

PA-3002/0058  
(formerly  
C.1102/03)

**Parliamentary Commissioner Act 1967**

**Report by the Parliamentary Commissioner for Administration  
(the Ombudsman) to**

Mr Richard Shepherd MP

**of the results of an investigation into a complaint made by**

Public Concern At Work  
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1. Public Concern At Work (the Charity) complained that the Department of Trade and Industry (the Department) had mishandled arrangements for revising and reviewing the regulations governing information on the public register about employment tribunal claims, especially those under the Public Interest Disclosure Act 1998 (PIDA). In particular, they complained that the Department had misled the Charity; had given them assurances which they had not kept; and had mishandled a public consultation about the matter.
2. The Charity complained also that the Department had refused to give them information in breach of the Code of Practice on Access to Government Information; that has been the subject of a separate investigation and report by me (reference A.24/03). There is significant common ground in relation to the events surrounding both investigations. However, I should make clear that I see a distinct difference between them. In respect of the former my responsibility was solely to examine whether the Department had acted reasonably, in accordance with the Code, in refusing to release information. I

concluded that they had. But my responsibilities when investigating and reporting on a complaint of maladministration leading to injustice go much further than that. And my powers under the Parliamentary Commissioner Act 1967 enable me to disclose information obtained in the course of, or for the purpose of, my investigation. This report therefore contains information, including legal advice and internal discussion and advice which, in my report on the Code investigation I concluded it was reasonable for the Department to withhold. Furthermore, I do not believe that the question of legal professional privilege prevents me from disclosing legal advice in this report. Equally, I appreciate that these matters are complex and sensitive and I have therefore done so only to the extent I believe necessary to support my findings and conclusions.

3. My investigation began in April 2003 once I had obtained comments from the then Permanent Secretary of the Department after the referral of the complaint by the Member. I have not put into this report every detail investigated by my staff, but I am satisfied that no matter of significance has been overlooked. Annex A gives an explanation of some of the expressions and abbreviations used in this report.

### **Statutory and administrative background**

4. Under the Employment Tribunals Act 1996 (the 1996 Act) and the relevant regulations under that Act, the Secretary of State for Trade and Industry maintains what are now known as employment tribunals. The tribunals are judicial bodies, under the oversight of a President in England and Wales (the President), and another President in Scotland. The administrative staff of those tribunals form part of the Employment Tribunals Service (the Tribunal Service), which is an executive agency of the Department. At the time relevant to this investigation under the Employment Tribunals (Constitution and Procedure) Regulations 1993 (as later amended) (the 1993 Regulations), the Secretary of the Central Office of the Employment Tribunals (England and Wales) (the Secretary) had to maintain a register<sup>1</sup>. (A similar arrangement applied in Scotland, under parallel regulations.) The register was of applications, appeals, and decisions, and had to be open to inspection

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<sup>1</sup> Regulation 9 of the 1993 Regulations.

by anyone, without charge, at all reasonable hours. In 1999 an application had to set out the names and addresses of the parties, and “the grounds, with particulars thereof, on which relief is sought”<sup>2</sup>. Those applications were made on form IT1 (later known as ET1); respondents made a first reply on form IT3. The Secretary had normally to enter particulars of an originating application in the register<sup>3</sup>. Those functions of the Secretary were administrative functions, and formed part of the work of the Tribunal Service, and so of the Department. The employment tribunals receive some 100,000 claims each year. However, many are settled between the parties without the need for a hearing, often through the mediation of the Advisory, Conciliation and Arbitration Service (ACAS).

5. PIDA amended earlier legislation, mainly the Employment Relations Act 1996. It came into force on 2 July 1999. It protects certain disclosures about wrongdoing made by workers and is known colloquially as “the whistleblowing law”. If a worker is dismissed or subjected to a detriment in breach of PIDA, he or she may claim compensation against the employer in an employment tribunal. The tribunals received a total of some 1,300 claims under PIDA in its first three years.

6. The Charity are a registered charity, and incorporated as a company limited by guarantee. Their principal objectives are “to promote ethical standards of conduct and compliance with the law by governmental, industrial, commercial, voluntary sector and professional organisations ... in their administration and management, treatment of personnel, ...”. They pursue those objectives through research, education and advisory work on what is generally known as “whistleblowing”. The Charity were asked by relevant Members, ministers and the Department to help promote Mr Richard Shepherd’s Private Member’s Bill which became PIDA. The Charity need information to monitor how PIDA is working. In particular, they wish to know the types of wrongdoing, disclosure, reprisal and employee in PIDA claims. That is so that they can (a) better inform employees, employers and their advisers, and (b) assess whether PIDA might need any amendment. The information about claims is important to the Charity because some two-thirds of PIDA claims are settled without reaching a hearing, and because some tribunal decisions are issued in only summary form. The Charity maintain that

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<sup>2</sup> Rule 1 of schedule 1 to the 1993 Regulations.

<sup>3</sup> Rule 2 of schedule 1 to the 1993 Regulations.

there is a particular public interest in PIDA claims being made available as sometimes they detail serious allegations of wrongdoing which were not raised with, or dealt with by, the authorities.

7. There are several instruments which may affect how information is used or disclosed. One is the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), which was incorporated into UK domestic law by the Human Rights Act 1998, which came into force on 2 October 2000. Articles 8 (right to respect for private and family life) and 10 (freedom of expression) may be relevant, though those are qualified and not absolute rights. Another such instrument is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Directive). That was given effect in UK domestic law by the Data Protection Act 1998, which came into force in stages between 1 March 2000 and 24 October 2001. Finally, there is the Freedom of Information Act 2000 (applying to England, Wales and Northern Ireland), which at the time relevant to this investigation was yet to come fully into force, but relevant for policy intent.

8. The Treasury Solicitor's Department provides legal services to other government departments. When departments are involved in litigation, they often use the Treasury Solicitor's Department as the solicitors to conduct that litigation for them.

9. In November 2000 the Cabinet Office issued a *Code of practice on written consultation*. That set down guidelines for written consultations by government departments, which they were directed to follow unless ministers concluded that exceptional circumstances required a departure. The general criteria set out in the code were to be reproduced in consultation documents, with an explanation of any departure, and confirmation that they had otherwise been followed. (That edition of the code continued in force until replaced by a later edition in April 2004.)

## Jurisdiction

10. The Parliamentary Commissioner Act 1967<sup>4</sup> precludes me from investigating complaints about the commencement or conduct of civil or criminal proceedings before any UK court of law. That preclusion includes discussions and agreements leading to the settlement of proceedings, either through a consent order or the withdrawal of the proceedings. Such matters are set out in this report only to put into context the matters which I have investigated.

## Chronology

11. I set out below the sequence of events relevant to the Charity's complaint. This outline is based on my examination of those original files which the Department were able to produce to me, and some papers provided by the Charity.

12. <sup>1999</sup> On 25 October 1999 the Charity asked the Tribunal Service for information about the gist of claims under PIDA made up to that date to employment tribunals in England and Wales. The Tribunal Service said that the only information on unsettled claims that could be supplied was that on the statutory register, which recorded the names of the parties and the type of claim, but not the content of the claim or the addresses of the parties. They told the Charity that to make the claim form (form IT1) available would assist "unregulated consultants" or "ambulance-chasers" (who through the addresses could more easily contact an employer who was being sued). On 26 October 1999 and again on 4 November 1999 the Charity wrote asking the President to review the matter and allow them access to details of the claims; they argued that under the regulations the register ought to include such information, and that the information should usually be publicly available. They also said that under the new Civil Procedure Rules the courts allowed the public access to any claim which had been served. In his replies of 28 October 1999 and 8 November 1999, the President said that the register did not need to record details of the claims; and that, if it did contain details, those would be open to "unregulated consultants" acting for employers. He

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<sup>4</sup> Section 5(3), and paragraph 6 of schedule 3.

urged the Charity not to press the point as it was a sensitive area. The Charity obtained legal advice that the statutory register was required to contain such information about claims as to allow a member of the public inspecting the register to understand the gist of the claims. On 6 December 1999 they asked the Secretary to comply with their request for details of the claims under PIDA, or they would seek a judicial review of the matter. The President again turned down the request.

13. <sup>2000</sup> On 27 January 2000 the Charity's solicitors served papers on the Secretary, care of the Treasury Solicitor's Department, who passed copies of the papers to the Tribunal Service, the Department's Legal Services Directorate B (Legal B), and their Employment Relations Directorate (Employment Relations). On 2 February 2000 the High Court granted the Charity leave to apply for judicial review. Meanwhile, officials in the Department began to consider several issues, including whether the matter was a judicial one (which properly involved the President) or an administrative one (involving the Secretary and the Department); what the policy intention was behind the regulations as they then stood; and what the Department's options might be. One of the Department's lawyers noted that the responsibility for keeping the register was a statutory duty on the Secretary; that the current President was against the existence of the register; and that there was a difference of practice between Scotland (where the register gave names and addresses of the parties) and England (where the register gave only the names).

14. On 10 February 2000 officials from the Tribunal Service, and lawyers from both the Department and the Treasury Solicitor's Department had a conference with counsel about the case. Counsel confirmed that, if the case went ahead, the Charity were likely to gain the declaration they wanted from the court; those present discussed the difficulties of the situation from the Department's point of view, and what the options were. (Counsel advised that the matter was an administrative one, and that the President did not have the power to decide what the register should contain.) A note of a meeting on 15 February 2000 records that the Department's lawyers and administrators expected the Secretary to lose at judicial review; that they thought it might be best to reach a compromise with the Charity first, to avoid a possible adverse court decision; and that one of the lawyers was considering the possibility of amending the regulations. On 15 February 2000 the

Treasury Solicitor's Department asked the Charity's solicitor to agree to postpone the hearing, then fixed for 3 March 2000, partly because the case raised important policy issues which would need to be considered at ministerial level. The parties agreed to put the hearing back to the first available date after 17 April 2000. By 17 February 2000 the hearing had been fixed for 18 April 2000. Evidence had to be lodged by 15 March 2000.

15. On 18 February 2000 the chief executive of the Tribunal Service put a submission to the Parliamentary Under-Secretary of State for Competitiveness (the Minister), setting out advice on the Charity's application, but not seeking any specific decisions. He said that legal advice was that they had little hope of succeeding against the application, but they could try to persuade the Charity to withdraw the application to give the Department time to consider how to make applications available, and what protections needed to be put in place; they would probably have to meet the Charity's costs, and to give them the information they had been seeking and "a date for implementation - autumn". He set out problems that greater disclosure would bring. Making a summary of each application would be "resource intensive and potentially contentious", given 100,000 applications per year. To avoid that, the Tribunal Service would have to make the full applications available. Media reporting in some cases would make conciliation by ACAS harder. Greater disclosure, he continued, would help "ambulance-chasers", which the President would be against, although it appeared that the Department had no particular view on that. There would have to be exceptions, partly because of the right to privacy in the European Convention, and that would involve amending at least the tribunal rules. Making the applications available might lead to one-sided reporting, and ministers would need to consider whether to disclose the employers' responses too. Also, there were practical problems in setting up a central register for information then held in 24 offices throughout Great Britain. On 21 February 2000 the Minister's private office confirmed that he was "fully content" with the proposed way of handling the application, and that he would be happy to be involved in any discussions with the Charity.

