CABINET

THE FUTURE OF THE CONDITIONS OF EMPLOYMENT
AND NATIONAL ARBITRATION ORDER

Memorandum by the Attorney-General

Policy considerations must be the determining factor with regard to the form and content of the new Order and it would be unrealistic to apply the legal criteria, which one might apply in the case of a Statute, to an Order such as this, hammered out by difficult negotiations to reconcile conflicting interests. At the same time it may be of assistance to my colleagues to have a short statement of some of its legal implications.

2. Basically, as my colleagues will have seen, its effect is that employers, organisations of employers or trade unions may report to the Minister 'disputes' (Article 1) or 'issues' (Article 2). A 'dispute' is a 'dispute in a trade or industry or section of a trade or industry or in an undertaking, connected with terms of employment or conditions of labour' (it does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of a trade union). An 'issue' is an issue as to whether an employer should observe terms and conditions recognised in the district, that is, in effect, established by voluntary negotiation or arbitration. When there is machinery for voluntary settlement of the terms and conditions of employment, the employers' organisation or trade union must be one which habitually takes part in the settlement of terms and conditions by that machinery. When there is no such machinery, the organisation or trade union must be one which represents a substantial proportion of the workers or unions. In effect, therefore, dissident non-affiliated unions would in general be excluded, though there might be breakaway unions which complied with the requirement that they should represent substantial numbers of workers. There is, of course, nothing to prevent any union or employers' organisation or any other body which does not comply with the description in the Order from reporting disputes to the Minister, but if they did, their so doing would not confer the obligations on the Minister or Tribunal for which the Order provides. Inasmuch as only unions could refer disputes, the difficulty of single employees referring disputes to the Minister would be avoided.

3. When a 'dispute' or 'issue' is reported to him, the Minister may take steps to promote a settlement (Article 4) but, in the case of a dispute (as distinct from an issue), he must, when he thinks there is suitable negotiation or arbitration machinery to which the parties have not had full resort, refer it to that machinery (Article 5). Again, in the case of a 'dispute' he must, if he has not referred it to this machinery, refer it, if not otherwise settled, to the Tribunal within fourteen days after it is reported to him, or such longer period as he thinks desirable, and may, if it has been referred to the machinery without result, cancel the reference and refer it to the Tribunal (Article 8 (i) and (ii)). He may also, if he
thinks one of the parties is taking action to compel acceptance of the disputed terms or conditions of employment resulting in stoppage of work or substantial breach of agreement between the parties, defer referring the dispute to the Tribunal or cause the Tribunal to stay its proceedings so long as the action continues (Article 8 (iii)). In the case of an 'issue', he must, if not otherwise settled, refer it to the Tribunal, and the Tribunal in such a case is limited to requiring the employer to conform to the recognised terms and conditions or terms and conditions which it thinks not less favourable than the recognised terms and conditions.

4. The sanction resulting from the application of this procedure by the Minister is that if the Tribunal makes an award on a dispute or issue referred to it, the terms and conditions specified in the award shall become implied terms of the contract of employment between the employers and workers to whom the award relates. The sanction in Order 1305 that strikes or lockouts which have not been duly reported or which take place within twenty-one days after being reported are illegal is gone and likewise Part III of Order 1305 which required employers to comply with recognised terms and conditions without any award by the National Arbitration Tribunal.

5. In view of the T.U.C. attitude, it would, in any event, be hardly practicable to reproduce the provisions of Order 1305 making it an offence to declare an illegal strike or lockout. Even, however, if it had been otherwise possible to retain them, in my opinion the following are strong reasons against retaining them:

   (i) in general it is doubtful whether the criminal law can ever be an effective weapon to restrain strikes;

   (ii) it would be impossible to continue any criminal provisions in an Order - if it were desirable to have them, they should be enacted by Statute;

   (iii) if there is any criminal provision whether in an Order or a Statute, it is impossible to allow it to be continually disregarded; but prosecutions are difficult to institute and may often involve risk of greatly aggravating the dispute and even possibly provoking a wholesale disobedience to the law. As my colleagues will know, the penal provisions of Order 1305 have been a source of constant difficulty, particularly to the Law Officers.

I am in entire agreement with the Minister of Labour that the new Order should not retain these provisions.

6. If it were desired to retain some criminal sanction, this would have, I think, to be done by Statute after full debate in Parliament, and then I think would be possible only in a very restricted form. The offence would probably have to consist of deliberately inciting others to disregard available negotiation or arbitration machinery but it would, in general, be difficult to obtain evidence sufficient to establish such an offence, and the provision would have mainly an 'in terrorem' value. It is, however, for consideration whether, short of making it a criminal offence, it should be made civilly actionable to incite others to strike without resorting to negotiation or arbitration, but this, I think, would also have to be by Statute and not in an Order under Defence Regulations. A point that may perhaps be made in debate is that the then Attorney-General, when moving the Second Reading of the Trades Disputes and Trade Unions Act, 1946, advised the House that there would be adequate legal machinery to deal
with "political" strikes and whoever deals with the matter in debate should perhaps be ready to meet this point. The position as to this is as set out in paragraph (1) of the Schedule to this paper.

7. In paragraph 6 of his paper (C.P.(51; 221), the Minister of Labour states that the present Order is experimental and the question of sanctions can be further considered when it is reviewed. For the time being, I think the sanction provided, namely, that the terms of the award should be implied terms of the contract of employment, should be as effective as sanctions in this field of law can be from the nature of the relationships with which they deal.

I have set out the other sanctions against strikes (such as they are) which remain after the repeal of Order 1305 in a Schedule to this paper, in case my colleagues wish to have them in mind.

8. In general, although there are criticisms of form which could be made, I think that the Order from the legal point should operate satisfactorily; but in any event its efficacy will no doubt depend far more on the extent to which it is accepted and used by those affected than on its precise wording from the legal point of view.

F.S.

Royal Courts of Justice, W.C.2,

24TH JULY, 1951.

SCHEDULE

1) It is a criminal offence to conspire to do or to incite others to do an unlawful act or to do a lawful act by unlawful means. Therefore to bring about a strike not in connection with a trade dispute is prima facie an indictable offence, but in practice the remedy can only be used in exceptional cases.

2) The Conspiracy and Protection of Property Act, 1875, makes it an offence (in effect) to strike if you know that by so doing you will deprive a substantial number of people of essential services such as gas and water, or cause damage to life or property.

3) If a worker breaks his contract of employment, e.g., if in the case of a weekly contract he stops work before the week is out, his employer may sue him for damages for breach of contract. The damage is generally small in money, and may be nominal. In practice, it has been found that employers, particularly the nationalised undertakings, hesitate to take these proceedings although they have been successfully taken on occasions. The remedy, however, is a remedy open to the individual employers and is not equivalent to some remedy in the hands of the State as a whole.