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If a report on a person states that a person is reliable



Prime Minister

Mr Owen's minute

(attached) puts

Treasury Chambers, Parliament Street, SW1P 3AG

01-233 3000

when the reporter knows he isn't - what is the legal position?

The case for 'negative noting'.

Do you wish to support

M Scholar Esq
Private Secretary to
the Prime Minister
10 Downing Street
LONDON SW1

l. Sean to

26 April 1983

Mr Owen's arguments

Yes
No

remember that such

a reference could

under liability for damages

Dear Michael

OBLIGATIONS OF CIVIL SERVICE MANAGERS

- or to acquiesce in the Chancellor's and Lord Privy Seal's preferred course?

No
MS
29/4

In your letter of 28 March about the papers enclosed with the Chancellor's letter of 17 March to the Lord Privy Seal you said that the Prime Minister was in general content with the proposals for putting across to Civil Service managers their obligations in relation to industrial action. But she was concerned at the effect of the lack of any obligation on the part of reporting officers to make explicit note of lack of reliability in periods of dispute.

The separate paper on the noting of files enclosed with the Chancellor's letter underlined legal and practical difficulties involved in instituting a formal procedure for the recording on personal files as a matter of routine of any industrial action taken by individual members of staff. However, the paper points out that senior management is likely by a variety of means to have a good picture of those staff, particularly at managerial level, who have been involved in any industrial action. It is therefore possible for departments, in deciding on promotions and postings, to take account of whether individuals have in the past been active in supporting industrial action. It will, as a result, be apparent to staff that a propensity to take industrial action narrows down the range of available postings and affects chances of promotion. The report suggests that guidance should be issued to departments by the MPO to ensure more consistency of approach in this. The Chancellor concluded that these more informal methods would be preferable to the institution of any new formal procedures. This would lead to direct confrontation with the unions at a time when industrial relations are showing modest signs of improvements.

SECRET



In any case there is in current circumstances no immediate likelihood that we shall need to issue the proposed message to managers at Annex B of the report on the obligations of managers. As and when a situation develops in which Ministers need to contemplate issuing a message of this kind, it will be possible to consider a rather fuller statement of departmental practice on postings and promotions, particularly for staff at management level.

As you will have seen, the Lord Privy Seal has expressed herself content with the proposals in the two papers, while pointing out that the right course of action may well vary according to the industrial relations position at the time. If this explanation of the background meets the Prime Minister's anxieties, we will now begin to implement the further action called for by these reports.

I am sending copies of this letter to Richard Mottram (Ministry of Defence), David Clarke (Department of Health and Social Security), Barnaby Shaw (Department of Employment), Henry Steele (Law Officers' Department) and Richard Hatfield (Cabinet Office).

Yours sincerely,

Margaret O'Mara

MISS M O'MARA
Private Secretary

SECRET

Civil Service,
Long Term,
PT-12



CORPORATION

1912

Prime Minister 1

2

MR SCHOLAR

Please see the Chancellor's

cc Mr Mount

Yes not

letter (attached).

Agree I write as at

OBLIGATIONS OF CIVIL SERVICE MANAGERS

X?

The Chancellor has written to Baroness Young enclosing a report by officials on the way in which the obligations of Civil Service managers would henceforward be made clear to them. The Chancellor invites colleagues' agreement to the recommendations in the report.

Mus 25/3

We are content with the way these obligations are to be put across to Civil Service managers, following John Vereker's successful efforts to inject tougher and more explicit passages into earlier unsatisfactory drafts. The essential point, which is reflected in both Annex A (at para C), setting out the points to get across, and in Annex B, which provides a message to reinforce managers' loyalties during a dispute, is that the individual should accept responsibilities to the service himself during a dispute and should discourage others from supporting industrial action.

Flag A
Flag B

However, the recommendation did not go nearly far enough on the question of recording managers' performance in respect to these obligations. The report proposes informal procedures. This would mean, for example, that the fact that an individual took part in a dispute would not necessarily be recorded in his or her annual report. According to Annex A (para E), reporting officers are expected to "take this factor into account when assessing a manager's performance" and to record particularly good performance, but they are not required at all to make explicit reference even to particularly bad performance. This is surprising since the officials' report acknowledges in the same paragraph that performance in adverse circumstances such as disputes is a "crucial test" of suitability for managerial positions.

The Chancellor's note refers to two objections to the noting of personal files: that it would provoke staff who have no

inclination to take industrial action; and that there are a number of legal and practical difficulties. In our view, many civil servants would share the view of the public at large that the Civil Service is overly tolerant of staff indiscipline and would regard a formal procedure as acceptable, even welcome. Legal advice indicates that the legal difficulties are minimal, provided that it was made clear, as it would be, that individuals' shortcomings in respect to their obligations during disputes would be treated simply as one of the factors to be taken into account when an employee is being considered for promotion.

x | If the Prime Minister agrees, the Chancellor's office should be minuted to the effect that the obligations and proposed message to managers convey the right flavour but their message will be diluted considerably by the absence of any obligation on the part of reporting officers to make explicit note of lack of reliability in periods of disputes.

