Information Tribunal Appeal Number: EA/2007/0055
Information Commissioner's Ref: FS50112248

Heard on the papers
at Procession House, London, EC4
on 4th December 2007

Decision Promulgated

17th December 2007

BEFORE

Chairman

JOHN ANGEL

and

LAY MEMBERS

PAUL TAYLOR AND ROSALIND TATAM

Between

Dr John Pugh MP

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

Ministry of Defence

Additional Party

:

Decision

The Tribunal upholds the Decision Notice dated 23rd May 2006 and dismisses the appeal.

Reasons for Decision

Introduction

1. Dr Pugh appeals against the Decision Notice of the Information Commissioner dated 23rd May 2007 (the Decision Notice) which decided that the MoD had correctly claimed the s.42 Freedom of Information Act 2000 (FOIA) exemption, namely legal professional privilege (LPP), in relation to his request, and upheld the MoD's view that the public interest in maintaining the exemption outweighed the public interest in disclosure.

2. The MoD was joined as a party and with the agreement of all the parties the case was considered on the papers before us and not at an oral hearing. This included the Tribunal considering the witness statement of Paul Inman the Deputy Director of Information Access at the MoD which was not challenged by Dr Pugh.

3. Because of the LPP exemption having been claimed by the MoD part of the information before us is contained in a closed bundle and has not been disclosed to Dr Pugh. It is necessary for the Tribunal to consider such information in this way because otherwise disclosure of the information at this stage in the proceedings or before would defeat the object of having exemptions under FOIA. It is only where the Tribunal orders disclosure and the public authority does not appeal against the decision that the information is no longer subject to confidentiality.

Factual background to the request for information

4. Dr Pugh is a Member of Parliament who has, on behalf of a constituent, been in correspondence with various government departments since April 2004 about the implications of two judgements of the European Court of Justice (ECJ) on the status of former employees of the Royal Ordinance Factory Organisation (ROFO).

5. The ROFO is regarded by the Government as having been part of the MoD until 2nd January 1985. On that date Royal Ordinance Plc (RO Plc) was formed. MoD

employees who transferred to RO Plc were treated by the Government as becoming employees of that company on that date. Following the abandonment of a planned flotation of RO Plc in summer 1986, there was an agreed sale to Vickers Plc in April 1987 of part of the business. The remainder was sold to British Aerospace Plc (now BAE Systems) in October 1987.

6. The two ECJ judgements in question are *Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* C-298/94, [1997] ICR 746 and *Celtec Ltd v Astley* C-478/03, [2005] ICR 1409. Both judgements concern the application of the *Acquired Rights Directive* (Directive 77/187), which was implemented into UK law by the then *Transfer of Undertakings (Protection of Employment) Regulations 1981*, more commonly known as "TUPE". In *Henke* the ECJ ruled that a reorganisation of public administrative functions (e.g. the transfer of an administrative function from one department of government or local government to another) will fall outside the scope of TUPE. In *Celtec Ltd* the ECJ acknowledged that a transfer to which TUPE applies may take place over a period of time. However, the ECJ ruled that there will always be a single 'date of transfer', being the date on which responsibility as employer for carrying on the business moves from the 'transferor' to the 'transferee'. The application of the ECJ judgment to the particular facts of the case in *Celtec Ltd* was considered by the House of Lords ([2006] UKHL 29, [2006] ICR 992) in June 2006.

7. Dr Pugh's particular concern is the implications of those two judgements for the date that his constituent should have been regarded as ceasing to be in civil service employment for the purpose of membership of the Principal Civil Service Pension Scheme (PCSPS). His constituent was in fact treated (in common with all transferring ROFO employees) as ceasing to be in civil service employment on 2nd January 1985 (ROFO employees being regarded as having transferred from the public sector to the private employment of RO Plc on that date). His constituent was at that time given the option of either transferring his accumulated pension benefits to a private sector scheme, or preserving them in the PCSPS. Dr Pugh contends (on behalf of his constituent) that he should in fact have been regarded, in the light of the two ECJ judgements, as continuing to be a civil service employee (and active

member of the PCSPS) until October 1987, when the business was sold to BAE Systems.

