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Civil Service

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn 3201

2 November 1979

The Rt Hon Lord Soames GCMG GCVO CBE
The Lord President of the Council
Civil Service Department
Whitehall
LONDON S W 1

Dear Christopher.

INDUSTRIAL ACTION IN THE CIVIL SERVICE AND THE NATIONAL HEALTH SERVICE - APPORTIONMENT ACT 1870

I note that the joint Opinion of 22 October which deals with industrial action in the NHS is on the agenda of E(CS) for 6 November. Prior to that meeting I should like to add to the comments I made in my letter of 23 October to Patrick Jenkin which enclosed a copy of the NHS Opinion.

In the case of management options (1)-(4) described in paragraph 1 of the NHS Opinion, the Apportionment Act 1870 is relevant. Broadly speaking what this Act does for salaries is to make them accrue from day to day. As a result of this any employee who has taken part in industrial action but is able to show, in respect of work done on a particular day, that he was not in substantial breach of his contractual obligations on that day, will be able to claim for that day's work a rateable portion of his salary, and this will be a matter of right. This clearly affects management options (1)-(4) but not (5) ("TRD") because in the latter case there can be no question of substantial performance of the employment contract for any day on which the option of TRD is applied. The 1870 Act can be excluded by express agreement between the parties but I have found no evidence that this is so under the relevant NHS contracts.

A practical illustration of the working of the 1870 Act would be where an employee has a salary of £10,800 a year payable monthly, and for five days in a particular month of thirty days he engages in industrial action such that on those five days he has not substantially performed his contract. As a result of the 1870 Act, and in the absence of any term to the contrary in the contract of employment, he will be entitled to £750; that is, his salary for that month, £900, less £150 or one-sixth of £900 in respect of the five days out of thirty on which he has not substantially performed his contract.

Having discussed the matter with Counsel I am satisfied that the 1870 Act does not bind the Crown but that the NHS

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employing bodies in question are not Crown bodies such that salaries paid by them would be excluded from the 1870 Act; accordingly I confirm the statement made by Counsel in paragraph 4 of the NHS Opinion that "the Act does apply to salaries of NHS employees".

But since the 1870 Act does not bind the Crown it follows that any application of management options (1)-(4) to Civil Servants - that is, Crown servants - would be on a different basis. I thought it as well to mention this since the possibility of extending these options outside the NHS to "appropriate sectors of the Civil Service" was mentioned in paragraph 5 of my letter of 23 October to Patrick Jenkin.

This difference can be expressed fairly simply, as follows. In a case where any of options (1)-(4) is applied to Civil Servants, and a portion of salary is paid to them under that option in circumstances where the 1870 Act would have given them a right to that payment had they not been Civil Servants, it will be an ex gratia payment in their hands and should be clearly expressed by management to be such a payment when it is made.

This may be a useful factor from management's point of view and indeed could strengthen its bargaining position in the sense that in some cases the exercise of an option would result in Civil Servants receiving payments to which they were not legally entitled. However I would not be in favour of withholding pay to which Civil Servants had no strict legal entitlement in cases where there would be such an entitlement in the private sector or, to put it more accurately, in cases where the 1870 Act applied. In other words, if management wish to apply any of options (1)-(4) to Civil Servants, I believe it should make all payments under these options as if the Crown were bound by the 1870 Act, making it clear at the same time that the payments are ex gratia.

In particular cases, both in the NHS and in the Civil Service, the application of options (1)-(4) may create difficulty not only in administrative terms but also from the legal standpoint. This reinforces the view, which I expressed in paragraph 5 of my letter of 23 October to Patrick Jenkin, that advice in this area will often be required from departmental lawyers and from me.

This letter is copied to the Prime Minister, all members of E(CS), the Lord Advocate and Sir Robert Armstrong.

Yours ever.

Michael