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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

TRADE UNION IMMUNITIES FOR SECONDARY ACTION

Memorandum by the Secretary of State for Employment

I published on 19 February for consultation a working paper containing the proposals for limiting immunities for secondary industrial action approved by the Committee on 13 February (E(80)4th Meeting).

INDUSTRIAL VIEWS

2. I have received comments from the TUC and the CBI and from other employers associations as well as from individuals. The TUC are against any legislation in this area and criticise the proposals as confusing and leaving too much discretion to the judges. They claim that these new restrictions and the intention to publish a future Green Paper show the Government as enacting a slow re-run of the Industrial Relations Act of 1971.

3. Employers have expressed conflicting views. Some want to ban secondary action. Others would settle at this stage for the Working Paper proposals, but clarified and tightened somewhat. Some would prefer no action now, but to await the Green Paper.

4. The view that prevailed in the CBI Council this week is that ideally

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all secondary action should be outlawed, but that their priority is to see the Employment Bill, with its picketing provisions, operative for next winter. In the absence of a total ban at this stage, they would settle for a tightening of our proposals for the Bill and for the Green Paper later this year to undertake a comprehensive review of union immunities.

AMENDING OUR PROPOSALS

5. The range of views shows just how difficult it is to strike a reasonable balance between the immunities needed for union action and the rights of others injured by such action. I understand the wish, in the emotionally charged atmosphere of the steel dispute, to ban secondary action altogether. But there is no chance of making that stick even if we put it in this Bill. It would go further even than the 1971 Act and there would be every incentive for unions to turn would-be secondary action into primary disputes. The reality of industrial life would not be changed. A law felt to be unreasonable would be flouted and I would be fearful that all our proposals would go the same way.

6. From the totality of the consultations and discussions I have had, I am confident that our Working Paper proposals are on the right lines. But we do need to take account of the two main criticisms of them, namely that:

(a) there should be some limitation on the scope of the secondary action that can be taken with immunity by employees of first suppliers and customers. Although normally such action would be directed against the employer in dispute, it would be possible under the Working Paper proposals to direct it solely against other people in order to put indirect pressure on the employer in dispute. It is claimed that the action should be aimed more directly against the employer in dispute in order to gain immunity.

(b) some aspects of the proposals would be very difficult to operate in practice and would leave more for the judges to decide than they would themselves like. This is said, for instance, of the general tests of capability and extraneous motive which are said to add little in practical effect to the specific definition of remoteness and to be generally easy for trade union officials to meet. The criticism is also made of the proposal to define a "first supplier etc" as someone doing "substantial" business with the employer in dispute. It is claimed that the effect of this definition is to concentrate immunity on secondary action taken by employees of small suppliers and customers who are most likely to be in such a relationship; and that it will often be extremely difficult to know in practice what is "substantial" business and when it is being done.

7. I accept the force of these criticisms and am convinced that we must adjust our proposals on these points to make them simpler and more effective. For this purpose I think we should take as the basic principle that secondary action is justifiable only to the extent that it puts direct pressure on the employer in dispute to settle. I therefore intend to limit immunity for secondary action to where its sole or principal purpose is to interfere with business between the employer in dispute and the supplier or customer whose employees are taking the action; and where that action is reasonably likely to have that effect.

8. The position would therefore be as follows. There would be immunity for interference with commercial contracts between the employer in dispute and a first supplier or customer. However, where secondary action also resulted in other contracts being broken (as, for instance, in the case of a sympathetic strike), there would be immunity only where these breaches of contract were a consequence of the action aimed at the employer in dispute. In other words if the secondary action was not aimed at interfering directly with business with the employer in dispute, but was aimed at breaking other contracts (between a first supplier and anyone else) as a means of indirectly putting pressure on the employer in dispute, there would be no immunity. The effect of such a provision is to require that the secondary action must be aimed directly at the employer in dispute and not be intended to influence him simply by damaging a lot of other people.

9. This would be a tighter restriction of the scope of secondary action than originally envisaged in the Working Paper. Indeed, one effect would be that no secondary action would attract immunity where the employer in dispute had already been closed down by his own employees' primary action. In such a situation there would be no business being conducted with which any secondary action could be said to be interfering and so there would be no immunity for it. Secondary action would enjoy immunity only where there was eg a partial strike at the employer in dispute, work was still being done and that employer therefore still had active customers and suppliers. This would entirely accord with the basic principle in paragraph 7 above.

10. A further effect would be to impose severer restrictions on secondary action by employees of first customers than by those of first suppliers. This would be so because it is much less likely that the principal purpose (and likely effect) of such action by employees of first customers would be to affect directly business with the employer in dispute. Secondary action taken by employees of first suppliers is generally directed inwards against the employer in dispute: secondary action taken by employees of first customers is generally directed

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outwards into the community at large and affecting the customers' contracts with other parties. It is the latter kind of disruption that the public are rightly looking to the Government to restrain.

11. ASSOCIATED EMPLOYERS. There is one situation to which the consultations have drawn attention where I think it would be right to make special provision for immunity to run, since this is a prime example of "material support". This situation can arise when industrial action is being taken against one of a group of companies. The company in dispute may then arrange for an associated employer to make good his lost production. There may be no supplier/customer link between the two firms so that the second firm would not be brought within the scope of immunity for secondary action. This is however, a situation where the group employer can manipulate the allocation of production between the associated companies in order to break the original strike and where many people would think it reasonable for a union to have immunity for counter-action. I therefore propose to provide that, if at any time during a dispute an employer carries out production or work hitherto undertaken by an associated employer who is in dispute, the employees of that employer would have the same immunity to take industrial action as those working for the employer in dispute.