8. The request for information that is the subject of the Decision Notice was made by Dr Pugh in a letter of 6th September 2005 to Dr John Reid, then Secretary of State for Defence, in the following terms:

> *"I would be grateful to learn what advice the Department, or the Government, has sought or provided regarding the application of the two judgements of the ECJ referred to above on the ROFO transfer and matters, in order to ensure that the Government's potential liabilities are properly covered."*

9. Although the request was addressed to an MP (who is not a "public authority" for the purposes of the Act), the request was treated by Dr Reid as a request to the MoD and the MoD in turn treated it as a request made to them under s.1 FOIA.

10. Dr Pugh also made a request in similar terms on the same day to the Rt Hon John Hutton MP (then Minister of State for the Cabinet Office). The two requests have, so far as is relevant, been regarded and dealt with by all parties as being the same request for information.

11. The MoD responded to Dr Pugh on 28th September 2005. It explained that legal advice had been sought by the MoD in October 2004 in relation to a letter that Dr Pugh had written to Douglas Alexander MP (then Minister of State, Cabinet Office) on 23rd August 2004 on the same topic (the disputed information). The letter had also been passed to the MoD and the MoD had sought advice before replying to that letter on 17th January 2005. The MoD stated that it was withholding this advice under the exemption for information covered by legal professional privilege, s 42 FOIA. In relation to the public interest test, it said that it did not consider the case to be *"exceptional"* so as to outweigh the public interest in maintaining the exemption. This letter also explained that the MoD was not aware of any other advice having been taken, by it or the Government, on the application of the two ECJ judgements to the transfer of the former ROFO employees to the private sector.

12. On 7th October 2005, Dr Pugh submitted a request for an internal review of the MoD's decision. He stated that *"the information requested relates to advice as to how the government should discharge its legal responsibilities to a significant group of citizens"* and said that it was needed *"to enable me as a Member of Parliament to scrutinise whether the executive arm of government is carrying out its responsibilities properly"*. He made clear that he did not accept that no legal advice had been sought on this issue since *"the two judgements of the ECJ are most clear and unequivocal, and it would seem obvious that their application to the circumstances of the ROFO pensions would require government action unless there were, as yet, undiscovered legal arguments presented to the contrary"*.

13. On 1st December 2005, the MoD responded to Dr Pugh's request for an internal review. The MoD upheld its original decision. It explained, in relation to the public interest test, that it considered the public interest favoured the maintenance of the exemption because (i) there is a strong public interest in protecting the confidentiality of communications between lawyers and their clients; and (ii) the application of the two ECJ judgements to the facts of any particular case is a matter of law for the courts to determine. The MoD explained that it therefore considered that there is little public interest in releasing the advice.

14. On 11th January 2006 Dr Pugh wrote again to the MoD requesting that the Ministry reconsider its decision. In his letter, he argued that the public interest in disclosure was strong because the matter concerned the relationship between former public sector employees and the Government. He explained that if legal advice received by the Government contradicted the Government's previously stated position, there would be a clear public interest in that being known to the public.

15. On the same day, Dr Pugh submitted a complaint to the Commissioner about the way in which his request had been handled. Neither of these letters of 11th January 2006 was received by their respective recipients. Dr Pugh subsequently sent reminders and further copies of his letters to both the Commissioner and the MoD on 23rd March 2006. These were received.

16. The MoD responded on 7th April 2006. In that letter it clarified that the advice it had sought in relation to Dr Pugh's earlier correspondence had concerned only the first ECJ case, *Henke*. It confirmed that it had not sought, and therefore did not hold, legal advice in relation to the second ECJ case, *Celtec v Astley*.

The Information Commissioner's decision

17. The Commissioner served the Decision Notice on both Dr Pugh and the MoD in accordance with s. 50 FOIA. In the Decision Notice, the Commissioner stated that he was satisfied that the MoD did not hold information of precisely the description specified in the request. However, the MoD did hold information that fell within the scope of the request, specifically the advice that it took in 2004 in relation to Dr Pugh's correspondence. The Commissioner stated that he was satisfied the MoD had properly applied the s. 42 exemption to this advice and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner accordingly found that the public authority had dealt with the request for information in accordance with the Act.

