our consultative document to review other aspects of the operation of the 1913 Act. Certainly the definition of "political objects" needs to be brought up-to-date to cover elections to the European Parliament and there have also been complaints that under the Act a union remains free to use its general fund for other forms of political activity such as supporting "quasi-political" organisations against the wishes of some of its members. These objections too should be examined.

10. I recognise that a judgment needs to be made on the timing even of consultations on proposals of this nature because of the risk of opening up the whole question of the financing of political parties. But at the same time it must be recognised that "contracting out" cannot be justified and is the cause of considerable resentment among our most valuable supporters.

The Next Step

11. A consultative document on the issues outlined above with a view to early legislation would maintain the momentum of our policy of industrial relations reform, represent a substantial, but not excessive,

further step in our step-by-step approach and keep public attention focussed where we want it, on trade unions and their anti-democratic and bureaucratic failings.

12. To complete the picture - to enable us to have a broad discussion of our objectives and tactics - I review in Annex B the full range of other possible measures which have been proposed by particular groups of our supporters. I give the reasons why I am opposed to including them in this next round of consultations.

Conclusions

13. Accordingly I recommend that

(i) we should continue the step-by-step approach which has stood us in good stead up to now. This means that we should concentrade on practical measures to remedy acknowledged abuses, thus ensuring wide public support for our measures and not getting too far ahead of employer opinion;

(ii) we should, as before, consult widely and carefully before legislating;

(iii) as our nest step, we should focus on the issue of the need for trade union reform and during the autumn issue a consultative document. This should examine:-

(a) the question of legislation to require secret ballots for the election of trade union leaders

(b) the question of mandatory strike ballots (though more briefly as it has already been considered in the Green Paper on Trade Union Immunities and attracted little support)

(c) the operation of the 1913 Act, particularly

(i) the case for substituting contracting-in to the political levy for contracting-out

(ii) the amendment of the "political objects" provision.

14. This would not foreclose on any options which we might want to put to the electorate, nor rule out the possibility of introducing legislation on (iii) (a) and/or (c) in this Parliament.

Department of Employment
7 October 1982

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ANNEX A

THE EMPLOYMENT ACT 1980 AND THE EMPLOYMENT BILL 1982

The Employment Act 1980 received Royal Assent on 1 August 1980. Under its main provisions

(a) the Secretary of State was given powers to set up a scheme to provide payments towards expenses incurred by independent trade unions when conducting secret ballots for certain purposes. This scheme covers ballots for the calling or ending of industrial action; elections to the Executive Committee; rule changes; transfers and amalgamations; and, by a recent order, wage offers. The Act also require employers of more than 20 workers to provide facilities for secret ballots if requested to do so by a trade union.

(b) the Secretary of State was also given powers to issue codes of practice on industrial relations matters which, although not themselves legally binding, may be taken into account by courts, industrial tribunals or the Central Arbitration Committee. (To date codes have been issued on picketing and the closed shop).

(c) important protections were given to those working in closed shops. First, any person employed in or seeking employment in a job where a closed shop operates was given the right not to be unreasonably refused membership of the relevant union and the right not to be unreasonably expelled from it. Secondly, it made dismissal of an employee for non-membership of a union unfair in cases where the person had genuine grounds of conscience or other deeply held personal conviction or where the employee had been with the company as a non-union member since before the closed shop came into force. It also made unfair any dismissals for non-membership of a union in any new closed shop which has not been approved by at least 80% of the workforce in a secret ballot. Finally, it gave employers the right to 'join' a trade union in proceedings for unfair dismissal for non-membership of a union if he claimed that the union exerted pressure on him to dismiss the employee concerned.

(d) secondary picketing (ie picketing other than at the employee's own place of work) was excluded from a new definition of 'peaceful picketing' to replace the definition in the 1974 Act.

(e) important restrictions were placed on other secondary action (ie action such as 'blacking' taken by workers not in dispute with their employer). Indiscriminate secondary action was outlawed by the removal of immunity for secondary action which interferes with commercial contracts unless the action is specifically targeted on the employer in dispute.

(f) industrial action to compel workers to join a particular trade union was made unlawful (a provision which is being repealed in the 1982 Bill because it is rendered unnecessary by the wider prohibition of 'union labour only' requirements).