16. On 23 February 2000 Legal B recorded that the chief executive of the Tribunal Service had asked them to work on the possible option of amending the regulations so that details of applications did not need to be included on the register. That might be an option to put to the Minister. They had only

about a week to “bottom it out”. In a conference with counsel on 7 March, counsel advised on the problems and options. Officials mentioned that “the President of ACAS”<sup>5</sup> and the Minister wanted to remove altogether the requirement to make details of applications available. Counsel raised a possible problem about data protection law, which Legal B agreed to look into. The Treasury Solicitor’s Department agreed to approach the Charity’s lawyers to seek a further postponement.

17. Meanwhile on 14 February 2000 the chief executive of the Tribunal Service had discussed with officials the issues arising from the Charity’s court application; subsequently officials had discussed the options with the Department’s lawyers, the Treasury Solicitor’s Department, counsel, the Presidents in England and Wales and in Scotland, and ACAS. The President was against greater disclosure, the new Scottish President leant toward greater disclosure, and ACAS considered that disclosure would make conciliation harder in some cases. On 8 March 2000 the Tribunal Service considered whether to approach the Charity to ask them to agree to withdraw the application, on the undertaking that a new scheme providing for disclosure would be introduced (with exceptions). The Tribunal Service noted that the application was likely to succeed, and a more open system might have to be run for a while before any new regulations could be made. It argued that to reverse the position then by regulations might not sit easily with the Government’s position on freedom of information or, arguably, with an open tribunal system. A new scheme, with specific exemptions from disclosure, could be in place by October “with a fair wind”.

18. The chief executive of the Tribunal Service, members of Legal B, the caseholder from the Treasury Solicitor’s Department, and a representative from another department met counsel on 13 March 2000. Counsel advised that any changes to legislation about what should appear on the register needed careful thought not least because of the data protection issue. He considered that the Department should contest the judicial review application; if they lost, the decision might give helpful guidance. Also, if they lost, they might be allowed to appeal, and could in good faith consider doing so. That would give them time to consider their options, including perhaps changing the regulations, without having to change practice

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<sup>5</sup> According to the note of the meeting. (There is no president of ACAS.) Compare the next paragraph.

meanwhile. One of the Department's lawyers said that, if it were possible to implement amending regulations by late June or early July, the Department would need to go out to consultation before 18 April 2000, the judicial review hearing date, and so it would be clear what the Department's intention was. It was agreed that a Government view about the data protection issue ought to be reached by the end of the month. Counsel said that the Department could offer the Charity only a legislative review, with no assurances as to the outcome; and that the Charity might agree to an adjournment, but not to withdraw the proceedings.

19. On 14 March 2000 the chief executive of the Tribunal Service sent the Minister a submission, explaining the state of play with the proceedings and the Department's research on the options available. He said, "the Data Protection point may prevent full disclosure of the IT1 in very many cases. If that proves to be the case, the choice for Ministers may then lie between preparation of summaries by [the Tribunal Service] - unattractive for several reasons - and changes to the regulations that would in effect regularize the current position. It is the latter point that prevents us from offering a "deal" to [the Charity] and has led us to protect the Government's position by presenting a witness statement resisting the application". The chief executive proposed to seek an adjournment from the Charity on the basis that the Tribunal Service agreed to a legislative review, but without making any promises on the outcome. He said that the Department might wish to include the options for handling disclosure of details of applications in the consultation process over the revised regulations. In any event, they would want the revised regulations in place by 2 October that year, when the Human Rights Act would come into force. On 15 March 2000 the Minister's private secretary told the chief executive of the Tribunal Service that the Minister was content for him to approach the Charity to seek an agreement; and reminded him that the Minister had already offered to add weight to the negotiations, if the chief executive thought that helpful. The same day the Department lodged a witness statement by the Secretary, in defence against the judicial review application.

20. On 16 March 2000 Legal B wrote to the Home Office Legal Adviser about the data protection issues. The Home Office replied on 22 March 2000. They thought that there were legitimate grounds for processing the data, although they could not say definitely that the processing could be carried out fairly

and lawfully, and in line with data protection principles. Also, they thought that data protection arguments would not help much in resisting the judicial review application, and that, if the Department wished to resist the disclosure sought by the Charity, they would probably need to consider amending their regulations.

21. Meanwhile, on 20 March 2000, the chief executive of the Tribunal Service had written to the Office of the Data Protection Commissioner about the data protection issues. That Office explained on the telephone on 23 March 2000, and by letter on 24 March 2000, that they did have concerns over the extent of information included in applications; but suggested that if certain bodies had particular interests in cases under specific legislation, one way forward might be to offer to contact the individual applicants to see if they wished their full details to be passed on to that body. In a note of 24 March 2000 jotted on that letter, the chief executive said that the Tribunal Service could write to applicants in PIDA cases asking if they were content to have their applications disclosed; that that might not deal with the general principle, but might satisfy the Charity.

22. On about 22 or 23 March 2000, the Treasury Solicitor asked the Charity to agree to an adjournment. On 24 March 2000 the director of the Charity telephoned the Secretary asking for a “without prejudice” meeting. Papers on Legal B’s file record that the chief executive of the Tribunal Service was advised to mention the general issues that the Department were considering, but not to go into detail. They record also that the Department were considering what agreement they could offer to the Charity to allow the action to be settled; that the Tribunal Service were firmly against any general arrangement which would involve their staff having to extract information from claims (it was all or nothing); that the chief executive would prefer revising the regulations to provide for the existing practice to continue (the “nothing” option); but that he was willing in principle to give the Charity the information they wanted on PIDA claims if the data subjects had given their approval. However, in a letter of 27 March 2000, Legal B told the chief executive that they were concerned that that might make it hard to resist similar applications from others; they advised him against granting the Charity that concession, if he wanted to revise the regulations to confirm existing policy.

23. On 27 March 2000 the Charity's director met the chief executive of the Tribunal Service. The chief executive said that the application had raised difficult issues about sensitive information. If successful, it might deter people from applying and hinder conciliation, and there was a risk of defamation. The Department wished to have time to consider the problems. The director said that the Charity were interested only in PIDA cases, and were only seeking information which they believed the Department were empowered to give them. He argued that granting what they wanted need not commit the Department to giving the same sort of information to others such as "ambulance-chasers". The Charity were not willing to adjourn their application because their original request had been roundly rejected by the President. They agreed to consider one another's position. The chief executive told the director that ministers might want to consider changing the regulations, and might provide either for disclosure or for the same practice which the Tribunal Service then followed. The director said that the Charity considered that, if they should lose, they ought to pursue their point through Parliament.

24. In the days after the meeting, the parties discussed whether the Tribunal Service might give to the Charity, in an anonymised form, the information which they wanted. Counsel advised Legal B that that was possible, although the Department might prefer to take forward the case in order to get some court guidance on the issues, even though they might lose. After further exchanges, Legal B told the chief executive of the Tribunal Service on 31 March 2000 that counsel considered that the agreement which the Tribunal Service proposed was acceptable, but agreed with Legal B that only past applications should be covered because the Department were reviewing the legislation anyway. They said that the terms of the agreement should be confidential. The Tribunal Service should ask the Charity to agree to withdraw their claim, as the court would not then need to know the terms of the withdrawal; whereas if the Charity wanted a consent order, the court would want to consider that and might even want to take a view on it. However, the Tribunal Service should make clear that any final arrangement was subject to legal advice. The chief executive of the Tribunal Service wrote to the Charity along those lines.

25. At the end of March 2000 the President wrote to the Department about wider matters, including planned changes to the 1993 regulations. On

6 April 2000 a senior policy adviser in Employment Relations noted that pressure of other work, and particularly work on the Charity's judicial review case, meant that the lawyers were behind in drafting a new set of rules, not related to this case. They could no longer meet their target of having the new rules in place before the end of June, and he would not expect them to be ready before the end of July at the earliest.

26. On 5 April 2000 the Charity's solicitor told the Treasury Solicitor's Department that the Charity would not agree to an adjournment. Legal B noted that the Charity's lawyers had told counsel for the Department the week before that the Charity meant to raise data protection issues in the hearing, and so it seemed that those issues did need to be addressed; there should be an "ad hoc" meeting of government legal advisers so that all interested government departments had the opportunity first to comment on the issues raised and related points. On 7 April 2000 the Charity's solicitors wrote to the Treasury Solicitor's Department with their terms for the proposed agreement. The Tribunal Service would supply anonymised copies of form IT1 in PIDA cases, and continue to do so at least quarterly; the Charity would be free to make use of the information as they saw fit, and could answer enquiries about the terms of the agreement; the Department would pay the Charity's costs; and on that basis the Charity would withdraw the judicial review application. On 10 April 2000 a senior Departmental lawyer advised the chief executive of the Tribunal Service that he should not agree to make form IT1 available to the Charity, even in an anonymised form, because the process of anonymisation was tantamount to data 'processing'.

27. On 11 April 2000 the chief executive of the Tribunal Service put a submission to the Minister. He explained that they had discussed with the Charity a settlement which would allow them to have the information which they wanted, albeit in anonymised form. However, lawyers had revealed a potential difficulty: "In practice, we plan to appeal, should we lose as expected on 18 April. This, on the assumption the Court grants leave to appeal, should give time to prepare amendments to the regulations." (On 13 April 2000 the Minister's private office confirmed that the Minister had noted the contents of the submission without comment.) Also on 11 April 2000, the Treasury Solicitor's Department telephoned the Charity's solicitors, again seeking an adjournment. They said that the case raised issues of importance across Whitehall, which were to be discussed at a major

meeting; meanwhile, the Department could not agree to a settlement along the lines set out in the letter of 7 April 2000 from the Charity's solicitors, much as the Tribunal Service would have liked to. The solicitors replied the next day saying that the Charity would not agree to an adjournment.

28. On 13 April 2000 representatives from various government departments attended an "ad hoc" meeting of government legal advisers on the subject of data protection. The Department explained their policy reasons for wishing to avoid disclosing form IT1 generally, whether whole or in an edited form. Other departments differed on whether the data protection Directive would allow such information to be disclosed. The meeting explored various legal issues arising, but could not agree on an interpretation of the effect of the Directive on the case; they noted that there were also unsettled policy issues. For two reasons the meeting did not support a settlement with the Charity on the terms proposed. First, it was almost impossible to anonymise securely, because applications could be married with the entries on the register. Second, the Government was arguing elsewhere that anonymisation was processing. They recommended seeking an adjournment, to allow time for the Government to settle its line on the policy and legal issues. If the judicial review was lost, the employment tribunal rules might need to be amended to limit the information on the register, to avoid the risk of claims for damages for breaching someone's rights under the European Convention or the Directive; and the Department could appeal, to allow time for the rules to be amended meanwhile.

29. In the days following, the Department agreed their counsel's skeleton argument and, after further legal advice, they decided not to try further for another adjournment. On 17 April 2000 the chief executive of the Tribunal Service sent a submission to the Minister explaining the outcome of the legal advisers' meeting on 13 April 2000. The Tribunal Service had agreed to fight the application at the hearing on the basis that existing practice met the requirement to put particulars of claims on the register, and that data protection issues would be mentioned only so that they could be raised on appeal.