The appeal to the Tribunal

18. The Notice of Appeal names both the Department of Trade and Industry (DTI) and the MoD as the public authorities to whom Dr Pugh's request was sent. The Commissioner accepted that Dr Pugh's two requests of 6th September 2005 were in fact dealt with by both the MPs to whom they were sent as requests to the MoD. The MoD dealt with the request accordingly and it is the MoD's response to Dr Pugh's request which the Commissioner investigated. The Decision Notice is accordingly only a determination by the Commissioner in relation to Dr Pugh's request to the MoD and it is this Decision Notice only to with which the Tribunal is concerned in this appeal.

19. In the Notice of Appeal, Dr Pugh complains that the Commissioner has misdirected himself on two matters:

    a. In respect of paragraph 37 of the Decision Notice, Dr Pugh complains that the Commissioner has stated that the information being sought related only

to the seeking of advice as to how to respond to the enquiries, whereas in fact the information requested was of such a detailed and technical nature that the formulation and delivery of that advice could not have taken place without addressing the substantive issue itself. Dr Pugh says that the Commissioner has here created "an artificial distinction".

b. In respect of paragraph 38 of the Decision Notice, Dr Pugh complains that the Commissioner has wrongly taken the view that the information sought did not affect or change the financial status of a significant group of people and has therefore failed properly to consider the balance of the public interest. Dr Pugh points out that the information sought related to "a pension fund of approximately £1 billion, affecting 19,500 pensioners and their dependents, as well as the financial position/liability of HM Government".

Statutory framework

20. Section 42 of the Act provides:

"(1) Information in respect of which a claim to legal professional privilege…could be maintained in legal proceedings is exempt information."

21. Section 2(2) of the Act provides:

"*In respect of any information which is exempt information by virtue of any provision of Part II Section 1(1)(b) does not apply if or to the extent that –*

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

22. The Tribunal's powers in relation to appeals under s. 57 FOIA are set out in s. 58 as follows:

(1) If on an appeal under sectio*n 57 the Tribunal considers-*

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

23. The starting point for the Tribunal is the decision notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence) may make different findings of fact from the Commissioner and consider the decision notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA has been applied correctly. In cases involving the public interest test in section 2(2)(b) a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts that will involve a finding that the decision notice was not in accordance with the law.

24. The question of whether the exemption in s. 42 FOIA is engaged and whether the consequential public interest test was applied properly are all questions of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

25. The questions for the Tribunal to consider in this case are

   (a) Whether s. 42 of the Act was engaged, and if so

   (b) Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

Legal Professional Privilege

26. What is LPP? In *Bellamy v ICO and Secretary of State for Trade and Industry* [2006] UKIT EA 2005 0023 a differently constituted Tribunal after reviewing the judicial authority in relation to LPP found:

> 9. In general, the notion of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence.

27. This Tribunal adopts the definition of LPP in *Bellamy*. Having considered the disputed information, the written submissions and all other evidence before us the Tribunal finds that it is covered by LPP and therefore agrees with the Commissioner's finding in the Decision Notice that the exemption is engaged.

The public interest test and LPP

28. The Tribunal has considered the public interest test (PIT) in relation to the s.42 exemption in a number of decisions. *Bellamy* undertook a review of the case law on LPP and concluded at paragraph 35

> As can be seen from the citation of legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. ... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case, of which this case is not one.

29. This finding has been largely adopted by this Tribunal in other decisions - *Shipton v Information Commissioner* (EA/2006/0028), *Kitchener v Information Commissioner & Derby City Council* [2006] UKIT EA 2006 0044 and more recently, in *Adlam v Information Commissioner* (EA/2006/0079) where the Tribunal said at paragraph 63:

> The real debate between the Appellant and the other parties concerns whether the public interest in maintaining the exemption in section 42 in this case outweighed any public interest in disclosure of the particular information. The exemption is a qualified one. However, the Tribunal in *Bellamy v Information Commissioner* (EA/2005/0023) made it clear especially at paragraph 35 that there was what it called "a strong element of public interest inbuilt into the privilege itself" and that "at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.

30. In *Shipton* at paragraph 14 the Tribunal having recognised that s.42 was not an absolute exemption stated that if the qualified nature of the exemption is to have any meaning

> There will be occasions when the public interest in disclosure will outweigh the public interest in maintaining privilege. This may arise, for example, when the harm likely to be suffered by the party entitled to legal profession privilege is slight, or the requirement for disclosure is overwhelming.

