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MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECTS OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

Memorandum by the Lord President of the Council

I attach (E(CS)(80)9) a report, by the Official Committee on Industrial Relations in the Civil Service, on the scope for altering civil servants' contracts of employment so as to widen management's range of response to industrial action. This question is of particular interest in regard to lay-off without pay when work dries up because of the industrial action of other civil servants.

2. In the case of industrial civil servants, such lay-off is explicitly provided for. It can be done immediately if the lack of work is caused by the action of other industrials; after 28 days, if it is because of the action of non-industrials. Non-industrial staff, on the other hand, cannot be laid off under existing conditions. In this, they are on a par with white-collar workers in the private sector.

3. Unilateral variation of the contracts of non-industrials in order to change this position would call for legislation. As for attempting to proceed by agreement, the legal and management arguments against seeking to engineer changes in existing contracts (eg at the stage of promotion or of a general salary increase) seem to me decisive. The arguments against changing the terms to be offered to new entrants are much less decisive, but the impact of any changes would take a considerable time to permeate the grades concerned.

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4. I concluded that we should have to live with the existing range of management options in dealing with industrial action in the Civil Service. The Prime Minister has, however, asked E Committee to examine further the possibility of legislation to make it possible to change the contracts of staff already in post. This, and further action on changing the terms offered to new entrants, is discussed in my paper, E(80)(84).

CS

Civil Service Department
Whitehall
London SW1

1 August 1980

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June 1980

CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY
SUB-COMMITTEE ON INDUSTRIAL RELATIONS
IN THE CIVIL SERVICE

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Report by the Official Committee (OCS))

INTRODUCTION

1. E(CS) has several times expressed concern that the restrictions imposed by civil servants' contracts of employment appear to impose unreasonable constraints on management's freedom of response to industrial action.

2. The Committee first considered the problem posed by management's inability to lay-off non-industrial staff without pay when work could not be provided because of the industrial action of other civil servants. The terms and conditions of service of non-industrial civil servants protect them against such lay-off (unlike industrial civil servants - see footnote Ø - but in line with practice in the private sector for white collar workers); and the Law Officers advised that there are major legal obstacles to imposing a unilateral change which would fundamentally alter the nature of the employee's rights. On the basis of the Law Officers' advice, E(CS) concluded (E(CS)(79)3rd meeting) that any general unilateral variation of contracts was not possible without legislation; they also decided that legislation to enable such a change to be made should not be contemplated.

Ø Industrial civil servants, on the hand, can be laid off without pay when there is no work because of the action of other industrials. Under the Agreement on Guarantee Payments, however, industrials can be paid for the first 28 days if there is no work because of the action of non-industrials.

3. E(CS) therefore instructed OCS to consider whether changes in contracts with the aim of minimising any restrictions might be secured by agreement - for example, for new entrants, on promotion, or at the time of a general salary increase. The aim would be not only to secure a right to lay off without pay but also to remove doubts about management's right to expect staff to work overtime and to require staff to undertake the work of a lower grade.

RECENT AND CURRENT INDUSTRIAL ACTION

4. As background to the main discussion, E(CS) might care to be reminded of recent industrial action and of the success or otherwise of the management responses adopted.

i. Department for National Savings (DNS); DHSS Local Offices

Staff who refused to work normally at the end of last year in protest about Civil Service manpower reductions were put on TRD. The staff affected in both Departments (600 in total) returned to work after a few days.

ii. TUC Day of Action

The 16,400 staff who took part lost pay (estimated saving in salaries was £310,000).

iii. ROF Bishopton

43 Professional and Technology (P & T) supervisory grades who have refused to operate a bonus scheme were placed on TRD some weeks ago. (Some of them were put on TRD after refusing to undertake the work of the lower grade P & Ts). Over 1,200 industrials have been laid off with pay as a result, in some cases for more than the 28 days provided for in the Agreement on Guarantee Payments.

iv. Customs and Excise

Staff at Felixstowe refused to work Sunday overtime. The Staff Side were reminded that overtime is obligatory and a refusal could be regarded as a disciplinary matter. As a result, the staff complied with the management direction. Staff at Portsmouth refused to report for an early shift and maintained their refusal until told that TRD was being contemplated.