30. The High Court heard the case on 18 April 2000. The Department's counsel argued that the legislation did not require the register to show more than it then did; and that the Charity's view would lead to results which could

not have been intended. Those included infringing personal privacy and jeopardising conciliation. He said that the wide disclosure for which the Charity argued might breach the Directive, but the Department reserved their position on that. The Charity's counsel argued that the register contained less information than the law required; and that there was greater openness in the courts, which was fundamental to open justice and gave rise to no particular problems such as over personal privacy. The next day the judge gave oral judgment for the Charity. He found that the Secretary had to enter on the register the name of the applicant; the name of the respondent; the date the application was made and received; the relief sought; and a summary of the grounds of the claim sufficient to enable a member of the public to identify the gist of those grounds. Addressing the issue of public interest, the conclusions reached by the judge were: "(1) There are respectable and conflicting arguments as to whether the disclosure of details of claims initiated in employment tribunals is in the public interest. The policy arguments are not so overwhelming in either direction that I should strive to avoid what appears to be the natural interpretation of the 1993 regulations and the 1996 Act. (2)...it is sometimes embarrassing for a party to employment tribunal proceedings to have certain details of his claim made public. On the other hand, claimants in the courts suffer similar embarrassment. That is part of the price which all citizens pay, in order to have the benefit of an open system of justice. (3) It has always been the policy of the law that, so far as possible, litigation should be conducted under the public gaze and under the critical scrutiny of all who wish to report legal proceedings.... (4) The principle of open justice applies to employment tribunals with just as much force as it applies to court proceedings...." He granted the Charity the order they sought, to have access to the PIDA claims; but gave the Department leave to appeal, and ordered with the consent of the parties that the Department need take no action to comply with his order until the conclusion of any appeal.

31. Later that day the Treasury Solicitor's Department reported on the judgment to the chief executive of the Tribunal Service and others in Government. They wrongly included the addresses of the parties in the details which they said the court had found should be put on the register. They said that the position on data protection issues had been reserved, without any comment from the judge; and that, if the Department decided to go down that road, there were 28 days in which to lodge notice of an appeal

from the date the order was sealed, which might mean by 17 May 2000. The Department needed to be able to instruct them by about 10 May 2000 on whether to issue an appeal, and whether that should be partly on data protection grounds.

32. On 20 April 2000 the Charity's director wrote to the chief executive of the Tribunal Service about the judgment. He said that, first, he did not believe that the judge had said the addresses of the parties should be put on the register. As he understood it, that was the information which "unregulated consultants" would want and which the President had been concerned they should not have. Secondly, he thought that the judgment meant that concerns about possible breaches of data protection laws did not now arise. Thirdly, he offered a meeting, because he thought that there might be some small and sensible steps that could help meet the Department's concerns about the interests of the respondent, without adding any significant administrative burden for them. That same day lawyers from Legal B met with other government lawyers and administrators from Employment Relations to consider what to do. The consensus was that there might be risks in any options about the future level of disclosure on the register, as there would be in pressing ahead with an appeal. The best option was to change the regulations, at least in the short term, to legitimise the then practice, and keep open the possibility of an appeal meanwhile; though even that involved further consideration of some points, especially the position with applications lodged before any rule change. An appeal might be the only way to resist having to comply with the court judgment for those applications. It was agreed to put that to ministers and seek a policy decision.

33. Employment Relations set to work on a submission to go to ministers, along the lines decided in the meeting, while Legal B considered the legal questions arising. On 25 April 2000 the director of the Charity wrote to the Minister, repeating the offer of a meeting which he had made to the chief executive of the Tribunal Service (paragraph 32).

34. After advice from Legal B, Employment Relations put a submission to the Minister on 26 April 2000 (but dated 25 April). It asked him to agree that the regulations should be amended urgently to provide for the Tribunal Service to put "minimum information on the register as they do now"; that the

Tribunal Service should explore whether there were any “sweeteners” which could be offered to the Charity to minimise the risk of challenge to the amended legislation; and that the Department should seek further advice on that course of action. The submission set out various options, bearing in mind the acute timetable: (i) It rejected the option of putting summary information on the register. “There are major resource implications in [the Tribunal Service] staff writing summaries for 103,000 cases [yearly], let alone the difficulties of satisfying the parties that the summary is adequate, which effectively rule out this option. Data protection issues also arise.” (ii) It left open the option of revising the IT1 form to ask for summary information as a possible longer-term solution, but said that that would not deal with the problem of existing cases filed on the existing form. (iii) It said that the option of making the full IT1 form public carried legal risks, including damages if found to be in breach of the Directive; that would involve getting further advice “but [other departments] resist this - the reason why the position has not been addressed before now”; and a clear answer on the complex issues involved probably could not be got in the time available. (iv) They did not feel confident of winning an appeal. (v) The option of amending the legislation to legitimise the status quo seemed the least bad option, but it was sensible to seek further advice on that, at least about the effect on applications already lodged. The submission accepted that that option was unattractive on freedom of information grounds, and had presentational disadvantages. “The possibility of prejudicing statutory conciliation [that is, by ACAS] is a reasonable justification and we could strengthen it by committing the Lord Chancellor’s Department’s forthcoming review of tribunals to advise on the issue of disclosure across the board.” The submission discussed whether the normal procedure (including consulting the Council on Tribunals, as they had to do) could be hastened so as to have amended regulations in force by 17 May 2000, but granted that that could attract criticism. If the Minister agreed with the recommendation, he would need to clear the course of action with the Lord Chancellor. For that purpose, the submission included a draft letter which explained the problems besetting the Department in the case; set out what they proposed to do in the short term; suggested that uncertainty over data protection legislation needed to be settled in order to judge the proper level of disclosure of claims in tribunals and the courts generally; and suggested including the issue in the remit of a forthcoming review of tribunals (the Leggatt review).

35. Meanwhile, officials were preparing the ground for amending the 1993 Regulations. On 25 April 2000 Employment Relations and Legal B had discussed how quickly they might be able to clear the regulations with the Council on Tribunals, once the Minister had given the go-ahead. On 26 April 2000 Legal B prepared a first tentative draft of amendments to the 1993 Regulations. There were also further discussions in the Department about the limited details which might appear on the register, and in particular whether practice in England and Wales should be brought into line with that in Scotland, where the parties' addresses were shown on the register. On 27 April 2000 Employment Relations told Legal B that they had agreed with the Tribunal Service that the policy should be to show addresses; it would be hard to justify a continuing difference in practice, or, given policy on openness, giving less information than hitherto in Scotland without some good reason. Addresses had been shown in Scotland for years without apparently prejudicing conciliation. "Ambulance-chasers" seemed to be able to find parties without difficulty, even without having their addresses on the register. There might be a problem over data protection. That day, the Tribunal Service confirmed that such a policy would not cut across anything which they had told the Charity. The same day, one of the Department's special advisers queried whether the Department had to say that it was **they** who wanted to change the law to limit disclosure. Employment Relations replied that there was no prospect of another department intervening to take responsibility. "We are in a difficult position precisely because other Government departments are our opponents on this and have closed off our options."

36. On 28 April 2000 the Secretary of State asked whether the Department could agree a position with the Charity. The director of Employment Relations answered the same day. He said that they could not bargain with the Charity or open up to them until they knew which course they were pursuing and had further legal advice and clearance with colleagues. On 2 May 2000 the Secretary of State's private office told Employment Relations that he was now content with the recommendation in their submission of 25 April 2000 (paragraph 34); and the Minister's private office told them that he was content for the Department to go ahead as proposed, and would write to the Lord Chancellor (as they had suggested).

37. Meanwhile, on 28 April 2000, at Legal B's request, the Treasury Solicitor's Department had asked counsel to draft a notice of appeal. On 2 May 2000 Legal B sought advice from counsel on other matters. They had a conference with him on 3 May 2000. The same day the chief executive of the Tribunal Service wrote to the Charity's director; they were still considering whether to appeal, and so could not discuss the detailed issues and implications of the judgment. He continued: "We do, however, remain sympathetic to the needs of [the Charity] and would be happy to meet with you to talk in general terms about any assistance we may be able to offer". By the end of 3 May, Employment Relations had circulated for comment draft letters to the Council on Tribunals, and to the President and his Scottish counterpart; and Legal B had circulated draft amending regulations for both the 1993 regulations and the corresponding Scottish regulations.

38. The following morning the Treasury Solicitor's Department told Legal B that they had found out that an amendment to the Civil Procedure Rules which had come into force on 2 May 2000 reduced from 28 to 14 days the time for appealing. They said that, since judgment had been given [that is, the court order had been drawn up] on 20 April 2000, the appeal notice should be filed that day; but they understood from the Civil Appeals Office that a number of practitioners had been caught out by the change, and that sympathetic consideration would likely be given to an application for an extension of time. They wished to be able to file the appeal notice the next day. The same day Employment Relations put a submission to the Minister to bring him up to date. They reported the mistake over the appeal period. They explained that they had no option but to appeal the case, to avoid having to comply with the judgment, as they could not amend the regulations by the next day. They said: "The appeal is being drafted on the merits of the judgement, without attempting to raise the new issue of compliance with data protection legislation (though this could probably be raised at a later stage). Across-Whitehall agreement would be needed to bring data protection into the appeal which is impossible in the time available, and difficult on any timescale. ... Although the 18 May deadline is now superseded, we are now on track for implementation of the new legislation by then, subject to confirmation that this course of action is not vulnerable to challenge. The appeal could then be withdrawn, provided that all has gone according to plan." The next day the Treasury Solicitor's Department lodged notice of appeal, including an application to extend the time in which to do so.

39. On 8 May 2000 Legal B noted that the Department could no longer justify trying to hasten the revised regulations to have them in place by 18 May 2000, and proposed a meeting to review how to handle the matter. Legal B met with senior officials from Employee Relations and the Tribunal Service on 10 May 2000. One of the lawyers mentioned a concern that they had a judgment which they did not seriously contest, and that appealing might be seen as a device. Another lawyer said that there was no propriety question as things stood, as they needed further legal advice before deciding whether to withdraw an appeal. If it was not favourable, then they would want to maintain an appeal for the purposes of past cases. They discussed how to handle contact with the Council on Tribunals and the Charity. After the meeting, discussions and consultation continued on the various matters in hand. On 11 May 2000 the Tribunal Service noted possible points for the chief executive to make to the Charity on the telephone when discussing setting up a meeting. Those included telling the Charity that they had had to appeal because the case raised complex issues with wider implications; telling them that the Minister had asked to be involved in the meeting; and offering to pay their reasonable costs in the appeal. The same day Legal B commented saying that it was very important that the chief executive should not reveal any legal advice. On 12 May 2000 the Tribunal Service gave the President a copy of a letter which Employment Relations were sending him to explain what the Department had decided to do (subject to further legal advice). On 15 May 2000 the Department received a copy of the draft of the full judgment of 19 April 2000.

40. On 16 May 2000 Legal B recorded that “The read-across to the current and future proposed practice of the civil courts and wider freedom of information policy is awkward and [the Department’s proposed] course of action may be subject to criticism”; a commitment to a longer-term review of the issue might divert some public criticism. They posed the question as to what effect the proposed course would have on past claims and the court order; if there were unacceptable problems in the Department’s preferred course, the next best option would probably be to proceed with the appeal and raise data protection issues. Legal B circulated for comment revised versions of the two sets of draft amending regulations.