The harm may be slight where the privilege holder no longer has a recognised interest to protect. However where the particular issue raised by the legal advice sought remains "live" this would render it particularly sensitive – see *Kitchener* at [18].

31. Also recently In *Gillingham v Information Commissioner* EA/2007/0028 at paragraph 16 after reciting most of the above decisions on LPP the Tribunal

> ....noted that, generally speaking, the public interest reasons for maintaining the legal professional privilege exemption are particularly strong. This is because the purpose of the privilege is to serve the administration of justice and to safeguard the right of any person to obtain entirely frank and realistic legal advice. The privilege is a fundamental human right long established in the common law and now supported both by European law and by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless the balance of public interest must be assessed in each case to see whether in the particular circumstances the public interest in maintaining the exemption outweighs the public interest in disclosure.

32. At paragraph 8 the Tribunal stated that

> A person seeking disclosure of material protected by legal professional privilege could argue that Parliament, by making the exemption in the Act qualified and not absolute, intended that legal professional privilege could be

overridden without any particular difficulty. We do not consider that this is what Parliament intended. The test which we must apply is that laid down in s2(2)(b), namely, that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This wording does not give any guidance as to the degree of importance of the public interest in maintaining a particular exemption. On the inherent importance of the exemption we take our cue from the decisions mentioned.
For the public interest in maintaining legal professional privilege not to outweigh the public interest in disclosure, the public interest in disclosure needs to be particularly strong, because proportionate reasons are required for not upholding a fundamental human right.

33. Most recently in *Kessler v Information Commissioner and HM Commissioners for Revenue & Customs (*EA/2007/0043) the Tribunal found in relation to *Bellamy* at paragraphs 53 to 56

> 53. This was an early decision from this Tribunal on the exemption under section 42 of FOIA and it is clear from the approaches taken in subsequent decisions that although there will be powerful reasons for maintaining the exemption because of its very nature as a protection from disclosure, it is not an absolute exemption, and care should be taken not to accord it higher status. There will be occasions when the public interest in disclosure will outweigh the public interest in maintaining the exemption.
>
> 54. We adopt what was said in *Burgess v The Information Commissioner and Stafford Borough Council* (EA/2006/0091) at paragraph 44;
>
> *"The Tribunal wants to make it clear that legal privilege is not an absolute [exemption] and furthermore, it is not enough in each case simply to assert that the Tribunal's previous decision in* <u>*Bellamy*</u> *effectively makes the [exemption] an absolute one: that is not correct."*
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> 55. We agree with the Appellant's assertion that by making section 42 a qualified exemption subject to the public interest test in section 2(2)(b), Parliament clearly rejected the view expressed in some judgments that the public interest in obtaining legal advice in confidence automatically prevails over almost any other interest. By the enactment of FOIA, Parliament has done exactly what the House of Lords in <u>R v Derby Magistrates Court, ex parte B</u> [1995] 4 All ER 526, per Lord Taylor, said was required to change the absolute nature of legal privilege, it has added a public interest balancing exercise.
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> 56. As to the application of that public interest balancing exercise, we again agree with the Appellant's assertion that FOIA puts no onus on an applicant to show that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Additional Party points out that "there is no suggestion anywhere within the section that any legal burden of proof is applicable at all." The Information Commissioner did not, in our opinion, place

any burden on the Appellant to show that the public interest lay in favour of disclosure.

Legal submissions on PIT

34. The MoD argues that given the significance of the public interest in the protection of information subject to legal professional privilege, even though the s. 42 exemption is a qualified exemption the Tribunal has recognised that disclosure of information that is exempt under it should only occur where there are "at least equally strong countervailing considerations" weighing in favour of disclosure (see *Bellamy* and *Adlam*). The public policy rationale for this high level of protection for information that is subject to legal professional privilege lies in the principles comprising the rule of law. It is a matter of high public importance that all persons should be able to obtain legal advice as to the conduct of their affairs. This aim is best advanced by ensuring full and frank communication between clients and their legal advisers. The benefits accruing are secured in practice by a high degree of certainty that information so communicated is to be regarded as confidential. Anything less than this is capable of seriously undermining the policy objective, thereby damaging the public interest - *R v Derby Magistrates ex parte B* [1996] 1 AC 487 per Lord Taylor at 508A – E; and per Lord Lloyd at pp. 509C – 510A.