5. The use of TRD in DNS and DHSS was encouraging and resulted in an early return to normal working. Similarly, the "no pay for no work" response to a one-day stoppage (TUC Day of Action) is seen to be a firm management action (publicity beforehand about the no pay rule may have prevented larger support for the stoppage). The Customs and Excise approach to limited industrial action (iv. above) appeared to be effective. The recent use of TRD (ROF Bishopton) is not so far encouraging. The P & T staff affected

are still on TRD, there are significant financial implications (because the industrial staff are still being paid after 28 days), and there is a loss of production.

6. It is difficult to draw general conclusions. In the case of ROF Bishopton, provisions in the conditions of service of the P & T grades concerned that they would not take industrial action and that they could be required to undertake the work of lower grades might have been helpful, but it is unlikely that these provisions would have prevented the industrial action. (E(CS) considered the question of no-strike agreements and came down against them, partly because of significant practical difficulties and partly because such agreements would only be achievable at an unacceptably high price - E(CS)(79)2nd meeting, Item 2).

RESTRICTIONS ON MANAGEMENT FREEDOM - THE LEGAL POSITION

7. Paragraphs 3 and 4 of Annex 'A' describe the legal relevance of civil servants' terms and conditions of service to management responses to industrial action.

8. The first sentence of paragraph 2 of Annex 'A' comments that the relationship between the Crown and its employees is assumed to be basically contractual (Law Officers' Joint Opinion of 2 October 1979). The important point is that, in common with most contracts of employment, those for civil servants do not give management freedom to do whatever it wants. Where it can be demonstrated that a civil servant is in fundamental breach of his contract of employment, it may be possible for management to dismiss staff lawfully, or send them home without pay (Temporary Relief from Duty (TRD)), or make deductions from their pay without sending them home (reduced pay options). In that important respect, management is not powerless (see paragraphs 4-6 above on recent industrial action). In practice it is common law and recent employment legislation which, taken together, determine management's freedom of response.

SCOPE OF THE OCS STUDY

9. Although paragraphs 4 to 6 show that management has available good responses to industrial action - despite legal restrictions found in the generality of contracts of employment and not just in those of civil servants - we have considered whether it might be possible to seek the agreed variation of existing individual contracts or to introduce new contracts for Civil Service recruits, with the aim of reducing the restrictions. To give one example by way of illustration, would it be helpful for contracts to make it clear that civil servants could be required, if necessary, to do the work of lower grades?

10. We concluded that, realistically, changes of the sort envisaged would be negotiable only at an unacceptably high price - in return, say, for an allowance, or for an enhanced salary. We

turned our attention, therefore, to the possibilities open to management to "engineer" agreed changes in contract conditions - for example, by exerting pressure on an individual to agree to a change in conditions of service either at a time of promotion or at the time of a general salary increase.

11. The position is rather different in the case of future recruits to the Civil Service. The individuals would have the choice of accepting the new different terms and conditions of service or declining the appointment.

12. The legal background to attempts by management to "engineer" agreed changes is set out in paragraphs 9 to 16 of Annex 'A' and paragraph 5 of Annex 'B'. Broadly speaking, it would be legally possible (to a greater extent in Scotland than in England and Wales) to seek to achieve agreement, by such means, to changes in a civil servant's terms and conditions of service.

13. Throughout the paper, references to agreed changes in contracts are references to changes which have or may acquire legal validity. Some of the methods which are discussed for "engineering" such changes may nevertheless be open to criticism. On this point, the views of the Attorney General are highly relevant. The Attorney General, when consulted during our study, expressed concern about the propriety of management adopting either of the options set out in paragraphs 14 and 15 of Annex A. These options relate to the introduction of new terms in favour of management at the stage of promotion or a general salary increase. The Attorney General's view is that the use of either would not escape justifiable criticism merely on the grounds that the change was or might become valid in law; it might still fairly be regarded as an unfair and unreasonable burden on individual civil servants in the sense that they had no real choice but to accept it in return for benefits which ought to have been theirs in any event.

