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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn 3201

23 October 1979

The Rt Hon Patrick Jenkin MP
Secretary of State for Social Services
Alexander Fleming House
Elephant and Castle
LONDON SE1 6BY

Dear Patrick,

MANAGEMENT RESPONSE TO INDUSTRIAL ACTION IN THE NHS

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— On 27 July you wrote to me seeking legal advice on a number of management options that were being considered in this area. By agreement, we deferred the matter pending consideration by the Law Officers and Treasury Counsel of a wide range of issues relating to industrial action in the public sector; see now the joint Opinion of 1 October copied to you as a member of E(CS).

2. Since it was not possible for the joint Opinion to cover all the NHS issues, Treasury Counsel have at my request and that of your Solicitor prepared an Opinion dealing specifically with the five options they identified from the papers you sent me, and I enclose a copy of this. I have discussed the subject with Treasury Counsel and I entirely agree with the views put forward, which may be taken as mine also. I understand that the Lord Advocate will advise separately on the law in Scotland.

3. The five options are clearly set out in the first paragraph of the Opinion and I do not need to repeat them here. Each is regarded as capable of lawful application but great care will have to be taken here, particularly in respect of options (3) and (5).

4. You will see from the underlined passage in the first paragraph of the Opinion that the advice on each option is based on the premise that the disruptive action by employees amounts to a substantial breach of their obligations. Although the words used are not identical, the premise is the same as that on which the advice on the lawfulness of "TRD" was given in the joint Opinion of 1 October - namely that the employees' action must have been such as would have justified summary dismissal by a private employer. References elsewhere in the Opinion to employees not having substantially performed their contracts, and similar expressions, should be read in the same way.

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5. You will also note that the Opinion deals only with PTB staff in the NHS. It was agreed at an early stage that it would be impracticable for advice to be given on all categories of NHS staff because of the multiplicity of special and local agreements. Caution should therefore be exercised in applying any of the five options to NHS staff other than PTB staff, and in all such cases managers should first be satisfied that there is no relevant term of employment or other special factor which would rule out the valid use of any particular option. On this, managers should consult their departmental legal advisers who in turn should consult me in difficult cases. Subject to this I see no reason why all the options discussed in the Opinion should not be available for use in the NHS generally and indeed in appropriate sectors of the Civil Service.

6. I expect we will discuss the Opinion at a later meeting of E(CS). This letter and its enclosure are copied to the Prime Minister, all members of E(CS), the Lord Advocate and Sir John Hunt, and your Solicitor has already been sent the original of the Opinion.

Yours ever.

Michael.

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INDUSTRIAL ACTION IN THE N.H.S.

JOINT OPINION

1. We are asked to advise on the legality of the following suggested responses by management to industrial action by FTB staff in the N.H.S. :

(1) paying reduced pay to those who work fewer hours than are stipulated for in their terms of employment;

(2) not paying those on strike;

(3) after giving notice of management's intention, paying only a proportion of normal pay to those who while refusing to carry out full duties perform some normal duties;

(4) after giving notice of management's intention, not paying those who while refusing to carry out full duties perform some normal duties;

(5) after giving notice of management's intention, suspending without pay some (but not all) of those prepared to provide only limited services but not required by management for that purpose.

Before considering these responses in turn, we observe that the various actions taken by the employees as set out above appear to amount to substantial breaches of their obligations such as would justify their dismissal. We assume that the suggested responses are intended as alternatives to taking

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Paying reduced pay for reduced hours

2. We have no doubt but that this response is lawful. What management contemplates doing is not to make a deduction from salary already earned such as might fall foul of the Truck Acts but to make a payment only in respect of the hours that have been worked. In law for the reasons explained below the payment would be either ex gratia on the basis that the employee was not entitled to any payment, or if he was entitled to payment his entitlement would be to only a proportion of his full contractual pay by the application of the Apportionment Act 1870 or on a quantum meruit.

3. It is well arguable that those who fail to work the hours stipulated for in their terms of employment will have failed to satisfy the condition precedent to earning their right to receive any salary for the period in question. The basis of this argument is that the contract of employment of each employee is an entire contract in respect of each period of payment so that the employee paid weekly or monthly is entitled to be paid only if the full week or month has been worked (see Halsbury's Laws 4th ed. Vol.16 paras. 554 and 555). The N.H.S. employees who are required by their terms of employment to work a 38-hour week and are paid on a weekly or monthly basis (see Section XXIX of the Conditions of Service) would disentitle themselves on this argument to any pay should they work, for example, a 37-hour week; accordingly on this basis any sums paid to the employee would be ex gratia.