35. This point is demonstrated, so the MoD submits, by the fact that ordinarily (as regards disclosure/inspection in the context of litigation), once information is subject to legal professional privilege, it retains that protection without limitation in time (see *Adlam* at [72]), and regardless of the subject matter of any subsequent litigation, and regardless of whether or not a court considers that the client has any recognisable interest in doing so in those proceedings (see *Nationwide Building Societies v Various Solicitors* [1999] PNLR 52 per Blackburne J at 69). These characteristics, the MoD argues, demonstrate both the specific strength of the public interest in the protection of legal professional privilege, and the fact that the need to protect/promote that public interest is not of itself sensitive to the passage of time. The existence of such protection in the litigation context is the most cogent evidence

of the public interest in the protection of information within the scope of legal professional privilege. Ordinarily in litigation, the public interest is best (and most obviously) served by rules requiring the disclosure as between the parties to the litigation of all documentation/information that touches on the dispute between them. This is itself a matter of high public importance. For this reason, the clear and long-standing exception to these rules that exists in respect of information covered by legal professional privilege is itself a matter of high significance.

36. The MoD submits that the reasons why there is a strong public interest in maintaining the exemption under section 42 are clear, and having regard to those reasons, there is no basis for drawing any distinction between the position of natural persons, and the position of bodies that are FOIA public authorities. With this the Tribunal agrees.

37. The MoD further submits that in the interests of maintaining the rule of law, there is a particularly strong public interest in enabling public authorities to obtain appropriate legal advice on the basis of free and candid communication with their lawyers (and vice-versa). Legal advice needs to be given in context, with a full knowledge of all the relevant facts. Without the ability to seek comprehensive advice, with complete candour, the circumstances surrounding the decision-making process are impaired hence putting at risk the quality of decision-making itself.

38. Finally the MoD argues that the inherent public interest in maintaining legal professional privilege is in itself so weighty that only in cases where there is an exceptionally compelling public interest in favour of disclosure of the specific information sought would the balance fall in favour of disclosure.

<u>Tribunal's finding on PIT</u>

39. This Tribunal notes and approves the development of the application of the LLP exemption in the line of Tribunal decisions outlined above.

40. The Tribunal accepts that with all exemptions under FOIA that the exemption itself will usually represent the principal public interest in maintaining the exemption and

therefore can be described as an “inherent” public interest in favour of maintaining the exemption. The Tribunal does not accept that there is any inbuilt weight automatically applicable to qualified exemptions, whether class based or not. However in the case of the LLP exemption the weight of judicial opinion referred to in the above cases gives the exemption itself greater weight and to that extent may be described as having an “inbuilt” weight requiring equally weighty public interests in favour of disclosure, if the exemption is not to be maintained.

41. The MoD and Commissioner contend that the public interests in favour of disclosure need to be “exceptional” to result in disclosure where the LPP exemption is engaged. We do not believe that this is the correct test to be applied under FOIA. The test is as set out under s.2(2)(b) FOIA, namely that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” This requires a consideration of the factors in favour of maintaining the exemption and those favouring disclosure and the weight to be attributed to the factors in the circumstances of the particular case in order determining where the balance lies. The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.

Application of PIT – factors in favour of maintaining the exemption

42. The MoD submits in this case that there is an inbuilt weighty public interest inherent in the exemption and this factor is accepted by the Commissioner. This submission is largely based on the findings in *Bellamy* and other Tribunal decisions. In addition, the MoD argues, there is also a specific public interest in maintaining LPP, in view of the possibility that Dr Pugh’s constituent, or others to whom this advice might be shown if it was disclosed, may be raising this matter with a view to engaging in some form of litigation against the Government.

43. In the Tribunal's view this additional submission must be considered in the context that the identity and motive of the requester is largely irrelevant in FOIA cases.

44. The MoD submits that If Dr Pugh or his constituent wish to establish the legal position as to when the transfer of the relevant undertaking took place, there is nothing to prevent them seeking independent legal advice and, if necessary, bringing legal proceedings to determine the question, particularly as the MOD has already advised Dr Pugh that his constituent should consider this course of action.

45. Again in the Tribunal's view this submission must be considered in the context that the requester is entitled to pursue a FOIA request prior to a decision to litigate.