14. The Lord Advocate, who was also consulted during our study, took the view that whether Civil Service management should proceed as suggested in paragraph 5 of Annex B is a matter for political decision. Nevertheless, he recognised the Attorney General's reasons for the advice set out in paragraph 13 above.

SEEKING TO "ENGINEER" AGREED CHANGES - MANAGEMENT AND PRACTICAL CONSIDERATIONS

15. There are management arguments both for and against bringing pressure to bear on staff to accept changes to their detriment.

16. In the case of existing contracts, the adoption of a policy to change contracts by such means might demonstrate that the Government, as an employer, intended to take a firmer stand in relation to industrial action by its employees. In addition, it would enable management to use the procedure for changing terms and conditions of service to make explicit some conditions of service which, in the view of management, are currently implicit.

For example, it is arguable that confirmation that staff would, on occasion, be required to undertake the work of the grade below is closely linked to the issue of promotion and that it could reasonably be insisted upon as a condition of promotion. A step to make such a condition explicit would leave the unions in no doubt about management's determination to use this power if it thought it appropriate.

17. On the other hand, there would be a good many practical difficulties to be overcome by management. Changes might take a long time to work through the system although this would depend on the stage at which they were introduced. If change was introduced at the point of promotion it would create two classes of staff in the higher grade because only some would be governed by the new obligations. Such discriminatory action might disturb working relationships in the office concerned for a long time. Apart from the practical disadvantages, a decision to adopt a policy of changing contracts by requiring staff to agree to changes in return for receiving promotion or a general salary increase, would considerably worsen industrial relations and not only on a short-term basis.

18. In the case of contracts for new entrants (either long term or period appointees) the management disadvantages though similar to those in paragraphs 16 and 17 are a good deal less acute. The distinction between new entrants and existing staff with preserved rights would be less open to attack than differences opened up between present staff. Some recruits might be deterred by the contract terms but it seems likely that these would in any case be a minority and particularly so in a time of high unemployment. The new contracts would take a long time to work through the whole system although the impact would be felt more quickly in the case of the main recruitment grades (the clerical grades, for example).

19. There must in any case be considerable doubt whether at the end of the day these changes would greatly strengthen management's position in dealing with industrial action. Management already has powers; the use of TRD, as shown in paragraph 5, has so far in most cases proved effective and there is also power (not so far used in the Civil Service but used in the National Health Service and available to us - E(CS)(80)3) to reduce pay if duties are not fully performed. It is true that power to lay staff off without pay when they were without work by reason of the industrial action of others might reduce the financial cost to management of some forms of selective industrial action - but at a cost in managerial and industrial relations terms which management might not wish to pay. Certainly the representatives of the private sector who were consulted said that they would never contemplate such action in respect of their white collar staff. There is no evidence yet that the existing management options are inadequate for dealing with industrial action and there is a case for saying that these should be further tested before taking a step into the unknown with what would, inevitably, be (at least as regards England and Wales) a limited change in contracts of employment.

SUMMARY AND CONCLUSIONS

20. This is a difficult and complex subject on which, perhaps understandably, the Official Committee did not reach firm conclusions. Civil servants' contracts of employment do restrict management's freedom of response to industrial action. However, restrictions are founded in common or statute law and are no more pronounced for the Civil Service as an employer than for other employers. The legal advice (Annexes 'A' and 'B') shows that it would be possible to go down the road of attempting to 'engineer' changes in contracts terms. In deciding whether or not to adopt that course, account must be taken of the Attorney General's strong doubts about the propriety of doing so, and of the management and practical considerations.

21. On balance, the weight of the management arguments is probably against seeking to 'engineer' agreed changes in existing contracts.

