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CABINET
MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

POSSIBLE LEGISLATION TO ENABLE CIVIL SERVANTS
TO BE LAID OFF WITHOUT PAY

Memorandum by the Lord President of the Council

I have circulated under E(80)83 a report to E(CS) by officials examining the scope for altering civil servants' contracts of employment so as to widen management's range of response to industrial action.

2. The report led me to the conclusion that we should have to live with the existing range of management options in dealing with industrial action. E Committee has, however, been invited by the Prime Minister to consider further the possibility of introducing legislation to make it possible to change the contracts of white collar civil servants already in post. The intention would be to enable management to lay off staff who were without work by reason of the industrial action of others. The Prime Minister asked for an indication of the shape of legislation that would be required -

- a. for white collar civil servants
- b. for white collar workers in the private sector also.

3. There are strong practical arguments in favour of being able to take such action. The use of selective strike action by small numbers of staff, leaving much larger numbers without work, is a recent development (linked largely to the use of computers). It enables unions to inflict severe financial damage on employers while themselves suffering very little hardship. It would be reasonable for employers to seek protection against this development.

4. In my view it would not be defensible for the Government to take such powers in relation to the civil service in isolation. The legislation should cover the whole nation. If private employers do not want it, it should as a minimum cover all Government employees. But difficult problems of definition would then arise.

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5. The attached report by officials has been quickly prepared to show the shape of possible legislation covering -

- a. the Civil Service. (The pattern would be similar for Government employees generally.)
- b. all employees.

6. Legislation would be complex and much more work would be needed before instructions could be given to Parliamentary Counsel. It would also, to say the least, be controversial. When E(CS) considered in 1979 the idea of legislating for civil servants only we came down against it for three main reasons:-

- a. we would be overriding by legislation terms of service which were freely offered and accepted on entry into the Civil Service in circumstances where the employees affected would not be in breach of contract and - in most cases - blameless in every other respect (we believed this to be a serious matter of principle);
- b. it was far from clear that existing measures were inadequate;
- c. the threat of legislation would unite militants and moderates and would lead to widespread industrial action.

7. The arguments against legislating apply also to the private sector. As in the case of the Civil Service, there would be considerable practical difficulties and, initially, uncertainty in the operation of the procedures. Most employers would probably never use the legislation. Furthermore, legislation would run counter to our general approach of leaving management and employees to resolve these problems without the intervention of the law.

8. When E(CS) considered this they concluded that we should not go down this road and I remain of that view.

9. The other aspect of the problem, commented on by several colleagues, is the suggestion that terms offered to new entrants should be changed to make them eligible for lay-off. My officials will include this in a wider review of the terms of employment offered to new recruits. The review will raise a number of complex and difficult issues and will take some time to complete.

CS

Civil Service Department
Whitehall
London SW1

1 August 1980

POSSIBLE LEGISLATION TO ENABLE CIVIL SERVANTS
TO BE LAID OFF WITHOUT PAY

SHAPE OF POSSIBLE LEGISLATION

(Report by Officials)

Introduction

The objectives of the legislation would be -

- i. tactical - to discourage Civil Service unions from using selective industrial action to cause serious disruption within the Service at small cost to the unions;
- ii. financial - to minimise the cost to the Government of having staff without work through industrial action, whatever the unions involved.

The problems largely arise in the non-industrial sector of the Civil Service where there are no collective agreements allowing lay-off without pay, unlike the agreement with most Government industrial workers whereby industrial workers may be laid off without pay as a result of action by other industrials.

2. The shape of legislation to allow the employer to lay-off without pay civil servants who are without sufficient work as a result of industrial action depends on a number of factors - including inter alia the employees to be covered, the source and type of industrial action which has led to insufficient work, the different types of management response, the safeguards to be applied to and the procedures for laying off.

Precedents

3. In considering the shape of possible legislation, we looked at the Australian Public Service legislation and at the Agreement on Guarantee Payments which applies to most industrial civil servants in the United Kingdom.

4. The Australian Commonwealth Employees (Employment Provisions) Act 1977 provides that public service employees who are affected by industrial action (including industrial action outside the public service) may be laid off without pay if they cannot be re-employed or if there is serious disruption to their work. There has to be a written declaration, by the employing authority, specifying the employees or class of employees being laid off.

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Any such declaration overrides other legal provisions. There is no provision for a special procedure allowing an appeal.