41. The same day the chief executive of the Tribunal Service discussed matters with the Charity's director on the telephone. He suggested that the two sides should meet (with the Minister included), and offered to pay their reasonable costs in the appeal. The next day Employment Relations wrote to the Council on Tribunals, with the revised drafts. They explained their policy concerns about including more about claims on the register. "Up to 75% of cases . . . are settled or otherwise withdrawn before they are heard either through the intervention of an ACAS conciliation officer, exercising the statutory conciliation function, or privately. ACAS has expressed concern, which we share, that public disclosure of the applicant's claim form will prejudice conciliation because respondents may feel that they have to take the case to a hearing to defend their name. It also seems unfair that details of only the applicant's claim should be published, and yet disclosing the respondent's case as well could merely lead to a public exchange of tit-for-tat, which is hardly likely to promote settlement either." They explained their proposed course, and mentioned the proposal for a longer-term review of the issue. They asked for an early reply. On 18 May 2000 the Charity wrote to the Tribunal Service to thank them for the offer to pay their costs.

42. The next day the Treasury Solicitor's Department lodged in court the Department's skeleton argument for the appeal. (That reserved the position on data protection, saying that a supplementary skeleton would be served if the respondent wanted to advance arguments on those grounds.) Meanwhile, further discussion and correspondence continued on some of the details of the draft amending regulations, and on 22 May 2000 Employment Relations ordered printed copies; proofs were ready within two days. On 25 May 2000 Employment Relations sent ministers a submission, which commented again on the confusion over the appeal deadline and set out the up-to-date position in the case. It said that, although the original deadline no longer applied, and the timescale was by then less acute, there was still good reason for urgency. It explained that there were a number of problems still to be resolved, "notably whether the proposed changes to the regulations will apply in respect of existing cases within the system as well as new cases being filed". If all went well, they would expect to make the revised regulations before the end of June 2000.

43. On 31 May 2000 the Council on Tribunals replied. They had no comments on the draft amending regulations, but had concerns about amending the regulations to reverse the effect of the court ruling. They agreed that the issue of disclosure needed to be examined carefully in a longer timescale than was available then. They generally favoured more rather than less openness, although they granted that there were issues which needed “full consideration and wide consultation”. To deal with the problem of “ambulance-chasers”, they suggested that a way forward might be to make the claim form available for public inspection in cases identified from the register and on payment of a fee.

44. While work continued on some of the details of the amending regulations, including discussions with counsel, on 13 June 2000 the Department received the approved transcript of the judgment of 19 April 2000 (paragraph 30). Legal B continued to have concerns that someone might legally challenge the Tribunal Service over failing to fulfil their duties as to the register before the amending regulations came into effect. On 16 June 2000 Employment Relations agreed that the point needed investigation; but they did not readily see a real risk, partly because it seemed that “ambulance-chasers” could already find applicants from the information which then went onto the register, and their main interest would be in new cases anyhow. On 22 June 2000 Legal B asked Employment Relations to have revised proofs of the amending regulations printed, taking in various changes.

45. Meanwhile, on 19 June 2000, the Treasury Solicitor’s Department had told Legal B that the Charity’s solicitors proposed to apply for the hearing to be hastened, and had asked whether the Department would consent to that. The next day Employment Relations and the Tribunal Service commented that, so long as a hearing was not brought forward, the Department should be able to amend the regulations and abandon the appeal before reaching a hearing, and hence without the costs of a hearing. That day the director of the Charity telephoned the Tribunal Service to ask when they were going to meet the Minister. On 21 June 2000 the Tribunal Service spoke to Legal B about that; they wanted the meeting when it had finally been decided to amend the regulations, so that the Minister could tell them that, as well as saying what they could do for the Charity by way of an introductory letter telling applicants about the Charity. By 22 June 2000 a meeting had been arranged for the morning of 25 July 2000. On 27 June 2000 the Treasury Solicitor’s

Department told Legal B that the hearing had been set down for 23 or 24 November 2000.

46. By then the revised proofs were ready. After some further checking and consultation about the final form of the amending regulations, on 3 July 2000 Legal B asked for further revised proofs, which were ready by 10 July 2000. Meanwhile, in a memorandum of 6 July 2000 about the Leggatt review (paragraph 34), Employment Relations had said that the Lord Chancellor had replied to the Minister, refusing to include in the review the issue around the disclosure of information on tribunal cases. On 14 July 2000 Employment Relations confirmed to Legal B that they should draft a memorandum to accompany the signed regulations. On 19 July 2000 Employment Relations suggested that the memorandum should perhaps say why they were making the change; “ie that we believe the amendments are necessary since greater disclosure is likely to prejudice settlements, and this is not in the interests of the parties nor of the tribunals”. The final version on 21 July 2000 read: “The Government does not consider that publishing originating applications, or more detailed particulars of originating applications, is appropriate because this would risk prejudicing voluntary settlements of employment disputes”.

47. On 21 July 2000 Employment Relations and the Tribunal Service sent submissions to the Minister. The one from Employment Relations asked the Minister to sign the two amending instruments (one for England and Wales and the other for Scotland); to agree that the appeal be withdrawn; and to note certain issues for the meeting fixed with the Charity. It said that there were benefits, rather than costs, to business arising from the changes. Full disclosure of the claim forms would hinder settling disputes if employers felt obliged to take cases to a hearing to clear their names of whatever allegations had been made. “More generally, there could be damage to the wider employment relations and to the reputations of individual companies. [An employers’ organisation] are firmly opposed to greater disclosure.” It recommended that the issue of disclosure should be included in the Department’s review of employment tribunal procedures. “Although a better option would be the independent Leggatt review, the Lord Chancellor has already rejected a proposal that public disclosure be included in Leggatt’s remit (though we may want to return to the charge if the announcement receives much public criticism).” The submission noted that the President did not favour disclosing addresses in England and Wales. “However, given that

the Scots have done so for many years, it would be difficult to argue publicly that this would be damaging and I recommend that addresses should be included on the register in the interests of greater openness.” It recommended that the appeal should be withdrawn. “The appeal has a fairly low chance of success and additional costs would be incurred by prolonging it. If the appeal was to continue we would need to resolve the sensitive data protection issues, which is something other Departments would resist.”

48. The Tribunal Service’s submission recommended lines to be adopted in the meeting with the Charity, saying that the aim of the meeting was “to head [the Charity] off from public criticism of the new legislation, or any other damage”. It suggested using the meeting to mollify the Charity, partly by stressing the good points from their point of view. They had won the right to see past forms IT1 (or summaries), and addresses of both parties would now be shown in the register. It suggested exploring ways of co-operating to help them find the information they would want on future PIDA cases without providing precedents which others could exploit; and pointing out the review of employment tribunals which the Secretary of State had now announced, and saying that the Department proposed to issue a consultation paper in the autumn “and will undertake to consider the question of disclosure publicly there”. In a note on the background, the submission recorded that the Charity had played an important role in researching and discussing with the Department’s officials what was to become PIDA; that they believed that to monitor the effectiveness of PIDA they needed access to the applications made by individuals under PIDA; and that the employment tribunals had up to then had 153 claims under PIDA.

49. On 24 July 2000 the Minister signed the two instruments. The same day the Charity’s director telephoned the Tribunal Service to clarify the purpose of the meeting the next morning. The Tribunal Service’s note of the call records that they told him that it had arisen out his letter of 25 April 2000 (paragraph 33); and that the Minister wanted the opportunity to express his sympathy with the Charity’s wish to monitor the effectiveness of PIDA and explain why the Department had needed to appeal. The director said that the Charity were interested only in the claims under PIDA, and had a concern which they wished to raise, in that it seemed that not all PIDA claims were properly recorded as such. The note records that the director was clearly unaware of the Department’s plans to revise “the rules of procedure”, and

wished to use the meeting to identify a practical way of meeting the Department's policy aims.

50. The next morning (25 July 2000) the Minister, accompanied by the new chief executive and other senior officials from the Tribunal Service, Employment Relations, and Legal B, met the chairman and the director of the Charity. According to the Charity the Department asked them for an undertaking not to disclose the proposals to be discussed at the meeting until the Minister had made any formal public announcement. The Minister said that the Department were considering dropping their appeal and making temporary regulations to reverse the effect of the decision of the High Court. The Charity asked to see a draft of the regulations, with a list of consultees. The Department said that the regulations would be "holding regulations" pending consultation on the issue in the autumn. They would supply the Charity with copies of pre-existing PIDA claims. Under the holding regulations, the only extra information about claims on the register would be the addresses of the parties; that would help the Charity contact the parties about their claims. On 27 July 2000 Employment Relations drafted a letter for the Minister to send to the Charity. But the same day the Charity wrote to the Minister referring to what had been discussed, and arguing that an alternative solution would be for the proposed holding regulations to treat PIDA claims differently from other employment claims, and provide for greater disclosure of PIDA claims only; that would meet the needs of the Charity, without causing any great problem to the Department or the employers' organisation (paragraph 47). They added: "In the light of your request that these discussions remain confidential pending your announcement, we would be grateful if you could give us some forewarning of your eventual decision. In any event we look forward to seeing a draft of any proposed enactment along with a list of consultees."

51. On 31 July 2000 the Tribunal Service asked Legal B for thoughts on "an appropriate way" to refuse the Charity's request, so that they could adapt the draft letter which Employment Relations had prepared. Legal B replied between 31 July and 2 August 2000 saying that the addresses on the register would give the Charity a possible way of getting the information they wanted. They suggested that the policy reasons for refusing access to other claims would apply as much to PIDA claims. The Department had been through the statutory consultation with the Council on Tribunals, but had not otherwise

been out to consultation, and to be consistent with that approach they should not show the draft to the Charity. They assumed that the Minister would write after having decided to make (sign) the revised regulations as drafted with no further negotiations with the Charity; and suggested that the Minister should tell the Charity that he had decided to make the regulations, and perhaps send them a copy of the signed regulations. Employment Relations told the Tribunal Service that they agreed with Legal B on the issue. Legal B also commented that once it had been decided to make the regulations, there was some urgency in doing so in that it was improper for the Department to maintain the appeal for the sake of avoiding compliance with the judgment.

52. On 3 August 2000 Legal B reported to Employment Relations and the Tribunal Service that they had just received, to their surprise, copies of the regulations showing that they had been made on 24 July 2000 and laid before Parliament on 26 July 2000, and would come into force on 17 August 2000. Employment Relations told them that they were asking the relevant sections what had happened, but remarked that the orders might have been laid more quickly than usual because of "a last minute scare that the House would rise early". On 4 August, in an e-mail headed "PCAW cock-up", the director of that part of Employment Relations responsible for employment tribunals told the Minister's private office and the Department's newsroom that she had not been able to speak to the Charity's director, but was concerned about possible bad press about the matter. She suggested that, if approached, the Department's line should be that they were in sympathy with the Charity's aims, but needed longer to consider how to reconcile the public's right to information with the individual's right to privacy; and that they considered that any solution should cover all cases - there was no compelling reason to make a special case for PIDA cases. Discussions with the Charity had been carried out in good faith, and no substantive undertaking had been breached. She would telephone the Charity's director on Monday 7 August 2000, and say that she hoped that there had been no misunderstanding. She would explain apologetically that the Minister had signed, but not tabled, the orders before the meeting; he had considered the Charity's arguments and not been persuaded by them; there had been a great rush on at the time because of the enormous amount of Parliamentary business to be got through and the timetable had demanded that the instruments should be tabled immediately; and therefore they had not been able to give them a preview as the Minister had hoped.