22. The position in the case of contracts for new entrants is different in the sense that the individuals can either accept the terms offered or decline the appointment. Legal difficulties are fewer, and the question of propriety does not arise. On the other hand, if they accepted the contract offered, some of the management disadvantages referred to in paragraph 17 would still apply (a divided Service, for example). There would also be an adverse reaction from the Civil Service unions.

23. Apart from the legal and management considerations, and the question of propriety, there are, of course, political arguments to which the Lord Advocate has drawn attention.

RECOMMENDATIONS

24. E(CS) is invited to discuss the possibility of seeking to 'engineer' agreed changes in Civil Service contracts of employment, and

i. to agree that the proposal should not be pursued in the case of existing contracts

ii. to agree that the question of introducing a revised contract for new entrants should be examined.

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RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Note by the Treasury Solicitor)

Introduction

1. Although some of the legal rights and obligations of employer and employee may derive from statute or the common law, for the most part they are usually determined by the parties themselves in terms of the contract of employment. In order to ascertain what these terms are one needs to look primarily at the express provisions set out or incorporated in the contract. Where the contract is silent on any given issue a particular term may be implied by the common law or derive from the conduct of the parties. But in considering the employer's freedom of action against an employee one must first look at the express provisions of the contract itself.

2. The Law Officers, in the Joint Opinion of 1 October 1979 on the status of civil servants, make the assumption that the relationship between the Crown and its employees is basically contractual. Although the Opinion did not pursue the matter any further, it is considered that the express provisions of the contract of employment of a civil servant are to be found in the letter of appointment received by each new recruit, read together with the relevant terms and conditions set out or referred to in the Departmental Staff Handbook and the Civil Service Pay and Conditions of Service Code (both of which are referred to in the letter of appointment). In the course of time the express terms of the contract will almost always be varied in some respects - but the original contract will be found in the relevant parts of these documents (together with any documents referred to in the Code or the Handbook eg Staff Circulars). The provisions of the Staff Handbook and the Code are supplemented by guidance given to management (mainly in the Establishment Officers' Guide) but this is for the exclusive use of management and does not constitute part of a civil servant's terms and conditions of employment. However, to the

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extent that management guidance can be said to reflect normal practice in the day to day work of a Department, eg in the allocation of duties between grades, it may be legally relevant.

General relevance of civil servants' terms and conditions of service to management response to industrial action

3. Like the contracts of employment of most white collar employees the terms and conditions of service of non-industrial civil servants are relevant in terms of management freedom of response in the negative sense that they do not expressly give management freedom to do whatever it might consider expedient. For example they do not expressly authorise departments to respond to industrial action by sending home without pay those who work selectively, or to lay off without pay those for whom there is no work, or unilaterally to alter the contractual rights of civil servants. This being the case it is the general law ie both the common law and recent employment legislation which determines management's freedom of response. But this does not mean that management are powerless. Depending on the nature of the industrial action and the circumstances of each case, management may lawfully dismiss staff, or send them home without pay (TRD) or make deductions from their pay without sending them home (NHS options).

4. These responses are available only where the civil servant is in fundamental breach of his contract of employment. In cases where the industrial action takes the form of staff refusing to do certain work, management must first be able to show that the work which the staff refused to do was that which they were legally obliged to do. Such an obligation may arise from the express provisions of the contract (eg where there is a job description which clearly embraces the work in question) or from a term implied by the common law or from custom and practice or from conduct of the particular employee indicating that he has accepted that he is obliged to do the work.

What duties is a civil servant obliged to perform?