12. The greater restriction that I now propose on the scope of immunity enables us to drop the difficult concept of "substantial" in defining a first supplier or customer. The consultations have shown that it would not work and would penalise the small employer.

13. Another effect of the approach I now propose to adopt is to incorporate tests of motive and capability in a more direct form in restricting the scope of the immunity for secondary action. This is where they have their main practical effect and where the judges can more readily apply them to the facts of the case.

CONCLUSION

14. Annex 1 sets out the modified proposals that I now intend to ask Counsel to incorporate in a clause to be tabled within the next week, so that we may take it on Report Stage immediately after the Easter Recess. (To illustrate the effect of these more restrictive proposals Annex 2 shows how they could operate in some steel situations).

15. I believe that these modifications to the Working Paper proposals would make them more acceptable to employers and more specific. They would also make them more defensible to those who are concerned to give

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greater protection to third parties. I think they also stand a chance of being tacitly accepted by the TUC.

16. I invite my colleagues to agree that I should now introduce a clause to the proposed effect into the Employment Bill before the Recess.

Department of Employment J P

20 MARCH 1980

ANNEX 1

PROVISIONS TO BE MADE IN NEW CLAUSE IN EMPLOYMENT BILL /Paragraphs 2-5 are the proposed amendments to the Working Paper/

Primary and Secondary Action

As proposed in the Working Paper, an act in contemplation or furtherance of a trade dispute which induces a breach of or interferes with a commercial contract shall have immunity from actions in tort only if:

(a) it induces the employees of the employer in dispute (A)* to break their contracts (ie it is primary action).

(b) it induces the employees of A's supplier or customer (B) to break their contracts in furtherance of the dispute with A (ie it is secondary action).

2. The supplier or customer (B) would be defined as an employer who has a current contract or a current course of dealing with A at any time during the dispute.

The Scope of Secondary Action by Employees of Suppliers and Customers

3. Immunity for such secondary action which interferes with commercial contracts would be limited according to the principle that secondary action is justifiable only to the extent that it puts direct pressure on the employer in dispute to settle. If secondary action does not have a material effect on current business dealings between the employer in dispute and the supplier or customer whose employees are taking the action but only on the business of that supplier or customer himself or on his business dealings with other employers, there should be no immunity.

4. Therefore, in the circumstances described in paragraph 1(b) above (ie secondary action), an act would have immunity only if

- it had the purpose or principal purpose of breaking or interfering with a current contract or current course of dealing between the employer in dispute (A) and the supplier or customer where the secondary action was being taken (B); and if it was reasonably likely to have that effect.

* Key: A = employer in dispute
B = customer or supplier of A
C = any other employer who is not a customer or supplier of A

If the act met these tests of motive and capability, the immunity would also extend to breaches of any other contracts which were a consequence (eg as might be the case if the act aimed at A took the form of a sympathetic strike at B, thereby interfering with B's other business as well as his business with A). But there would be no immunity for inducing breaches of such other commercial contracts (eg between B and C) as a means of inducing a breach of contract between A and B.

5. An associated employer of an employer in dispute (that is to say, they are both part of the same group of companies) would normally be treated in the same way as any other employer in that his employees would be able to take secondary action only if he had a current contract or a current course of dealing with the employer in dispute. However, if at any time during a dispute an employer carried out production or work hitherto undertaken by an associated employer who is in dispute, the employees of that employer would have the same immunity to take industrial action as those who work for the employer in dispute.

Contracts of Employment

6. As proposed in the Working Paper, immunity would extend to any breach of a contract of employment falling within the circumstances described in paragraph 1(a) and (b) above even if it breaks or interferes with a commercial contract. In all other cases, immunity would continue to extend to any breach of a contract of employment alone, but would no longer constitute a lawful means for inducing a breach of or interfering with a commercial contract.

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Annex 2

ILLUSTRATIONS OF EFFECTS OF AMENDED PROPOSALS ON IMMUNITY FOR SECONDARY ACTION DURING A BRITISH STEEL CORPORATION STRIKE

1. Action by employees of first suppliers and customers of BSC

Such action would attract immunity

(i) insofar as its principal purpose was to interfere with the current contracts or course of dealing between the first supplier/customer and BSC and the action was reasonably likely to have that effect.

(ii) but not if its principal purpose was to interfere with contracts between the first supplier/customer and third parties, the motive behind such action being to influence the parties to those contracts or others affected - eg the general public or the Government - to put pressure on BSC to settle.

The strikes called by the ISTC at the private steel producers would clearly fall in the second category and therefore would not have attracted immunity. Furthermore, the immunity would depend on there being interference with the current business between BSC and a first supplier or customer. If there were no such current business (eg because the BSC were totally closed by its own employees' "primary" action), there would be no immunity for secondary action at a first supplier or customer.

2. Blacking by employees of stockholders of steel purchased from BSC on their premises

Where goods from the employer in dispute have been delivered to a customer (in this case the stockholder), blacking them would affect only the stockholder's contracts with other parties. There would be no immunity for that interference.

3. Blacking by Transport Workers of Goods in Transit

In the case of non-BSC goods, eg imported steel, where there is no contractual link with BSC, there would be no immunity for blacking.

In the case of BSC goods being moved from BSC premises (if this is happening anywhere), there would be likely to be immunity for blacking provided the goods were being moved under a contract between the employer of the transport workers and the BSC.

In the case of BSC steel purchased by a stockholder and being moved from his premises to a third party, there would be no immunity for blacking.

4. Blacking by Dockers of Steel

In the case of non-BSC steel there would be no contracts with the BSC (the employer in dispute) and therefore no immunity.

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