53. On 7 August 2000 a firm of “ambulance-chasers” told the Charity how pleased they were that addresses were to be on the Register. The Charity then discovered that the regulations had been made on 24 July 2000 (the day before their meeting with the Minister) and laid before Parliament on 26 July 2000 (just before it went into recess); and that they were due to come into force in the middle of August. When the director of the Charity spoke on the telephone that day to the Employment Relations director responsible for employment tribunals, he complained forcefully about what he saw as a breach of faith. She recorded that the Charity’s director had been very angry and the conversation a very difficult one. However, she said, those unhappy with the amended regulations would have to engage in the Department’s forthcoming review of the employment tribunals.

54. The next day she sent the Minister a submission with a revised draft letter for him to send the Charity; she asked him to agree that the appeal should be withdrawn. (On 9 August 2000 Legal B protested to Employment Relations that the legally significant act was making the regulations, not laying them before Parliament, and that their submission was misleading in suggesting that the legally significant act happened after the meeting. It was important that ministers should not be under any misapprehension as to the true position.) The Minister agreed the recommendations (with only a small amendment to the draft letter), and sent the letter on 11 August 2000. I set out the text of that letter at Annex B. The same day the Charity’s director wrote to the Minister, noting the apology which he had had on the telephone. He sent a copy of a piece which he had given to a newspaper journalist, whose article had appeared that day, highly critical of the Department for the revised regulations reversing the effect of the High Court judgment.

55. On 18 August 2000 the Tribunal Service wrote to the Charity with copies of 245 applications under PIDA which they said had been received to date. About the same date Legal B asked the Treasury Solicitor’s Department to withdraw the appeal. On 23 August 2000 the Minister wrote to the Charity, repeating that the issue of public disclosure would be considered further in the context of the review on tribunals which they expected to get under way in the autumn. He added, “Officials in my Department will be in touch nearer the time”. On 11 September 2000 the director of the Charity replied to the Minister, accepting his apology for failing to let them see the regulations in

draft, and thanking the Department for providing them with the copy applications. He said that the grounds the Minister had set out in the letter of 11 August 2000 for making the revised regulations left the Charity with a significantly different impression of the Government's position from the one they had had after the meeting. He sought assurances that the review would address afresh and on its merits the issue of public access to PIDA claims, and without treating the new amendments as more than a holding position; and that any consultative material would "give proper weight to the public policy reasoning of the High Court". He explained why the Charity believed the Department's reasons to be flawed. He said that it was wrong to say that the new rules provided for "more reliable information on the jurisdictions of claims", and that they "prevent the publication of what may well be unsubstantiated allegations by one party against another". He said that the only evidence supporting ACAS's view that disclosure of particulars would prejudice settlements was the substantial experience of the High Court, where such information was available to the public; to the best of the Charity's knowledge, it had never been asserted, let alone proven, that such disclosure might prejudice settlements. The only people who wanted the addresses of the parties were "ambulance-chasers". Had there been proper consultation the Minister would have been aware of those points. On 18 September 2000 the High Court dismissed the appeal (by dismissing the application for an extension of time to appeal).

56. On 25 September 2000 the Minister replied to the Charity. He believed that the Department had taken the best course of action and that there were compelling arguments for their approach. As the Charity knew, he had agreed that the matter would be looked at in greater detail on a longer timescale; and that there would be consultation on that, on which the Department would be in touch with the Charity "in due course". He explained that the Tribunal Service had improved their coding of cases, so that organisations like the Charity could identify claims which interested them. On 28 September 2000 the Charity pressed the Minister for the assurances which they had sought. On 2 October 2000 Employment Relations noted that the Charity were not happy, but said "Despite our lost ground with [the Charity] it's time to bring this corresp[ondence] to an end . . .". Meanwhile, as the Charity considered that the Department had given them no assurances that the consultation would be fair, reasonable and informed, they had made arrangements with several Members to "pray against" the regulations on the

return of the Commons (to try to secure a debate on the matter). The Minister wrote again to the Charity on 10 October 2000, and confirmed that the Department would carry out the consultation in a fair, reasonable and informed manner. As a result the Charity did not ask Members to pray against the regulations.

57. On 29 November 2000 the Charity's director wrote to the Minister, saying that he had seen the Secretary of State's press release [of 27 November 2000] announcing new proposals for employment tribunals. He asked the Department to put them on the mailing list for the proposals, in case they did not appear there.

58. <sup>2001</sup> The Charity sent the Minister a reminder on 3 January 2001. On 19 January 2001 the chairman of the Charity wrote to the Minister, pointing to the third paragraph in his letter of 11 August 2000 (see Annex B). He said that they had had no answer to their last two letters. He asked what the position was on public consultation on the issue of public disclosure, and whether the Minister's assurances would still be honoured, because the proposals lately announced were hard to reconcile with those assurances. The Minister replied on 31 January 2001, apologising that the Charity's letters had seemed to go unanswered. He understood that officials had sent the Charity a copy of the press notice on the employment tribunal proposals, in response to their letter of 29 November 2000; but that the Department had no record of their letter of 3 January 2001. He explained that the Department had meant to consult publicly on those proposals in the foregoing autumn; but that as a broad consensus had emerged early among "the key representative organisations" [on the matters primarily in question], they had decided to take forward the proposed measures quickly without formal consultation. That review of tribunal procedures had not, therefore, provided "an opportunity to consult on public disclosure as we had originally envisaged". "I can reassure you that I remain firm on my earlier commitment to consult on this issue, and the matter will be taken forward in due course."

59. On 9 February 2001 the Charity's chairman complained to the Minister. He said that the Department had failed to show them the revised regulations before making them. The Minister had assured them that those regulations were holding ones, and that they would be reviewed soon in a public consultation; but the consultation which had happened had neither included

the Charity nor dealt with public access to claims. The Charity had acted on the Department's assurances by keeping the issue confidential, but had been misled. He made a request for information under the Code of Practice on Access to Government Information (which is not the subject of this report).

60. In a submission of 6 March 2001 to the Permanent Secretary and the Minister on the information request, Employment Relations said that after the High Court judgment the Department had decided that the best course was to revise the regulations to legitimise then current practice. It said, "[An employers' organisation] in particular were concerned that publishing full details of claims would be damaging to business, and the Department agreed with their analysis". The Department had accepted the need for a more careful examination in a longer timescale, although there was no wider demand for disclosure, and a public consultation on disclosure alone would not be proportionate to the importance of the issue; the forthcoming review of employment tribunals should provide an opportunity to consult on disclosure.

61. Employment Relations put up another submission on 22 March 2001, with a draft letter, and on 27 March 2001 the Minister replied to the Charity's chairman. He refused access to the documents the Charity wished to see, but set out some of the background. For instance, on the issue of whether the Department had considered treating PIDA claims differently from other tribunal claims (paragraph 50), he explained that the President and the Department had throughout believed access could not be given to one body only, without extending it to the wider public. He stressed that the Department still intended "to give the disclosure issue further consideration through public consultation when a suitable opportunity arises". The Charity's answer of 5 April 2001, dealing mainly with Code issues, explained in detail why the Charity felt misled. During further work on the Code issues, Employment Relations sent the Permanent Secretary and the Minister a submission dated 11 May 2001. That again was mainly about Code matters, but said that the Department had not deliberately misled the Charity; there had been a genuine misunderstanding at the meeting of 25 July 2000 (paragraph 50). The Government had then intended in the autumn of that year to consult publicly on the proposed changes to the tribunal regulations; it had been only later that they had changed their mind, for reasons which they had explained to the Charity. On 12 June 2001 Legal B told Employment

Relations that they had not found anything on their files to suggest that data protection issues had been identified specifically when considering whether to treat PIDA claims differently from other claims. On 15 June 2001 Legal B told Employment Relations that they had considered how they had handled the consultation with the Council on Tribunals on the amending regulations; they had concluded that there was no evidence that the Department had misled the Council or that the process had been flawed. In further correspondence about the Charity's request for information, another Minister in the Department sent a full reply on 3 July 2001. He repeated that the Department had not deliberately misled the Charity at the meeting with the Minister or over the consultation that autumn.

62. Meanwhile, on 22 June 2001 the Department had announced a major new consultation on proposals to promote the settling of employment disputes; and [on 20 July 2001] they published the consultation paper, *Routes to Resolution*. The consultation paper did not mention the Cabinet Office's *Code of practice on written consultation* (paragraph 9); although a separate sheet on the Department's website, apparently published at the same time, set out the consultation criteria laid down by that code. After outlining the various other proposals and issues, the consultation paper turned to the issue of registering cases publicly at sections 5.22 to 5.25, which I set out in Annex C. The only other mentions of the issue were brief ones on pages 35 and 37. Although section 5.25 stated that the impact of the proposals was considered in the appended impact assessment, that assessment did not consider the issue separately, nor even mention it. Also, *Dispute Resolution in Britain - A background paper*, which the Department published as part of the consultation, did not deal specifically, if at all, with the register issue. The Charity responded to the consultation on 18 September 2001. After replying to the wider proposals, they summarised their case for publishing details of claims and responses on the register, especially for cases under PIDA. They said that doing so in those cases would recognise and reflect the distinct public interest aspect of claims under PIDA; and would reduce the risk that an overriding public interest could be bought off in settling a claim privately (as might have happened, they said, in "the claims against Maxwell's misuse of pension funds, the sexual abuse of children in care in North Wales, or the safety risks on Piper Alpha").

63. On 8 November 2001 (one month after the consultation had ended) the Department published the Government response. They had decided on far-reaching reforms of employment disputes. But, at sections 79 to 80, they said that they would not take forward the proposal to place on the register the particulars of the complaint and the response, because the vast majority of respondents were against making more information available on the register.

64. On 7 December 2001 the Charity's director began discussing with the Department how the statutory grievance procedure under the new Employment Bill arising from the consultation might affect the working of PIDA; and whether the Bill might need some amendment on that point. On 11 December the Charity's caseworker read all the public responses to the consultation, and later prepared an analysis of them. His analysis reported that, of the 197 responses to the consultation, 17 (8.6%) were not publicly available; while, among the rest, 102 (51.8%) had commented on the public register, and 78 (39.6%) had not. 64 respondents could be seen to have commented on whether applications should only be registered once the claim had been through conciliation; 54 for, and 10 against. 6 respondents could be seen to have wanted the public register abolished. 84 respondents could be seen to have commented on whether more details of complaints and of responses should be added to the public register; 17 for, and 67 against. The analysis reported that those against that proposal gave various reasons; 22 were concerned about sensitive or personal details, and some of them that such publication might discourage claims; 17 were concerned that publication might lead to blacklisting of applicants; 15 that it might lead to negative publicity; 9 that it might help "ambulance-chasers"; and 8 that it might hinder the settlement of cases.

65. <sup>2002</sup> During the first half of 2002, the Charity's dealings with the Department focused on the Employment Bill, and they and their allies secured an amendment in June 2002. The Charity have said that during that time they spent six person days at the Register of Tribunals in Bury St Edmunds trying to find information about PIDA claims, and at least as much time trying to analyse the information on claims. At the end of June 2002 the Charity decided that their new chairman should seek a meeting with the Minister. They wished to press him to help them get information on PIDA claims and avoid the costs and problems they were facing, in their view because of the

Department's mishandling of the issue. Failing that, they would ask the Member to put their complaint to me. The chairman wrote to the Minister on 22 July 2002. He pressed the case for the Government to do more to promote PIDA, and asked for a meeting to discuss that, how PIDA was working as a piece of employment law, and the problems the Charity were having getting and analysing information on PIDA claims.