5. In considering what duties a civil servant is obliged to perform it is necessary to distinguish between the obligations attaching to his present post or job and his potential obligation to take up other posts or jobs within the civil service. Every civil servant is a member of a grade which embraces a number of different types of job, and which therefore determines the type of job he can be posted to. Accordingly a non-industrial civil servant's potential obligations in the course of his career extend well beyond those relating to the particular post which he holds at a particular time. He may for example be liable to be transferred to a different department or, if he is in a mobile grade, to be posted to another part of the country. He may be posted to a job (within the same grade) the subject matter of which is very different from what he was used to in his previous job. The potential liability to be posted to another job within the overall terms of the contract always remains. However in determining what duties a civil servant is bound to perform at any one time it is necessary to look at the duties attached to the present job. First reference has to be made to the express provisions in the contractual documents - the letter of appointment, Staff Handbook etc, the Civil Service Pay and Conditions of Service Code. It is unlikely however that these documents alone will provide a sufficient answer as to what the civil servant is obliged to do and it is necessary to look for other indicators. The starting point is to look at what he actually does. If an employee normally carries out certain duties on behalf of an employer this is a very strong indication that those duties are ones which the employee has accepted that he is obliged to perform. There may however be an element of goodwill over and above his contractual obligations which he can withdraw without breaching his contract. For example an employee might frequently work overtime when the needs of the job appear to require it but it does not necessarily follow that the frequency of such overtime working alters the voluntary character of the overtime in the particular case.

6. The extent of an employee's obligations may not be limited to the duties which he has so far been called upon to perform. There may be work which the employee would be obliged to perform but which he has not yet been required to perform. The needs of management will change and so too will the work required to be performed. The question will be whether particular work is within the ambit of his duties. In the civil service it is likely that the outer limit of his duties will be ascertained by reference to the grade of the individual civil servant. Because of the importance of the grading structure within the civil service it is likely that an industrial tribunal would hold that a civil servant's obligations cannot extend beyond those appropriate to his grade unless there is an express contractual provision or established practice to the effect that he is obliged to perform the duties appropriate to a higher or lower grade where necessary. In this connection it should be noted that while the courts have been willing to elaborate the employee's obligations of cooperation and of fidelity they have tended to resist arguments for implied terms giving employers the right to alter his job specification.

7. In ascertaining in a particular case what duties are within the ambit of the job reference may be made not only to what he has actually been doing but also to job descriptions contained in recruitment literature, management circulars and annual staff reports. Such job descriptions are unlikely to be incorporated into the contract as such but will be of evidentiary value as to what the contractual scope of the job is. Such job descriptions should not be given a strained interpretation in order to include obligations which are unlikely to be accepted by reasonable staff as being within the scope of their obligations. At the same time it is not necessary to construe job descriptions so narrowly that tasks reasonably within the ambit of the individual civil servant's general duties are thereby excluded.

8. Paragraphs 5 to 7 above necessarily provide only very general guidelines. Whether a task is within the ambit of a civil servant's duties can only be determined in the light of all the relevant facts and circumstances.

<u>Changing a civil servant's terms and conditions of service to give management greater freedom of response to industrial action</u>

9. The agreement of both parties to a contract of employment is needed for any material change in the employee's terms and conditions of service - unless the contract of employment expressly authorises the employer to make unilateral variations or the change is effected by legislation. Although in their letters of appointment civil servants are informed of the claimed right of the Crown to alter any term of service unilaterally, the effect of the Attorney General's advice in the Joint Opinion of 1 October 1979 is that it is doubtful whether the Crown can (without resorting to dismissal and re-engagement) impose different terms if these were to fundamentally alter the nature of the employee's rights since the employee must have the opportunity to refuse further service on the new terms.

10. Before dealing with the question of what is a material change in terms and conditions of service it is necessary to note that a distinction can be drawn between contractual terms and conditions of service, properly so called, and what are merely lawful orders which the employer is authorised by the common law to give to his staff. These "standing orders" or "working rules" will normally be clearly recognisable as such since they will deal with such matters as whether (for health or hygiene reasons) employees must wear protective clothing, whether male office staff must wear suits, the extent to which staff may be required to share office accommodation with others etc etc. These instructions are not normally made part of the contractual terms and conditions of service and accordingly are within the prerogative of the employer - for which reason they may be unilaterally changed from time to time, so long as they are reasonable.

