

CONFIDENTIAL

Civil Service



Lord Advocate's Chambers
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2 October 1979

Rt.Hon. Lord Soames, GCMG., GCVO., CBE.
Lord President of the Council
Civil Service Department
Whitehall
LONDON SW1

Dear Christopher,

INDUSTRIAL ACTION IN THE CIVIL SERVICE

I have seen the Attorney General's letter to you dated 1 October 1979. The request for advice from me on these matters has not as yet reached me. However, I have previously advised on the first two questions discussed by the Attorney in that letter and it may be helpful to colleagues if, for the meeting of E(CS) tomorrow, I were to summarise that advice and add my views on the third question. His advice, he has pointed out, relates to the law in England and the advice which I now give is on the law of Scotland.

For convenience I use the same system of notation that the Attorney General has used.

- (A) Advice is requested on the lawfulness, or otherwise, of "TRD". My advice is that Civil Servants who are in substantial breach of their Contract of Employment may be sent home without pay, so long as it is understood that they may return to their jobs on full pay when they indicate that they are willing and able to resume performing their contractual obligations by doing their work. I am fortified in this view by a decision of the Court of Session at first instance (Laurie v. The British Steel Corporation, referred to at Page 3 of the Joint Opinion appended to the Attorney General's letter) in which the principle underlying this advice was affirmed. The case was sponsored by the union, Apex, and was not appealed and accordingly I think we may take it that the union was advised that the decision was correct according to the law of Scotland.

I am further reinforced in this view by the fact that TRD was taken in Scotland following advice from my predecessor on Scots law and so far, no challenge of its validity has been offered in the Scottish courts. I think that if the unions had any real hope of challenging its validity, they would have done so by now.

... Continued.

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(B) I consider that employees who have committed no breach of contract, but are prevented from doing useful work by the industrial action of other employees (assuming, of course, that there is at the time no specific contractual term allowing this) would have an action for damages for breach of contract if they were sent home without pay. I think the damages would be equal to the pay they would have earned if they had been allowed to continue working, at least so long as no alternative employment was available to them.

(C) I consider that the Crown cannot unilaterally vary the terms and conditions of employment of its employees, so as to give itself the power to apply the procedure described in (B) above. As in England if the Crown gave proper notice that any new contracts were to have such a term in them and the employees continued to work on after the expiry of the period of notice, without protest, it could be implied that the new term had been agreed to. I do not suppose it likely that the employee would acquiesce in this way if such a change were proposed in present circumstances.

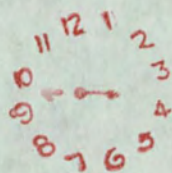
This letter is copied to the Prime Minister, all members of E(CS), the Secretary of State for Scotland, the Attorney General and Sir John Hunt.

Yours etc,

James

MACKAY OF CLASHFERN

2 OCT 1979



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