66. On 29 July 2002 the Government published the final report of the Employment Tribunal System Taskforce, whose role had been to consider the operational aspects of the work of the Employment Tribunal system as a whole. Although they had not consulted explicitly on the issue of the register, the taskforce recommended that the register of claims should be abolished because it was open to abuse by "ambulance-chasers" and others. Meanwhile, officials had begun to consider the Charity's request, although there are few papers about that on the files seen by my staff. On 30 August 2002 Employment Relations sent a submission to the Minister with a draft letter to the Charity. The submission set out the Department's view on championing whistleblowing procedures. It gave briefly some of the background about the tribunals register, and said that after the *Routes to Resolution* consultation the Government had decided not to publish details of complaints on the register. That was because the vast majority of respondents had been against doing so, although a trade union organisation and the Charity had seen a public interest in disclosure under PIDA, to reduce the risk of an overriding public interest being bought off in settling a claim. The submission warned that the Department would have difficulty satisfying the Charity about championing PIDA, and that the issue about the register would be best avoided altogether. On 6 September 2002 the Minister replied to the Charity and agreed to a meeting. He said they had consulted on the register issue, and that the vast majority of responses had been against publishing details of the complaint; he had asked his officials who were embarking on a revision of employment tribunal procedures to arrange a meeting with the Charity to discuss their concerns. The meeting with officials about the register took place on 1 October 2002. Two days later, the Charity wrote to Employment Relations summarising their position on that aspect. On 14 October 2002 the Minister met the Charity and said that, though he understood their concerns, he was not able to revisit the issue.

## The Department's reply to the complaint

67. In his comments to me, the then Permanent Secretary said: "The Department accepts that the chronological account of events set out in the complaint is essentially correct.

68. "[The Charity] were sent, and accepted, a Ministerial apology regarding the circumstances which led to regulations being made the day before [the Charity] attended the meeting with the Minister for Competitiveness on 25 July 2000. There was no intention to mislead [the Charity].

69. "The Department accepts that, following that meeting, [the Charity] were informed that the issue of public disclosure would be included in the forthcoming review of employment tribunal procedures on which it was expected that there would be a public consultation in Autumn 2000. [The Charity] were informed that officials would liaise with them as the review progressed. Public disclosure did not fall within the remit for the review but the review potentially offered a useful opportunity to meet the undertaking given to [the Charity]. In the event, due to other policy developments, no public consultation took place in connection with the review. The Department acknowledges that [the Charity] could reasonably have expected that there would be public consultation on this issue in Autumn 2000, although there was no absolute commitment to do this. No assurance had been given by the Department that the review would definitely be conducted in this way or at that time. In January 2001 the Department did commit itself to public consultation on the issue and it was included in a relevant public consultation at the earliest possible opportunity; that is the consultation on *Routes to Resolution* in July 2001.

70. "[The Charity] contend that [the Department] mishandled the consultation on the publication of details of complaints and responses set out in *Routes to Resolution*. They have stated that they were unable to reconcile the consultation with Ministerial assurances that consultation would be fair, reasonable and informed. The Department does not accept that contention. We believe that *Routes to Resolution* covers this issue correctly. Albeit briefly, the consultation paper discussed numerous issues and sought to do so without undue detail to ensure that they were readily accessible to readers. The vast majority of respondents were opposed to making more information

available on the register, and the Government decided not to take such a step [he referred here to the Government response (paragraph 63)].

71. “[The Charity] believe that the Department wrongly claimed support from respondents who misunderstood or were unaffected by the proposal. The Department does not agree. *Routes to Resolution* was aimed mainly at experienced employment relations and human resources practitioners, and the responses received (which are publicly available) gave no indication that its contents had been misunderstood. To the extent that [the Charity] are suggesting that the views of respondents who are not themselves directly affected by a particular proposal are irrelevant, the Department would not accept that suggestion.

72. “[The Department] do not agree that it was unreasonable to deny [the Charity] the opportunity to influence the revised regulations. The August 2000 revision was brought in quickly in order to prevent the Tribunal Service being in breach of the judgment and to bring the regulations into line with Ministerial policy intentions. The Minister has already acknowledged and apologised for the mishandling of the making of the regulations. Whilst there was no public consultation prior to the making of those regulations, the reasons for this were subsequently fully explained to [the Charity]. Their views on these issues were well-documented and well known to the Department [he referred here to the Department’s letters of 27 March 2001 and 3 July 2001 (paragraph 61)]. [The Charity] were not treated differently from other users of employment tribunals. Formal consultation took place only with the Council on Tribunals.

73. “The requirement for the applicant’s address to be put on the Register in England and Wales, introduced by the amendments made to the employment tribunal rules of procedure in August 2002, should enable [the Charity] to contact people bringing claims under PIDA, thus assisting them in their research. It also ensured consistency with the practice in Scotland. Following the amendments introduced in August, the Register can now be searched by jurisdiction code, the date that the application was registered or by the names of the parties, whether respondent or applicant.

74. “[The Tribunal Service] has ensured that its administrative staff are fully aware and understand the importance of the requirement that all cases

registered under PIDA are recorded accurately as such. As a result of one of the recommendations made in the *Routes to Resolution* consultation (and more recently by the Employment Tribunal System Taskforce), [the Tribunal Service] are in the process of revising the application to a tribunal (ET1) which will mean that more information concerning the circumstances of the claim is available earlier in the proceedings.

75. “While [the Department] is keen to accommodate the needs of organisations such as [the Charity] wherever possible, they are not the only voice on this issue. The question of disclosure is important to many different users of the system - to those bringing and responding to claims, to those who advise both sides, who decide and conciliate cases, and to organisations such as [the Charity] with an interest in individual rights. Hence the Department felt the need for public consultation in order to be able to gauge the strength and validity of the case on all sides. There are strong views both for and against disclosure of information.”

## Findings

76. Things did not start well. The President so roundly rejected the Charity’s request for particulars of tribunal applications under PIDA (paragraph 12), so the Charity later said, that they were unwilling to adjourn the court case (paragraph 23). Yet it turned out that the issue about particulars was an administrative matter for the Secretary, and not a legal matter for the President (paragraphs 13 and 14). I asked the Permanent Secretary what steps had been taken to make clear in guidelines what the division of responsibility was between the Tribunal Service and the judicial authorities in such matters. In reply, the present Permanent Secretary said that no specific steps had been necessary, as the legal advice obtained in 2000 had highlighted the importance of that issue, and departmental officials responsible for Employment Tribunal policy work were now finally aware of it, as were Tribunal Service staff. The Employment Tribunal rules had been revised in 2004, in part to put them into more readily comprehensible, “plain English” terms and the Permanent Secretary considered that there was no longer any significant risk of confusion arising over the issue in future.

77. A main strand of the Charity's complaint is that the Department misled them (paragraph 1). That largely concerns events surrounding the meeting on 25 July 2000 (paragraph 50). They had originally suggested a meeting as a way forward after the 19 April 2000 judgment, because they thought that ways, consistent with the judgment, could be found of meeting the Department's worries (paragraph 32). In later contacts, the Department refused to go into details on the legal issues, but suggested that they might be able somehow to explain why they had needed to appeal and to discuss ways of helping the Charity (paragraphs 37, 39, 41, 45, and 49). At an earlier meeting, on 27 March 2000, the chief executive of the Tribunal Service had told the Charity's director that ministers might consider changing the regulations (paragraph 23). But I have seen no evidence that between the April judgment and the July meeting the Department even mentioned to the Charity that they might change the regulations. It is not therefore surprising that, the day before the July meeting, the Charity were unaware of the Department's plans (paragraph 49). It is also clear that even after the meeting they thought that the Department had not yet fully decided to change the regulations, still less consulted on detailed proposals (paragraph 51). There can be no doubt that the Charity understood the Department to be discussing with them what they could or should do, not what they had already done. As I see it, the Charity assumed that they would be discussing how the parties might reach a solution which would go some way toward meeting their needs as well as those of the Department (paragraphs 32, 45 and 49), hence the compromise they suggested on 27 July 2000 (paragraph 50). It was not until 7 August 2000 that they discovered that on the day before their meeting the Minister had signed the regulations reversing the effect of the court judgment and that they had been laid the day after (paragraphs 49 and 52). I am critical of the Department not only for the way in which they misled the Charity, however inadvertent that might have been (paragraph 68 and Annex B), but also for not putting the Charity properly in the picture as soon as they realised what had happened.

78. At the time, the reaction of officials was that it was a timing problem. If only the regulations had been signed after the meeting, rather than before, matters would have been all right (paragraph 52). Since then, the Department's line has been (Annex B and paragraph 61) that there had been a misunderstanding for which the Minister had apologised; and that the Charity

had accepted the apology. As far as they were concerned, that was the end of the matter. But is that a fair assessment?

79. Before the court judgment of 19 April 2000, officials had expressed the view that the Department would probably lose the case (paragraphs 14, 15, 17 and 27). They were already minded to change the regulations to reverse the effect of any adverse decision (paragraphs 14, 16, 18, 19, and 22). By mid-April 2000 that was the Department's clear intention, and the Minister had noted that without comment (paragraph 27). The view from the "ad hoc" legal advisers' meeting on 13 April 2000 would only have confirmed them in that aim (paragraph 28). Moreover, they had noted that the Minister was against showing any details of claims on the register (paragraph 16). I am satisfied that they knew that the Minister would be likely to agree to such a change to the regulations.

80. After the judgment, the Department moved quickly to prepare amending regulations to reverse its effect as the best option in the circumstances (paragraphs 32 to 35). They were still uncertain about some of the implications. However, they were confident that changing the regulations would resolve their problems over future applications, even if they were unsure about the position of past applications (paragraphs 32, 39, 42 and 43). They started work to achieve that before an appeal would have to be lodged (paragraph 38). When that approach foundered, they still expected at first to have the new regulations in place within the same sort of timescale to which they had been working (paragraph 38), but amending the regulations as proposed proved to be a surprisingly hard task (paragraphs 35, 40, 42, 44, and 46). However, they still aimed to have the new regulations in place as soon as they reasonably could (paragraph 42). When the Department agreed the date for the Charity's meeting with the Minister and other officials (paragraph 45), they set a date before the approaching summer recess, but allowed time to tie up some loose ends first (paragraph 46). There is evidence that the Department's officials saw the making of the revised regulations as going hand in hand with the meeting with the Charity (paragraphs 45 and 47). I have seen no evidence to suggest they decided to leave both until just before the recess for any reason other than needing to allow time to deal with those loose ends.

81. In the end it took the Department some three months to prepare the revised regulations and present them for signing. The meeting with the

Charity was in the offing all that time. Had officials meant to consult the Charity about amendments to the rules, they had chance enough to do so; but at no stage did they suggest discussing the proposed amending regulations with the Charity. Indeed, they told the Secretary of State that they could not open up to them at that stage (paragraph 36). They chose to do only such consultation outside Government as by law they had to (paragraph 34). When the meeting was approaching, one of their submissions to the Minister asked him to sign the instruments, as the best option (paragraph 47). They did not suggest that he should wait until they had discussed matters with the Charity, nor that the views of the Charity would have any effect on the decision to make the orders. The Minister not only accepted the recommendations, but signed the orders without waiting for the meeting, which was to take place the next day (paragraph 49). In short the Department had never intended to consult the Charity on the orders amending the regulations, and from their point of view that was not the purpose of the meeting. Indeed, any changes to the amending regulations might have involved much further work and delay, whereas the Department clearly meant to achieve their stopgap solution without more ado, and certainly without facing an appeal hearing.