11. If what an employer seeks to vary unilaterally is not a working rule within the meaning of the preceding paragraph but a term or condition of service, the employee will be in a position to allege that the attempt to impose the change amounts to a wrongful repudiation by the employer of his contractual obligations. The question which then arises is whether the variation is sufficiently significant to amount in law to a wrongful repudiation. If the variation is fundamental ie if it is a variation of a fundamental term of the contract it will clearly amount to wrongful repudiation - in which case the employee may leave and claim constructive unfair dismissal. But it can also be argued that the deliberateness of the attempt by the employer to impose a change makes the variation into a repudiation irrespective of its magnitude. In this connection recent case law seems to indicate that if an imposed variation is held to be outside the latitude allowed by the contract of employment, that very fact may demonstrate the repudiatory character of the employer's conduct - provided that the change is not insignificant ie trivial. But these statements are of necessity of general application and the case law clearly shows that whether a particular attempt to impose a unilateral variation does amount to a wrongful repudiation by the employer will depend on all the facts of the particular case.

12. Although an attempt unilaterally to change the nature of the employee's work will normally amount to a wrongful repudiation by the employer, eg by switching an employee from skilled to unskilled work, the employer has a general right to control the method of doing the work. Since he can give instructions as to how the work is to be done, it follows that he has the right to change the instructions. Where any change involves traditional methods of working there will be no difficulty. But the position becomes more complicated when the change involves the use of machines which require some degree of skill and training. In the absence of any case law on "new technology" issues it is considered likely that the courts

would in most circumstances permit the employer to require his employees to utilise mechanical aids - provided that their use does not alter the whole nature of the job ie make it difficult to maintainthat the job remains the same.

13. It is important to bear in mind that the legal consequences of an attempt by the employer unilaterally to alter any term or condition of service (where this amounts to wrongful repudiation) will depend on the response of the employees affected. An employee may by his conduct be regarded as having tacitly approved the change - thereby making it consensual - or as being estopped by his conduct from claiming that it does not bind him. Or he may continue to work but make it clear that he does not accept the change, in which case he would remain free eg to sue for arrears of pay withheld if the change had been a reduction in his salary. Finally, if because of the change he leaves his employment he will be able to claim constructive unfair dismissal. If the change was repudiatory and significant then, unless the employer can satisfy the Tribunal that there were good grounds for justifying the change, the Tribunal will normally hold the constructive dismissal to be unfair. The chances of avoiding such a decision are greatly increased if the employer can show that a large majority of the staff affected have accepted the change.

14. Given that the terms and conditions of service of civil servants cannot be materially changed unilaterally, the question arises whether there is any stage (other than termination of the employment relationship) which could provide an "entry point" for Departments lawfully to require a civil servant to accept a material change. Promotion might afford an opportunity - particularly if the correct legal analysis of promotion is that it necessarily entails the formation of a new contract, because that would enable the employer to require the employee to accept other terms (not arising out of the promotion) which were not in the previous contract. In legal terms if it is the case that a new contract is formed then none of the terms of

the previous contract retain their effect except to the extent that they are expressed or implied in the new contract. Although there are judicial decisions which deal with promotion the issue in these cases arose in entirely different contexts, and different judges have taken different views, so that it can be said that the decided cases have not produced any ruling principle of general application. It is, however, considered that a tenable test is whether the change necessitated by the promotion is great enough to have altered the whole nature of the employment, so that only if it has will a new contract be regarded as having been formed. If this test is applied to the majority of civil service promotions the answer will usually be in the negative because where eg an Assistant Secretary is promoted to Under Secretary (even if posted to another Department) he will still be employed as a civil servant administrator albeit at a higher rank. Also relevant is that as a matter of civil service practice an officer on promotion is not treated as if he is entering into a new contract; he is not eg given on promotion a fresh letter of appointment in terms similar to his original letter of appointment. Generally, it is considered on balance that the sounder (and the more realistic) view is that promotion usually amounts to a consensual variation of the original contract of employment and not the replacement of the original contract by a new contract.