FR Y mb

n.o.
NICHOLAS OWEN



CF

copy 9

PA.

rusia/s

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

18 May 1983

Michael Scholar Esq.
Private Secretary
10 Downing Street
LONDON
SW1

Dear Michael,

OBLIGATIONS OF CIVIL SERVICE MANAGERS

With his letter of 11 May, Laurence Oates enclosed a note dealing with the specific legal question raised in your letter to me of 3 May. We are preparing, in consultation with MPO and employing departments, a further note on the practical steps involved in moving to the specific endorsement of personal files in cases of industrial action and shall submit it to you when it is ready.

I am copying this letter to Richard Mottram (Ministry of Defence), David Clarke (DHSS), Barnaby Shaw (Department of Employment), Mary Brown (Lord Privy Seal's Office), Laurence Oates and Henry Steel (Law Officers' Department), Richard Hatfield (Cabinet Office).

Yours sincerely,

Margaret O'Mara

MISS M O'MARA
Private Secretary

Civil Service
Long Term
H/2



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CONFIDENTIAL

SECRET

→ ✓ c. NO.

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405 7641 Ext.

Communications on this subject should be addressed to

THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

11 May 1983

2

Michael Scholar Esq
Prime Minister's Office
10 Downing Street
London SW1

MS

Prime Minister

This is the Law Officers' response to your question.

MS 12/5

Dear Michael,

OBLIGATIONS OF CIVIL SERVICE MANAGERS AND NOTING OF FILES

You copied here your letter of 3 May reporting the Prime Minister's comments on whether there should be an obligation on civil service managers to record lack of reliability during periods of industrial dispute.

I attach a Note, endorsed by the Attorney General and Lord Advocate, dealing with the specific legal question the P.M. raised.

Copies go to the recipients of your letter and to Christine Duncan.

Yours sincerely
Laurence Oates

LAURENCE OATES

SECRET



For the purposes of this Note, we assume a situation in which Departments have issued an instruction to managers in the civil service that as part of their duties of reporting on staff for whom they are responsible they will record lack of reliability in periods of industrial dispute. There are two aspects arising on a manager's failure to do so; first, the legal liability of the manager to the Department and, secondly, the legal liability of the Department (or manager in question) to members of the public affected by subsequent industrial action within the civil service.

2. Any manager who deliberately fails to act in accordance with the instruction will be in breach of his duty and his contract of employment. The remedy for a Department in those circumstances would be the use of the disciplinary procedures and sanctions under Estacode against the manager in question. There are sound reasons in law (and in practice) why the alternative course which may be theoretically available at common law of the Department's suing in the Courts for damages for breach of contract is unlikely to be a practical option - it will be difficult to establish a good cause of action (even where loss is caused to the Department by the actions of an individual taking part in industrial action, the failure to have reported on previous unreliability is unlikely to be regarded as a sufficiently proximate cause of the loss).

3. A failure to report unreliability would not give rise to any separate ground of action against the Department (or any individual civil servant) by a member of the public. Any legal claim against a Department arising out of loss suffered by a member of the public as a result of industrial action within the civil service would have to be based on a breach of statutory duty (where such a duty exists) and not on the basis of the failure to report unreliability.

CIVIL SERVICE : LT Management
PT12

12 MAY 1983

12 1 2 3 4 5
6 7 8 9 10 11



COMPTROLLER

12

SECRET



file
cc: Nick Owen

BH

7

10 DOWNING STREET

From the Private Secretary

3 May 1983

Dear Margaret,

Obligations to Civil Service Managers

Thank you for your letter of 26 April.

I showed this to the Prime Minister over the weekend. Mrs. Thatcher continues to support the view that reporting officers should be obliged to record lack of reliability in periods of dispute ("negative noting"). She thinks that it would be odd to report on someone that he is conscientious and reliable at all times while omitting to mention that he broke his contract of employment during a strike or during an industrial dispute. The Prime Minister believes that the informal approach favoured by the Chancellor can be haphazard and arbitrary in its effect; that an advantage of negative noting is that it advertises clearly to staff that industrial action is one factor which will be taken into account when promotion to responsible positions is considered; and that Departments would not need to be rigidly bound to any particular course of action by negative noting. On the industrial relations point, the Prime Minister considers that it will be better to announce negative noting at a time - like the present - when industrial relations are improving rather than when they are deteriorating. Finally, the Prime Minister has enquired what the legal position is if a reporting officer states, or gives the impression, that a person is reliable when the reporting officer knows that he is not. The Prime Minister wonders whether such a reference could render the reporting officer, or the Department, liable for damages.

6/E-1

I am sending copies of this letter to Richard Mottram (Ministry of Defence), David Clark (Department of Health and Social Security), Barnaby Shaw (Department of Employment), Henry Steel (Law Officers' Department) and Richard Hatfield (Cabinet Office) and Mary Brown (Lord Privy Seal's Office).