82. Was it merely an oversight, then, that the Department did not “open up” to the Charity, even after they had decided on a course and consulted (narrowly) on it (paragraph 36)? It seems not. After the meeting, officials said that it would have been wrong to consult only the Charity, and not other bodies. However, I do not find that persuasive under the circumstances; that seems to have been reasoning in hindsight rather than a view which they had reached before making the regulations. Indeed, that would not explain why they were prepared to talk to the Charity at all. We must look elsewhere for reasons.

83. The papers show several positive reasons which limited what the Department could or would agree with the Charity, or even say to them:

- Their main reason for wishing to resist the Charity’s application, and for amending the regulations to limit what was publicly disclosed about applications, had nothing to do with conciliation or other factors in the public domain. It was to do with worries and problems about data protection law and related issues.

- Until there was an agreed Government line on the data protection aspect, and given their legal advice, the Department could hardly agree to much greater openness in the register of applications if they could avoid it.
- The judicial review action brought by the Charity was a complicating factor. The Department had to keep open the option of raising data protection arguments, but were unwilling to argue them until there was a settled Government view on the main issues. Whether that was a proper way of handling the legal action is not for me to say (paragraph 9). I merely note that it was another reason for the Department to say little to the Charity about that aspect.
- Furthermore, there was a certain awkwardness in the Department about appealing when, arguably, they had little intention of going through with the appeal, but were largely using it as a way of avoiding having to carry out the High Court decision while they reversed its effect by regulations. (See for instance, paragraphs 18, 24, 29, 38, 39, 45.) Again, whether that was a proper way of running the legal action is not my concern; but it was another reason not to open up to the Charity.
- Moreover, the Department's lawyers advised their administrators repeatedly that the Department must not disclose anything about the legal advice (eg paragraphs 22 and 39). As all the discussions in the Department either involved the lawyers or hinged on what they had said, that left the administrators with little scope to say anything useful to the Charity about their main reasons for doing what they did.

84. What, then, was the Department's purpose in agreeing to meet the Charity? It was primarily to offer "sweeteners" to minimise the risk of challenge to the amended legislation (paragraph 34); to talk in general terms about any help they could give them (paragraph 37); to offer an introductory letter to applicants telling them about the Charity (paragraph 45); and to head off the Charity from public criticism of the new legislation, or "any other damage" (paragraph 48). Also, the Department intended to use the meeting in positive ways, such as exploring how to help the Charity find the

information they wanted on PIDA cases without providing precedents that others could exploit (paragraph 48). I note that the Department were in any case worried lest revised regulations might be open to challenge (for instance, paragraph 38). I have little doubt that the Department's main purpose in arranging the meeting was to try to persuade the Charity that the Department were being reasonable, and to offer "sweeteners"; and thereby to head off a challenge (either through Parliament or through the courts).

85. The Charity believed that they were entitled by law to details of tribunal claims (paragraph 12), although they were interested only in claims under PIDA (paragraph 23); they wished to have systematic access to details of those claims in order to carry out their charitable objectives (paragraphs 6, 48, and 65); and they believed that there was an overwhelming public interest in PIDA claims being open to inspection (paragraphs 6 and 62). Meanwhile, for reasons outlined above, the Department were not prepared to grant them the access they wanted, nor even to explain why that was so; but only to offer them "sweeteners". Any discussion between the two sides under those circumstances would clearly not result in agreement, and might lead to misunderstanding. Moreover, since the Department hoped to dissuade the Charity from challenging the legislation, but without giving them any worthwhile warning of that legislation, arguably there was something inherently misleading in the Department's position. The Department were in a very difficult position. However, it was wrong for them to be so secretive about their thinking on the matters at issue, and yet still to have the kind of interactions which they did with the Charity outside the ambit of the legal action. I strongly criticise them for that. If the revised regulations were open to challenge - and I give no view on that - it was wrong to try to head that off as the Department did. In short, the problem between the parties was not a problem merely of timing or accidental misunderstanding, as the Department have claimed (paragraph 78).

86. The Minister's letter of 11 August 2000 (set out at Annex B) reflects the difficulties in which the Department found themselves, partly through their own actions. As to the first paragraph, there was no wide consultation on the revised regulations, not because they regularised roughly the existing position, but because the Department wished to make them swiftly to safeguard their position on data protection. Also, there is no evidence that the Department had meant to show the Charity the orders before making or laying them. More

importantly, they had never meant to consult the Charity about them. In the second paragraph, suggesting that including addresses on the register would help the Charity was at best undiplomatic. Addresses were one detail that the Charity had not particularly wanted to appear on the register (paragraph 32). Indeed, at one stage the Charity were ready to consider a compromise under which they would have had anonymised details of claims (paragraph 26). Nor would addresses give the Charity ready access to the kinds of details about claims in which they were interested mainly. Also, saying that full disclosure of PIDA claims, as much as any other tribunal claims, would hinder settlements and so not be in the public interest, ignored the particular public interest in PIDA claims, which went beyond the interests of settling those cases (paragraph 62). The third paragraph dealt with later public consultation, and I turn now to that aspect.

87. The Department gave various assurances about the amending regulations of July 2000 and a later public consultation on publishing details of claims on the register (paragraphs 50 and 56). As I see it, there were four main assurances given: (a) The amending regulations were a temporary measure, and the Department would consult later on the register issue. (b) They expected to do so in a consultation dealing with other issues that autumn. (c) Officials would be in touch with the Charity about the consultation “in due course”. And (d) the Department would consult on the issue in a “fair, reasonable and informed manner”. As to assurance (a), the Department did consult later on the register issue, and do seem to have seen the amending regulations as a stopgap. Nor do I see reason to criticise strongly the Department’s handling of assurance (b). I have seen some evidence in the Department’s papers that that was what they meant to do when they gave that assurance (see, for instance, paragraph 53), and nothing there to suggest otherwise. I accept that it turned out that the soundings in question did not give a suitable chance to include the issue about the register. In hindsight, perhaps the Department should not have committed themselves to that timescale. However, I see that as bad luck as much as bad judgment, and am not inclined to criticise them strongly on that point.

88. Turning to assurance (c), I have seen no evidence that the Department took any steps to ensure that they told the Charity about developments. Instead, the Charity learned of events, when at all, only through public announcements or direct questions to the Department. It was within the

Department's control to tell the Charity of developments once they became clear. They should have told them that the consultation would not after all happen in the autumn of 2000, and, later, that it would be included in the *Routes to Resolution* consultation. I criticise the Department strongly for those omissions. I asked the then Permanent Secretary what steps he proposed to take to try to avoid the same happening again. In reply, the present Permanent Secretary said that her Department were strongly committed to developing best practice in consultation. She outlined to me measures taken following work commissioned from an external "consultation champion". She said that the Department's standards now go beyond Cabinet Office requirements and are being monitored at Board level. In the light of the omissions which I have described in this report, the Department are revisiting the work they do in evaluating consultations and in communicating lessons learned. The additional work will focus on developing best practice in providing feedback to responses received, particularly to those who have disagreed with the Department's assumptions or proposals. I welcome the measures described by the Permanent Secretary.

89. Assurance (d) is more of a problem. One issue is whether the Department were ready to allow greater openness on the register, given their qualms about legal issues, especially data protection (see paragraph 94 below). However, I have seen no evidence that that factor was in the front of their thinking once they had made the amending regulations in July 2000. Another is whether they saw a fair, reasonable, and informed consultation in the same way as the Charity did. Their attitude seems to have been that of course they would deal with a consultation that way. I have seen no evidence that they recorded, for their own purposes, a specific commitment to deal with the issue in a particular way. Clearly, the Charity understood the commitment in a very different way. They believed, reasonably, that they needed access to details of claims under PIDA to carry out some of their charitable aims effectively. Therefore it was important to them that the issue should be aired well. The Department should have realised that the Charity would expect more than that the issue should merely be bolted on to another consultation. They should either have avoided giving any such specific assurance, or (better) have recorded a detailed commitment and conferred with the Charity about the wording of that part of the consultation document when the time came. Again, I criticise them strongly for their poor handling of the matter.

90. Bearing assurance (d) in mind, how well did the *Routes to Resolution* consultation deal with the register issue? Apart from two brief references, the only matter in the consultation papers dealing specifically with the issue is that set out in Annex C to this report (paragraph 62). The extract in Annex C gives hardly any background to the questions, and no references to the literature or other sources where readers might find out more. So it did little to inform readers. Nor was it fair, since the only arguments it mentioned tended against the Charity's position and were open to question. The suggestion (in section 5.22) that delaying registering applications might help conciliation and settlement appears to have been based on no proper study or evidence; there were respectable arguments to the contrary. Meanwhile, there is no explanation for asserting (section 5.23) that delaying registration would not prevent the collation of statistical information on complaints; and that seems hard to reconcile with the problems which the Charity have reported. Most importantly, from the Charity's viewpoint, section 5.24 merely asked whether readers saw a public interest in publishing details on the register, and gave no hint of the powerful arguments behind that, let alone those specific to cases under PIDA. I conclude that *Routes to Resolution* did not air the issues about the register in a fair, reasonable, or informed way; and fell well below what the Charity were entitled to expect under the circumstances. I conclude that the register issues were simply bolted onto a consultation dealing with other matters, without being properly integrated into it; and that the Department failed to consider properly, or keep track of, what they had committed themselves to do.

91. As it happens, that consultation document did not properly meet the Government's own requirements for such consultations, in the Cabinet Office's code of practice (paragraph 9). For one thing, the code criteria should have been set out in the document, and not (as they were) separately (paragraph 62), although I would not see that as a big fault. More importantly, while criterion 3 of the code says that such documents should deal with issues concisely, the detailed discussion of that criterion says (at paragraph 5) that documents should set out the main information and competing arguments relevant to a decision, or say where they can be found. The *Routes to Resolution* consultation papers did not do that for the issues about the register.

92. The Charity believe that the Department did not properly analyse the responses to that consultation. I see no reason to doubt the analysis made by their caseworker (paragraph 64). However, I see little to be gained from going into that, for, if, as I have found, the consultation dealt poorly with the register issues, one would not expect it to have yielded good responses anyway.

93. The Charity have claimed that, by failing to fulfil their assurances about consulting on the register issues, the Department subverted the democratic process; in that the Charity ceased pressing Members to pray against the amending regulations once they were happy that the Minister had given them specific enough assurances about the quality of the intended consultation (paragraph 56). I have no doubt that they ceased those efforts because of those assurances. For the Department, one of the main purposes in meeting the Charity in July 2000, and hence in getting involved in the exchanges of letters which arose out of that, was to head off a challenge by the Charity to the amending regulations (paragraph 84). On the face of it, the Department were hoping that what they said would persuade the Charity not, for instance, to secure a debate on the regulations in Parliament. Whether that was subverting the democratic process in any way is not for me to say. However, it was maladministrative of the Department to give assurances which, on any reasonable view, they did not fulfil, and I criticise them for that.

