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ROYAL COURTS OF JUSTICE,  
LONDON, WC2A 2LL

16th November 1984

- 1) Mr Butler <sup>RAB</sup>
- 2) Prime Minister <sup>(2)</sup>

PRIME MINISTER

NEWCASTLE SHIFT DISPUTE

There is a "significant risk" of legal challenge if the Government goes for unilateral variation of the strikers' contracts (Mr Fowler's preferred option).  
The Lord President is chairing a meeting on this next week, and will report to you then.

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16/11

The Secretary of State for Social Services copied to the Attorney General his minute of 9th November.

This note considers the prospects of legal challenge should the Government decide to vary unilaterally the present terms and conditions of service of the employees concerned.

My conclusion is that the employees may be expected to bring either an action for compensation for constructive dismissal, or an action for a declaration that the purported variation of the terms and conditions of service is unlawful. The latter action might also include a claim for damages. There is a significant risk that actions of either kind would succeed. I set out the relevant criteria below. I should need to know more about the existing terms of service, and the proposed amendments, to assess the severity of that risk.

CONSTRUCTIVE DISMISSAL

If the employer's conduct is such as to entitle the employee to throw up his job without notice, and he does so, the employee shall be treated as dismissed by the employer. The conduct complained of must be conduct which is "a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound





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by one or more of the essential terms of the contract".

A common example of a significant breach is a reduction in pay. Another example is where the employer insists on the employee working hours which he was not contractually obliged to do. But there will be no breach at all if the employee's job is varied within the bounds permitted by the contract, even if as a result there is less opportunity to work and earn overtime pay. Breaches of clear contractual terms are generally treated as sufficiently fundamental to justify the employee resigning and claiming constructive dismissal.

If the employee can establish constructive dismissal, an Industrial Tribunal must go on to consider the question whether the dismissal was fair or unfair. This will turn on whether in all the circumstances the Tribunal considers that the employer, although in breach of the contract, nevertheless acted fairly.

In determining this, the decisive factor is the reasonableness of the employer's conduct. A Tribunal will, for example, examine whether or not the unilateral variation of the contract was in all the circumstances properly handled. Proper handling may involve consultation with employees and the taking into consideration of the interests of individual employees. A re-organisation of an employer's business may be reasonable, and it may be reasonable to require an employee to adapt his working hours and working practices to it. An Industrial Tribunal has to consider whether the employer was acting reasonably in deciding that the advantages to the employer of implementing the proposed re-organisation outweighed any disadvantages to the employees.





These criteria are plainly relevant to the origins of the Newcastle dispute.

#### ACTION FOR A DECLARATION AND/OR DAMAGES

Since an employee must resign before he can bring an action for constructive dismissal, it is perhaps more likely that the Newcastle strikers would bring an action for a declaration that the purported variation of the contract was unlawful as being in breach of contract. Such an action might be coupled with a claim for damages. The employee does not have to prove that the breach is one going to the root of the contract; he has only to show that there has been a breach. He does not have to resign in order to sue.

#### THE POSITION OF THE CROWN

There has been discussion as to whether the Crown has by reason of its constitutional position the right to alter any terms of service unilaterally. Modern letters of appointment to the Civil Service expressly inform civil servants of this claimed right from the commencement of their employment. But the right referred to in the letter of appointment is wholly unspecific in its terms. The Law Officers have previously advised that the prospects of the Crown successfully arguing before a modern court that it has the right to vary unilaterally the conditions of service for civil servants are poor.

#### CONCLUSION

There is clearly some significant risk of successful legal challenge if the Government decides to adopt the unilateral variation approach. That risk is, however, less than the risk attached to dismissing the strikers with an offer of re-engagement.





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I am copying this minute to the Lord President, the Chancellor of the Exchequer, the Secretaries of State for Employment and Social Services and Sir Robert Armstrong.

*Atul Kohli*

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COMBUSTION