46. The Commissioner considered that the request did not affect or change the financial status of a significant group of people – see Decision Notice at paragraph 38.

<u>Factors in favour of disclosure</u>

47. Dr Pugh as part of his grounds of appeal in paragraph 19b above maintains that a significant group is involved, some 19,500 pensions and their dependants, in relation to a pension fund of approximately £1 billion. This contention is not disputed by the other parties. The Tribunal also considers this to be a significant group in contrast to the Commissioner's finding.

48. Dr Pugh also makes the point that this could affect the financial position or liability of the Government which would clearly be of interest to the public.

49. In his letter of 11th January 2006 to the MoD Dr Pugh argues that the accurate understanding of how the law affects the legal relationship between the Government, former ROFO employees and their pension fund is something which should be shared with the parties as a general matter of public interest and not to do so could amount to negligence on the Government's behalf. Put another way there is a strong public interest in favour of releasing information related to advice as to how the Government should discharge its legal responsibilities to a significant group of citizens and disclosure is required in order to establish whether or not the executive arm of government is carrying out its responsibilities properly.

50. The Commissioner considered this argument at paragraphs 33 and 34 of the Decision Notice.

51. The Tribunal notes that TUPE affects large numbers of employees in the UK and that there will be a general public interest in understanding how ECJ decisions should be applied as a matter of policy to transfers of employees in the public sector.

Conclusion

52. The Tribunal having found that the exemption is engaged needs to consider the application of the PIT. The question of whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information is one to be addressed and determined by the Tribunal, based on all the relevant circumstances of this case and all the evidence before us.

53. Before doing this the Tribunal would set out some general principles established in other Tribunal decisions which we have taken into account in coming to our decision in this case:

    a. There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis.

    b. The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.

    c. In considering the public interest factors in favour of maintaining the exemption, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue.

    d. The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

54. The Commissioner in the Decision Notice [37] considered that in light of the Tribunal's finding in *Bellamy* that "only in very exceptional cases would the public

interest operate to allow such advice to be released" and that this was not one of those cases.

55. We are concerned that the Commissioner in this case should interpret the test in this way as explained at paragraph 41 above. Unlike other exemptions, because of the body of judicial opinion from higher courts in relation to the importance of maintaining LPP, we accept that there is a strong element of public interest inbuilt into the exemption itself, but that this does not, in effect, convert the exemption into an absolute exemption. It makes no difference that LPP is a class exemption. For the Commissioner or the Tribunal to find that the public interest favours disclosure there will need to be equally weighty public interest factors in favour of disclosure in the circumstances of the particular case. This does not necessarily mean that it needs to be an exceptional case.

56. We have considered all the factors favouring maintaining the exemption and those favouring disclosure in this case and consider them more closely balanced than found by the Commissioner in the Decision Notice. This is particularly because we find there is a significant group of people who are potentially affected by, and a large pension fund related to, the subject matter of the information. We find there is potentially a weighty public interest in this group knowing their pension rights and the public knowing whether there could be a call on the Government to find substantial sums to cover any pension shortfall.

57. However, we are mindful of the fact that Dr Pugh was seeking a legal opinion on the effect of two ECJ decisions on the interpretation of TUPE. There is no evidence that such an opinion was obtained in its own right and neither the MoD nor Government is obliged to obtain or create such advice in relation to a request under FOIA. We are only concerned with relevant information held by the MoD at the time of the request. The legal advice, which is the disputed information, was obtained in relation to a previous enquiry by Dr Pugh in 2004. As it refers to the first ECJ decision, *Henke,* the MoD quite correctly considered it as part of the request albeit not covering one of the decisions or being obtained under the circumstances envisaged by Dr Pugh under his request. Having considered the disputed information the Tribunal finds that it is tangential or at best only partially related to the request. This fact, in our view, weakens the weight of the public interests in

favour of disclosure. Also having considered the disputed information we conclude the ‘artificial distinction’ which Dr Pugh refers to in his first ground of appeal (paragraph 19a. above) does not occur.

58. We therefore find that in the circumstances of this particular case that the public interest in maintaining the LPP exemption outweighs the public interest in disclosure and we dismiss the appeal.

59. Our decision is unanimous.

Signed

JOHN ANGEL

Chairman Date 17th December 2007