The 1982 Employment Bill was introduced to Parliament in January 1982 following extensive consultations on the Green Paper on Trade Union Immunities published in 1981. It is expected to become law in the Autumn. Its main provisions

(a) enable the Secretary of State to pay compensation to victims of the closed shop who were dismissed under the last Government's legislation and who would have been protected as existing non-union members or conscientious objectors had the closed shop provisions of the Employment Act 1980 been in force at the time of their dismissal.

(b) make it unfair to dismiss an employee for not being a union member in a closed shop where the closed shop had not in the five years preceding the dismissal been supported in a ballot by 80% of the employees covered or 85% of those voting.

(c) substantially increase the compensation available for those unfairly dismissed for non-membership of a trade union or because of trade union membership or activities. There is a new special award - which applies to closed shop dismissals made unfair in the 1980 Act and the 1982 Bill - set at a minimum level at £10,000, or £15,000 where a reinstatement order has been made but not observed.

(d) extend the provisions on 'joinder' by enabling an employee who claims to have been unfairly dismissed for not being a member of a trade union to make a trade union party to unfair dismissal proceedings where he claims that the union put pressure on the employer to dismiss the non-union employee.

(e) amend the law relating to the dismissal of those taking part in a strike or other industrial action to provide that an employer has not discriminated against an employee (and therefore an industrial tribunal has no jurisdiction to determine an unfair dismissal complaint) if he has given equal treatment (as regards dismissal and offers of re-engagement within three months of their dismissals) to those taking part in the action at the same establishment as the dismissed employee at the date of his dismissal.

(f) make unlawful any discrimination against non-union firms in the awarding or making of contracts; and remove legal immunities from those who put pressure on an employer to discriminate in this way and from those who organise industrial action against companies or their workers on the ground that they are non-union firms.

(g) bring the legal immunities from civil actions for trade unions into line with those for individual officials. This will enable trade unions to be sued for an injunction or damages up to a specified limit where they are responsible for unlawful industrial action.

(h) restrict the definition of a lawful trade dispute (on which the immunities from civil actions rest) to disputes between workers and their own employer which are wholly or mainly related to the subjects of a trade dispute listed in section 29 of the Trade Union and Labour Relations Act 1974.

ANNEX B

OTHER POSSIBLE MEASURES OF INDUSTRIAL RELATIONS REFORM

1. Below, as foreshadowed in para 13 of the main paper, I review the other issues on which it has been suggested that we should legislate and explain why I am opposed to including any of them in this particular round of consultations.

Immunities

2. It is sometimes argued that the immunity for those (including unions) who induce others to break their contracts of employment - now in Section 13(1) of the 1974 Act and originating from the Dilke amendment in 1906 - should be revoked. A strong case in principle can be made. However, the effect would be that unions and officials would always be liable to damages unless, in calling for industrial action, they had given notice of their intention not shorter than the full period of notice in the contracts of employment of all the individual employees concerned. And, in logic, if individual contracts were not to be broken, they would need to be terminated. By the giving of notice, individuals would forfeit all rights to a redundancy payment or claims for unfair dismissal and to the benefits (eg the accrual of pension entitlement) which continued employment would have provided. Their relationship with their employer would have been severed. The possibility of it being re-established would essentially depend on whether the employer eventually needed to offer re-employment to continue in business or could recruit an alternative labour force. I do not believe that industrial or public opinion is anywhere near ready for such a step or that we could maintain the support of trade unionists for our industrial relations policies if we adopted it. We would be portrayed as denying "the right to strike".

Incorporation of trade unions

3. This has been advocated by the Centre for Policy Studies, but it is difficult to see how this could bring any material advantage. At present, although not corporate bodies, trade unions, because of Section 2 of the 1974 Act, have most of the attributes of such bodies, being able generally to sue and be sued in their own names. When the Employment Bill becomes law their funds will be at risk if they act unlawfully. Furthermore, incorporation would require

definition of the conditions for incorporation and this would take us back to the problems encountered under the 1971 Act. The problem of vicarious responsibility has in any case been dealt with in the Employment Bill. I am sure we should not contemplate any early change to the rules we are establishing.