5. The Agreement on Guarantee Payments provides that industrial civil servants whose normal work, or suitable alternative work, cannot be provided due to industrial action by other industrialists may be laid off without pay. Where the lay-off is caused by non-industrial staff action, there is entitlement to a limited Guarantee Payment of wages for a total period not exceeding four conditioned working weeks in any specified period of three months. The Agreement may be put into operation only after every effort has been made to find suitable alternative employment and after consultation with unions. There is no appeal machinery.

6. Shape of Legislation

The attached Annexes attempt to spell out the factors which will have to be taken into account in determining the shape of possible legislation.

Annex I: Civil Service

Annex I sets out the following tentative proposals:-

- i. the proposals should cover both non-industrial and industrial civil servants, overriding any existing agreements in the area;
- ii. any staff without useful work by reason of the industrial action could be laid off without pay;
- iii. lay-off would be at management's discretion;
- iv. in the case of lay-off in accordance with the statutory constraints the employer would be protected against claims for unfair dismissal;
- v. there would be no special appeals procedure for the individual, but there would be an underlying safeguard in that the proper exercise of the statutory power would be justifiable;
- vi. there would be no limit on the duration of statutory lay-off.

Annex II: Extension of the legislation to all employees

Annex II sets out some additional factors which would affect the shape of legislation if it were to apply

generally to the public and the private sectors and not solely to the Civil Service.

- i. a possible extension of the power to lay-off without pay in order to relieve employers of the economic effects of strike action in another enterprise perhaps confined to an associated employer.
- ii. the provision of tests of the employer's reasonableness. (These are thought unnecessary in legislation applicable only to the Civil Service because Ministers are accountable to Parliament.)

7. In considering this Annex it is important to bear in mind the high probability that many sections of industry would press for the legislation not merely to meet the objective now in the Government's mind but to go further and to provide for the statutory entitlement for employers to lay-off without pay to be extended to cover all those who find themselves suffering serious economic effects from the result of industrial disputes to which they are not parties. This would of course throw the net much wider, make the operation of the statutory provisions more difficult to control, cut right across the principle of allowing these matters to be determined by free collective bargaining between employer and employees and their unions and thereby extend the degree of opposition to the legislation.

8. Even without such an extension of objective on the part of employers some of the preceding considerations would still apply to an extension to the private sector and raise the additional problems noted in Annex II.

9. Financial implications

Legislation of this kind would have certain financial implications for employers and employees. If employers were relieved of their obligation to pay workers during lay-off this would serve to increase the amount of Unemployment Benefit payable. Those employees who did not have a direct interest in the dispute but were laid off in consequence of it would be entitled to claim Unemployment Benefit. Thus in many cases the effect of the provisions would be to provide a subsidy for the employer at the expense of the Exchequer.

10. We have not at this stage asked Parliamentary Counsel to begin to draft legislation. This cannot be done, even on a contingency basis, until Ministers have decided to proceed and, if so, on what basis.

LAY OFF OF GOVERNMENT EMPLOYEES WITHOUT PAY IN INDUSTRIAL DISPUTES

SHAPE OF LEGISLATION

A. The Civil Service

- 1. The shape of the legislation will be determined to a large extent by the factors in the following paragraphs.
- 2. Objective of the legislation

To enable the employer to lay off without pay all or some civil servants who are without work as a result of the industrial action of others. There would be no automatic lay off by operation of law.

- NOTE: i. The legislation probably needs to cover both non-industrial and industrial. This is because there are some industrial who are not covered by the Guarantee Payments Agreement; even those who are may only be laid off without pay if the industrial action was taken by other industrial (or they have been laid off with pay for four weeks). It would create further anomalies if industrial were treated more favourably than non-industrial. The statutory provisions should, therefore, apply to all civil servants but would be additional to any "contractual" rights of the employer.

- ii. Management should not be deprived of their discretion to select staff for laying off.

3. Staff to be covered

There is a choice between:-

- a. All civil servants without useful work who are employed at the establishment or place of work where the industrial action is taking place.

OR

- b. All civil servants without useful work as a result of industrial action.

NOTE: In each case there is the additional question whether the provision should apply to all civil servants within these categories, or only to those with an interest in the dispute, e.g. if they are members of the same union as those on strike or are part of the same bargaining unit.

- i. Alternative b. seems to be preferable because the effects of industrial action can go well beyond the boundaries of the place of the dispute.
- ii. It also seems undesirable to limit the application to those staff with an interest in the dispute. It would lead to difficult questions of what constitutes interest and it would be much easier to forego any such distinction.