Yours sincerely,

Michael Scholar

Miss Margaret O'Mara
HM Treasury

SECRET

BH

MR SCHOLAR29 April 1983

cc Mr Mount

OBLIGATIONS OF CIVIL SERVICE MANAGERS

The Treasury has produced, after a month of thought, no new arguments against the suggestion made in your letter of 28 March that reporting officers should be obliged to record any lack of reliability in periods of dispute ("negative noting").

The Chancellor favours the informal approach. It is claimed that this makes it possible - it is not put any higher than this - for departments to take account of individuals' activities during disputes and that this approach would avoid legal difficulties and confrontation with the unions when industrial relations with them are improving. I do not think that we should give up on this, at least not yet. Virtually any form of industrial activity is a breach of contract; there is surely something rather odd in reporting on a Mr Smith that he is conscientious, reliable at all times and so on, while omitting to mention that he has broken his contract of employment. In recent years I was well aware which of my staff were reliable during disputes, and which were not, but the form provided for reporting on one's staff, though very detailed, makes no explicit reference to reliability during disputes and discouraged one from commenting on this aspect of performance.

Negative noting has two advantages. The first is that it is more reliable than informal methods, which are haphazard in the extreme. Reporting officers themselves may sometimes be sympathetic to those who take industrial action and without a formal requirement to record these activities, might well omit to do this. The second advantage of negative noting is that it advertises clearly to staff that industrial action is one factor which will be taken into account when promotion to responsible positions is considered.

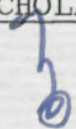
It is to this latter aspect that the alleged legal difficulties refer since it is argued that negative noting would be interpreted

by the unions as a disciplinary procedure and that they would try to present it as such. This could be countered in two ways. First, departments are not rigidly bound by negative noting: it is one factor which promotion boards, quite rightly, need to consider as a possible indicator of an individual's willingness to accept responsibility. It would be open to the individual concerned to explain his actions to a promotion board, and this, too, would need to be made clear. Second, the informal approach carries the danger that the individual concerned could claim that management had in fact operated a disciplinary sanction against him or her without using the appropriate procedures - discipline by the back door in other words.

The note from the Chancellor also mentions practical difficulties of negative noting. These seem fairly slight since reporting officers are already required to notify absences during disputes in order to ensure that those concerned are not paid during these periods.

Finally, there is the industrial relations point. Negative noting would have to be announced and this could be provocative but surely it would be better to do so at a time when industrial relations are improving, rather than when they are deteriorating.

NICHOLAS OWEN





MBPA
Management and Personnel Office

Whitehall London SW1A 2AZ

Telephone 01-273 } 4400
 GTN 273 }

29 March 1983

MMS 313

4

The Rt Hon Sir Geoffrey Howe QC MP
 Chancellor of the Exchequer
 HM Treasury
 Parliament Street
 London SW1P 3AG

Dear General,

OBLIGATIONS OF MANAGERS AND NOTING OF FILES

Thank you for your letter of 17 March about the reports from officials on the Standing Group on Industrial Action. I agree with you that these issues are far from easy, and that the right course of action may well vary according to the industrial relations position at the time.

In the present and foreseeable context, I am persuaded by your letter and the papers that it would be likely to be counter-productive to adopt anything other than the low-key approach you envisage. I would therefore be content for officials to be instructed to proceed as suggested in the notes.

I am copying this letter to the Prime Minister, the Secretary of State for Defence, the Secretary of State for Social Services, the Secretary of State for Employment, the Attorney General, and Sir Robert Armstrong.

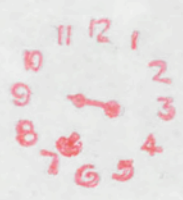
Yours ever

Dave

BARONESS YOUNG

Civil Service,
Long Term, Pt 12

31 MAR 1983





File
bc: Mr. Owen
3
DSG

10 DOWNING STREET

From the Private Secretary

28 March 1983

OBLIGATIONS OF CIVIL SERVICE MANAGERS

The Prime Minister has seen a copy of the Chancellor's letter of 17 March to the Lord Privy Seal, with which was enclosed a Report by Officials on the obligations of Civil Service managers in relation to industrial action.

The Prime Minister is content with the way in which it is proposed to put these obligations across to Civil Service managers. She considers that the proposed message to managers (Annex B to the Report) conveys the right flavour, but believes that the message will be diluted considerably by the absence of any obligation on the part of reporting officers to make explicit note of lack of reliability in periods of disputes.

I am sending copies of this letter to Richard Mottram (Ministry of Defence), David Clark (Department of Health and Social Security), Barnaby Shaw (Department of Employment), Henry Steel (Law Officers' Department) and Richard Hatfield (Cabinet Office).

Miss Margaret O'Mara,
H.M. Treasury.