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4. An alternative view, which we are inclined to think is the correct view despite the absence of clear authority, is that the employee is entitled to a proportion of his salary, that proportion being based on the application of s.2 Apportionment Act 1870. It is an open question whether an employee who through his own misconduct does not work the full contractual period is able to take advantage of the Act. The suggestion of Lush J. in Moriarty v Regent's Garage Co.Ltd. 1921 1 K.B. 423 at p.435 that he was not so able has been criticised, we think correctly (see, for example, Encyclopedia of Labour Relations Law 1-206, Goff and Jones: The Law of Restitution 2nd ed. pp.387,8). The Act can be ousted by a contrary stipulation but we do not construe the Conditions of Service as containing any such stipulation to the contrary. If, as we are inclined to think, the Act does apply to salaries of N.H.S. employees, the salary would be deemed to accrue from day to day, each day being an entire contract. On this basis an employee who worked one hour less than a full day would lose his right to be paid for that day, but not for the other days on which he worked full hours. Accordingly to pay him 37/38ths of his salary for the week would on this basis be to pay him in part what he was entitled to and in part an ex gratia payment.

5. A further possible basis on which an employee might claim to be entitled to receive pay is on a quantum meruit. But it would be unusual for the party in breach of his contractual obligations to claim on a quantum meruit, and we doubt if such a claim would succeed unless the conduct of management amounted to the free acceptance of the reduced work by the employee such that a fresh contract might be implied (see, for example, Chitty on Contracts 24th ed. para.1283). Management should be careful to make it clear

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to employees that they are still required to work the full contractual period and that any payments made are not to be taken as an acceptance of and acquiescence in the employees' action.

Not paying those on strike

6. In our opinion plainly there is no obligation to pay those who are on strike and therefore perform no duties at all. In such circumstances management can properly withhold making any payment.

Paying a proportion of normal pay to those who perform some but not all of their normal duties

7. We understand that what is envisaged under this head is that the employee works the full contractual period but refuses to perform some of his normal duties, and in response thereto management after due notice pays what it considers a reasonable proportion of the employee's normal pay. Much will depend on the facts of each particular case. If the employee can prove substantial performance of his contractual obligations, he would be entitled to his full remuneration. But we assume that the duties which the employee is required but refuses to perform each day are sufficiently important to prevent the employee from claiming successfully that his contract of employment has been substantially performed by him. In our opinion in such circumstances management would be entitled to say to the employee that the condition precedent to his remuneration, that is to say substantial performance of his contractual obligations, had not been satisfied. A fortiori this is so when the employee sets out wilfully to disrupt, as might be the case in a work to rule (see Secretary

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of State for Employment v A.S.L.E.F. (No.2) 1972 2 Q.B. 443 at p.492 per Lord Denning M.R.). On this basis therefore any payments made to the employee would be ex gratia and management can decide on the appropriate quantum.

8. However there seem to us to be some practical difficulties in this course. There may well be problems in deciding on an appropriate basis for payment and obviously some consistency throughout the N.H.S. is desirable. Indeed there may be days when the employee can claim that on the application of the Apportionment Act 1870 he is entitled to some pay on the basis that he has substantially performed his contractual obligations on those days. No employee will be content at working full-time for only a proportion of his pay to be determined by his employers and there must be a high risk that management's action will be challenged. We repeat that each case has to be determined on its own facts. Particular care will be needed in giving notice of management's intentions, in making sure that in the case of an unperformed duty relied on by management there has been a clear and valid direction to the employee to perform that duty and that there is no acquiescence in the employee's conduct.

Not paying those who perform some but not all of their normal duties

9. In our opinion on the same assumptions and for the same reasons as those explained in paragraph 7 above, the employee is not entitled to be paid and the suggested response is therefore lawful. But save that the withholding of pay avoids the difficulty of deciding on an appropriate basis for payment, all the other practical considerations referred to in paragraph 8 above are pertinent.

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Suspending without pay some employees prepared to provide only limited services

10. The power to suspend appears from para. 3 of Section XXXIV to be exceptional and limited and we doubt if it is applicable here. However as we have already advised the Treasury Solicitor in the Law Officers' and our Joint Opinion dated 1st October 1979 on the Status of Civil Servants, we think that what is known in the Civil Service as temporary relief from duty is lawful though we would urge that the procedures we have recommended in that Opinion be observed if this course is to be adopted. The fact that it is intended to send home without pay some but not all of the employees in default may pose administrative problems but does not affect the legality of what management does.

T. L. Ribeiro

Lincoln's Inn

Simon Brown

2 Garden Court,
Temple

Antony Grabiner.

1 Essex Court,
Temple

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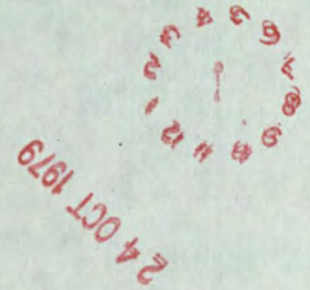

INDUSTRIAL ACTION IN THE N.H.S.

JOINT OPINION

H. Knorpel, Esq.,
Solicitor to the D.H.S.S.