4. Circumstances in which the legislation would apply

Legislation could be invoked where staff were without work because of industrial action of other civil servants OR employees other than civil servants.

- NOTE:
- i. the situation would be such that normal or suitable alternative work could not be found,
 - ii. the Australian legislation is drafted to cover situations
 - (a) where workers cannot be usefully employed, or
 - (b) there is a serious disruption to the performance of a function by the employing authority.

Of these alternatives (a) is more appropriate to the Civil Service.

- iii. the circumstances should include politically motivated industrial action.
- iv. it would be necessary to cover the situation where civil servants were without work because of the industrial action of workers outside the civil service; this could be costly to the Government as an employer.

5. Effect on other Agreements

It overrides them.

6. Protection of the employer against challenge

It might be necessary for the legislation to provide that the lawful exercise of the right of lay off shall not provide the basis for a successful claim for constructive unfair dismissal nor for any other contractual claim.

7. Employee protection

- a. The exercise of the statutory power would be justiciable. Thus a court could be asked to decide whether the power had been properly exercised, eg whether any prescribed conciliation procedure had been followed or due notice given.
- b. The Minister who had exercised the power would be accountable to Parliament.
- c. The relevant union or unions would be fully consulted.
- d. The contract is overridden only to the extent that the employer has a new right of lay off without pay.

NOTE: i. The effect of the power to lay off is to override all existing agreements (cf para 5), and we see no justification for providing for proportionate payment of wages on the lines of Estacode Kb.

8. Duration of lay off without pay

There is to be no time limit or other restriction on the duration of statutory lay off.

9. Definitions

Definitions would be a matter for Parliamentary Counsel. Some would certainly be necessary eg industrial and non-industrial civil servants; industrial action.

B. Other Government Employees

1. Part A relates specifically to the Civil Service. The same arguments would apply if it were decided to extend the legislation to other bodies where the Government is the employer (the National Health Service, for example); difficult problems of definition would, however, arise.

LAY OFF WITHOUT PAY OF WORKERS IN THE PRIVATE AND
THE REMAINDER OF THE PUBLIC SECTOR

SHAPE OF LEGISLATION

1. Most of the provisions in Annex I for a scheme applying solely to the Civil Service would continue to apply even if the scheme were extended to the whole of the public sector and beyond to the private sector as well. There are, however, areas in which extension beyond the Civil Service would give rise to additional considerations affecting the shape of the legislation. One major consequence of this extension would be the overriding of countless collective agreements providing for lay-off in situations of this kind. Other additional points are indicated below.

2. Employees to be covered

There would be a question whether the power to lay off without pay should be extended beyond the employees of the employer in dispute. It could be argued that it would parallel the Civil Service situation if the power were extended to employees of an associated employer of the employer in the original dispute. This might be justifiable where a dispute is occurring at one company in a group of companies and that company provides common services for the whole of the group. Thought would therefore need to be given to whether to extend the protection to associated companies who provide common services and so have a direct interest in the dispute. This will however give rise to challenge both from associated companies - who may argue that the ability of any particular employer to withstand the strike may depend on the overall viability of the group of companies to which he belongs and therefore that the right should flow across all associated companies - and from other companies who find themselves suffering damage from a strike elsewhere and who will see associated employers being in some instances just as distinct entities as they are themselves. There would be difficult questions to be resolved on this point.

Circumstances in which the legislation would apply

3. Similar definitional problems will arise in this area.

Protection of the employer against challenge

4. The statutory power should provide that the lay-off may not be regarded as a termination of employment. This would have the effect of freeing employers from -

- a. statutory claims for unfair dismissal, redundancy pay and guarantee pay.
- b. common law claims for wrongful dismissal and reimbursement of wages (especially wages during notice).

In addition the legislation would need to free employers from any contractual claim.

Employee Protection

5. If this legislation were extended to the rest of the public sector and the private sector there is the question whether it would be necessary to provide tests of the employer's reasonableness (to parallel the civil service safeguards - Annex I para 7). The tests envisaged might include:-

- a. whether the employer took all reasonable steps to provide suitable alternative work,
- b. whether the employer took all reasonable steps to minimise the extent or duration of the lay off, and to lay off no more employees than necessary,
- c. whether the employer acted fairly in selecting employees for lay-off.