Legally Enforceable Agreements

4 Greater certainty that unions and their members would observe agreements would be a valuable advance and there is at present nothing in law to prevent employers and unions agreeing that their agreements are legally enforceable. They do not however choose to do so. Even after the 1971 Act, which presumed all collective agreements to be intended by the parties to be legally binding unless they included a specific provision to the contrary, virtually every collective agreement included such a proviso. Certainly so far as substantive agreements on terms and conditions are concerned, the consultations on the 1981 Green Paper showed that employers still saw little or no advantage in having legally binding agreements. Indeed, many of the ways in which employers needed to react to the downturn in economic activity could have been blocked if unions and their members had been able to enforce the observance of previous agreements through the courts.

5 As for procedure agreements, amendments have been put down to the present Bill to link immunity to their observance (whilst not making such agreements legally enforceable as such). This proposal was first put forward last year by a CBI working party. While subsequently the CBI, realising the extent of the problems involved, came to see that this proposal was if anything, for the long term, certain other employer organisations have lent their support to it.

6 At the same time I see nothing to suggest that employers generally want this change, which would of course be far more dramatic than that taken in 1971, nor do I find any evidence that they are seeking to adapt their procedure agreements in preparation for it. Since the CBI working party there has been no move by employers in this direction and virtually no improvement of existing procedures. Indeed, a good many employers have consistently and strongly opposed the proposal as they do not believe that existing procedure agreements could bear the weight of legal interpretation and they would not wish them to do so. Moreover, the

effectiveness of such a provision could be frustrated by the unions in withdrawing from all existing procedure agreements and concerted action of this sort could be expected. To prevent this it would be necessary to legislate for enforced conciliation by ACAS in the absence of a procedure agreement or for a model procedure agreement to be imposed on all employers. Both these courses have strong disadvantages and I am still to be convinced that we would get the necessary support from employers.

7 Furthermore, I am strongly of the view that it would be better to allow the exposure of union funds to settle into the law before making such a change since to have any useful effect strikes in breach of procedure agreements should put trade union funds at risk. In short we should not consider a measure of this kind until there is clearer evidence of employer support and the Employment Bill 1982 has bedded down.

Secondary action

8 The 1980 Act considerably narrowed the scope of the immunity for secondary action which interferes with commercial contracts. In effect it allowed such action to be lawful only if its purpose and likely effect were to disrupt a current contract between the employer in dispute and a first customer or supplier. There is no good reason why the law should provide immunity for <u>any</u> secondary/ sympathetic action (the latter term is singularly inappropriate as no sympathy is shown to the innocent victims of the action). In our Manifesto we undertook to "ensure that the protection of the law is available to those not concerned in the dispute but who at present can suffer severely from secondary action (picketing, blacking and blockading)". We have not yet met this commitment fully.

9 However, Section 17 of the 1980 Act has now been construed successfully by both the House of Lords and the Court of Appeal and it is in the area of secondary action that we may expect some early legal actions involving union funds. I believe that it is much more important to ensure that the opening up of union funds for damages works and becomes accepted than to contemplate early action to narrow further or remove altogether the restricted immunity for secondary action established by the 1980 Act.

Lay-Off

10. There are two proposals to be considered, originally emanating from the Engineering Employers Federation, either or both of which could be adopted:-

(i) a measure to assist employers in combatting selective action. An employer whose course of business was disrupted by the industrial action of some of his employees could be enabled to lay-off without pay others of his employees whose work was affected.

(ii) a measure to alleviate the economic losses for employers caused by major disputes. Where industrial action in a major dispute is causing widespread disruption, the Secretary of State could be empowered by Order to enable employers whose business is affected to lay-off some or all of their employees.

11. While the purpose of these proposals can be presented as being no more than to extend to white collar workers and staff the provisions regarding lay-off in the event of industrial action which in most guaranteed pay agreements apply to blue collar workers, I believe that we should think very carefully before we go down this road. There are arguably objections of principle to Government intervention to enable one party - the employer - to set aside the terms of an agreement which has been freely made. (The argument that legislation is required because some employers, eg in Fleet Street, are too weak to negotiate the necessary changes in their agreements with unions reflected in the contracts of their employees merely casts doubts on whether, if the requested legislation was enacted, such employers would be able to avail themselves of it). I do not rule out that circumstances may require us to introduce such legislation, particularly if selective strike action threatens to develop widely as a deliberate tactic of unions, or in the event of a major dispute with widespread consequences for other employment, but we should certainly not rush into it. For this reason, I advise strongly against consulting on any proposals at this stage. Additionally, such intentions would be viewed by white-collar employees (largely our supporters) in particular as a direct attack on what are now their lawful and agreed interests.