15. A possible "entry point" of a different kind is where, although the existing contract continues, there is a proposal by the employer to make a change which is beneficial to the employee and which the employer is not obliged to make, eg individual promotion or a general salary increase - so that the employer may say: "I am considering conferring this benefit on you (which I am not obliged to confer) but I will do so only in return for your agreeing to accept the following change in your general terms and conditions of service". Where the employee accepts the change in his general terms and conditions of service (in return for the benefit) the contract will have been varied consensually and the employer will therefore be

able to invoke the change which he has achieved. But if the employee refuses to accept the change and the employer withholds the benefit the employer could, depending on the actual circumstances, be vulnerable to a claim of unfair constructive dismissal if the employee leaves in protest. This is because, in a case of refused promotion the courts (on the grounds that it is reasonable to do so) may well infer a term into the contract of employment that a person recognised by management as otherwise fit for promotion shall not be deprived of it on entirely extraneous grounds ie for refusing to accept an unrelated variation which the employer could not lawfully impose in other circumstances. A great deal would depend on the question whether the change sought by the employer could be reasonably said to be related to the promotion, and to be a reasonable change ie one which could be justified by the employer on reasonable grounds. Although it could be argued that it would be reasonable to make it one of the conditions of his promoted employment that a civil servant should be willing to carry out his "ante-promotion" duties when necessary, it would be difficult to maintain that the same argument applied where the change sought by the employer was that the employee should cease to be entitled to be paid any salary for any period after his promotion when there was no work for him to do because of industrial action by others.

16. Although different considerations arise where the occasion was a general salary increase there would still be a degree of risk where the change sought by the employer is not accepted by the employee. The Employment Appeal Tribunal has in at least two cases (Pepper & Hope v Daish 1980 IRLR 13, and F C Gardner Ltd v Beresford 1978 IRLR 63) stated that where an employee leaves his employment because he has not been given a general increase in salary paid to his colleagues, this can amount to unfair constructive dismissal. In the earlier case

the Tribunal formulated the general proposition that it would be reasonable in most circumstances to infer a term into the contract of employment to the effect that "an employer will not treat his employees arbitrarily, capriciously or inequitably in matters of remuneration". Although a condition that a detrimental change should be accepted by all civil servants eligible for a general pay increase would be clearly distinguishable from the two cases mentioned above, it is not inconceivable that a Tribunal would hold that the test quoted above nevertheless applied and that the denial of a general pay increase to staff who refused to accept the change was inequitable and, accordingly, amounted to a breach of the implied term - at least where the change sought by the employer was fundamental, extraneous (ie unrelated) to the pay increase, and not justifiable on other grounds considered by the Tribunal to be reasonable. A genuine package deal eg a gratuitous salary increase coupled with abolition of certain allowances is clearly permissible. The same would apply where the change was otherwise related to the increase eg insistence on increased productivity to help pay for the increase. But denial of a general increase to staff who refused to accept a new term of service under which they could be laid off without pay where there was no work for them as a result of industrial action by others might well be held to amount to arbitrary, capricious or inequitable treatment so as to bring about a constructive dismissal where the employee left in protest. Here again a great deal would depend on the particular circumstances and, in particular, on the general response of the staff involved.

ANNEX B

RESTRICTIONS ON MANAGEMENT'S FREEDOM TO RESPOND TO INDUSTRIAL ACTION: EFFECT OF CIVIL SERVANTS' TERMS AND CONDITIONS OF SERVICE

(Note by the Lord Advocate's Department)

1. This note sets out the general legal position in Scotland, which management must take into account when considering any variation in the terms and conditions of service of civil servants.

2. For the purposes of this note it is assumed that the relationship between the Crown and the civil servant is contractual.

3. The content of any contract must be agreed between the parties at its commencement.

4. Any alteration to the contract, whether proposed by the employer or the employee, must be agreed by both parties, either expressly or impliedly.

5. Every agreed variation is a new contract. In offering such a new contract, (e.g., in conjunction with a salary increase or on promotion), the employer can propose whatever changes he wishes. Provided (a) that every employee is treated on the same basis as all other employees in a similar position and (b) that any employee is entitled to continue in his existing job on the existing terms, this is a legitimate way for the employer to proceed.

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