94. In the above findings, I have dealt with the issues arising between the Department and the Charity. There is, however, an underlying matter on which I should comment. That concerns the legal issues, particularly data protection, which caused the Department to resist greater openness on the register. The Department have treated the matter as confidential because it concerns policy and legal advice, and because there were differences of opinion within Government on those issues. However, government departments have a duty to follow the requirements of such European Union instruments as the Directive, including reflecting them as necessary in domestic legislation. Equally, they have a duty to establish exactly what those requirements are. Those are essentially administrative matters, not policy ones. To put it another way, the UK Government made a policy decision when they undertook the treaty obligations under which such instruments are binding on them. Government departments are not free to adopt a policy contrary to that, while the treaty obligations bind them. My

investigation has shown that government departments differed sharply over the interpretation of the Directive in 2000. Such things happen. I can understand why the departments wished to keep that from public view, although I have little sympathy with such secretiveness since any reasonable view of the public interest would argue for openness on such an issue. What I cannot understand is that the Department, and it seems other departments, chose not to take the steps needed to settle what the law did and did not allow. The action brought by the Charity even provided a possible way of settling some of those issues, although the timescale created problems. Whether they should have used that action to do that is not a matter for me to consider. At the very least, in my view, officials should have obtained a definitive view on the main issues. The Department's officials said at the time that other departments had blocked them from doing so (paragraph 35). I have seen no evidence to support that, although, if they did that, it would only expose those departments to criticism. However, I consider that the role of other government departments here falls largely outside the scope of this investigation. I asked the then Permanent Secretary what steps had been taken, since litigation between the Department and the Charity ended, to settle what policy options the Department had regarding information about claims on the employment tribunals register. In reply, the present Permanent Secretary said that the Department's own concerns about shortcomings over the handling of the public register issue in the *Routes to Resolution* consultation had led them to give further consideration to the matter, and to carry out a further round of public consultation on it as part of a wider public consultation, launched in December 2003, on the reform of Employment Tribunal procedures. They had sent a copy of the consultation document to the Charity, who had responded to it. Ministers had ultimately concluded, following that further round of consultation, that the public register should in future consist of judgments only, and should no longer record any pre-judgment details of applicants or respondents. That had been both in the light of views expressed by some key stakeholders that the inclusion of details of the parties left them open to unwelcome and misleading approaches from "ambulance-chasers" and other breaches of privacy, and because of concerns that applicants could be subject to "blacklisting" and respondents could suffer unwanted damage to their reputations where claims were unfounded. The changes to the public register provisions had been implemented in new Employment Tribunal Regulations which came into effect on 1 October 2004, which had been debated in the House of Lords and in

Standing Committee in the House of Commons, when issues relating to PIDA claims had been fully aired, and ministers had made the Government's position clear.

95. However, the Government's formal response to consultation indicated that, in view of the unusual public interest considerations raised by PIDA cases, ministers were continuing to give consideration to the possibility of according them "special status". The Department had written to the Charity on 18 October 2004 offering that the Employment Tribunal rules might be amended so as to require the Employment Tribunals Service to give the Charity access to copies of all PIDA claims and response forms, subject to the Charity entering into a deed of confidentiality constraining them from disclosing information from the forms more widely than envisaged. The Permanent Secretary said that the offer recognised that there were strong arguments in favour of PIDA claim and response forms being made subject to some form of independent scrutiny so that, if warranted by circumstances, details of alleged wrongdoing by an employer could be passed on to an appropriate regulatory body. The Permanent Secretary said that, unfortunately, the Charity had declined the offer, which had been extended to another body with a special interest in whistleblowing issues; that body had accepted.

96. If at the time of the *Routes to Resolution* consultation the Department still considered that the Directive might prevent much more openness on the register, it was not clear to me how genuine an option they were offering by including the issue in the consultation. I note that the Cabinet Office code of practice (paragraph 8) says<sup>6</sup> that a consultation document should be clear about any aspects of an issue on which decisions have been taken, or are inevitable, so as to avoid wasting the time of respondents. That seems entirely sensible to me. I therefore asked the Permanent Secretary what the Department would have done had their consultation yielded responses more clearly weighing in favour of more openness. In reply, the present Permanent Secretary said that the Department would have drawn the results of the consultation to the Minister's attention, and invited him to take them into account in reaching his decisions. Ministers take into account a range of policy considerations such as that. They are not bound to abide by any consensus

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<sup>6</sup> At paragraph 5 in the explanations of criterion 2.

that might emerge in consultation, if policy considerations dictate otherwise; it is for ministers to take decisions based on their own judgment and then seek the appropriate Parliamentary approval for them.

97. Finally, I return to the issue of claims under PIDA. The Charity have asked why the Department did not give more thought to perhaps treating those claims differently from other claims. Such claims inherently invoke the public interest, and might involve matters of very great public interest. Therefore, it seems much less likely for those claims than for most other employment tribunal claims that having details on a public register would breach the Directive. I note that Legal B said later that the Department had not “identified” data protection issues specifically when considering whether to treat PIDA claims differently (paragraph 61). I agree that they had not considered PIDA cases separately as regards data protection issues. Where I disagree is that I can find little if any sign that they had considered treating PIDA claims differently at all, before the Charity suggested that option after their meeting of 25 July 2000 (paragraph 50). Thus it did not appear among the options put to the Minister in the submission dated 25 April that year (paragraph 34). Whether the Department should have treated PIDA claims differently in their regulations is in the end a policy matter, and so a matter for Government and Parliament to decide. However, the Department should at least have explored the option, and done so before settling the amending regulations. When the Charity did suggest that option to the Department, it was too late to affect the amending regulations, and the response of officials was very weak (paragraph 51). I conclude that they had given that possibility little if any thought. Revealingly, when that issue was raised later, the Department tended to confuse it with the quite different issue of whether to treat the Charity differently from other parties seeking details of claims (paragraph 61).

98. What, then, of redress for the mistakes which I have identified? The approach which I normally consider correct is that people or organisations who have suffered injustice through maladministration should, as far as possible, be put back in the position in which they would have been but for the maladministration. That cannot easily be done here. I cannot say whether, for instance, Parliament would have rejected the regulations had the Charity had more chance to lobby against them. Nor is it for me to say whether the regulations were flawed or that other regulations would have been better. In

short I cannot consider an injustice in terms of the present regulations or the difficulties which those cause for the Charity. What I can say, however, is that the serious shortcomings on the part of the Department which I have identified, served to deny the Charity the opportunity to influence the process, either through their own representations or through arrangements they had made for Members to pray against the regulations. In addition, the failure of the Department to keep the Charity properly in the picture has led them to incur unnecessary expense, time and trouble in seeking to ensure that they played their part in trying to safeguard what they regarded as legitimate public interest in PIDA claims. In the circumstances I invited the Permanent Secretary to offer apologies to the Charity for the shortcomings revealed by my investigation and compensation for the expense and botheration which they have been caused. In reply the Permanent Secretary said that she would write to the Charity apologising for the maladministration revealed by my investigation, and offering to discuss an appropriate level of compensation.

99. Serious shortcomings on the part of the Department served to deny the Charity the opportunity to influence the process of changing the regulations, and the failure to keep the Charity properly in the picture led them to incur unnecessary expense, time and trouble. The Permanent Secretary has agreed to write to the Charity apologising for the maladministration which has occurred, and offering to discuss with them an appropriate level of compensation. I regard all that as a suitable outcome to a justified complaint.

**Ann Abraham**  
**Parliamentary and Health Service Ombudsman**

1 August 2005

## Some of the Expressions Used in this Report

1993 Regulations:	The Employment Tribunals (Constitution and Procedure) Regulations 1993 (as later amended); (see paragraph 4). Those apply to England and Wales. There are parallel regulations for Scotland, the Employment Tribunals (Constitution and Procedure) (Scotland) Regulations 1993 (as later amended).
1996 Act:	The Employment Tribunals Act 1996 (see paragraph 4).
ACAS:	The Advisory, Conciliation and Arbitration Service (see paragraph 4).
“Ambulance-chasers”:	People or firms who target those involved in litigation (in this context, usually employers) with offers to provide services; otherwise referred to as “unregulated consultants” (see paragraphs 12, 15, and so on).
The Charity:	Public Concern at Work (see paragraphs 1 and 6).
The Directive:	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data; (see paragraph 7).
Employment Relations:	The Department’s Employment Relations Directorate (see paragraph 13), whose area of responsibility includes policy on employment tribunals.

- The European Convention:** The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), which was incorporated into UK domestic law by the Human Rights Act 1998 (see paragraph 7).
- IT1:** The form on which claimants put first or “originating” claims to the employment tribunals (see paragraphs 4 and 12), (now known as form ET1, - see paragraph 75); respondents enter their first replies on form IT3 (now form ET3).
- Legal B:** The Department’s Legal Services Directorate B (see paragraph 13), whose area of responsibility includes advice on employment tribunals.
- The Minister:** The Parliamentary Under-Secretary of State for Competitiveness; later known as Minister of State for Employment Relations and the Regions (see paragraph 15).
- PIDA:** The Public Interest Disclosure Act 1998 (see paragraphs 1 and 5).
- The President:** The President of the Employment Tribunals (England and Wales); (see paragraph 4); there is a separate President of the Employment Tribunals (Scotland).
- The Secretary:** The Secretary of the Central Office of the Employment Tribunals (England and Wales) (see paragraph 4); during the earlier events covered by this report, the same person was also the Secretary of the Central Office of the Employment Tribunals (Scotland), but from [June] 2000 the posts were filled separately.

The Tribunal Service: The Employment Tribunals Service, an executive agency of the Department (see paragraph 4) which provides the administrative staff of the employment tribunals throughout Great Britain.

“Unregulated consultants”: See “Ambulance-chasers.”

**[The text of the Minister's letter of 11 August 2000:]**

11 August 2000

#### EMPLOYMENT TRIBUNALS JUDICIAL REVIEW

Thank you for your letter of 27 July following our recent meeting. It was very helpful to be able to meet you to talk through the issues around public disclosure of tribunal applications and I am grateful for your flexibility in considering how to find a way through this complex issue. I understand that you have now spoken to . . . , Director of Employment Rights and Tribunals, who explained that the amendment orders have now been laid and are due to come into effect on 17 August. As I explained at our meeting, because the changes do not substantially alter the current level of information provided on the public register I did not see a need for wide consultation. However, as you know, I had hoped to let you have sight of the orders before they were laid, and I am very sorry that an administrative misunderstanding coupled with tight Parliamentary deadlines did not enable this to happen. I now enclose copies of the amendment orders for your information.

I would like to assure you that I have given careful consideration to the matters discussed. My conclusion is that amending the tribunal rules of procedure is the right way forward. It will provide you with access to people bringing claims under PIDA, by including addresses on the public register and more reliable information on the jurisdictions of claims. At the same time it will also prevent the publication of what may well be unsubstantiated allegations by one party against another which would not be prevented if we were to amend the rules of procedure to make public all PIDA applications as you suggested. As you know, I believe - with ACAS - that full disclosure of tribunal claims would be prejudicial to settlements and is therefore not in the public interest. This I see applying equally to PIDA applications as to any other claim.

However, I do accept that the issue of public disclosure needs to be considered very thoroughly, in a longer timescale than has been possible so far. I have therefore asked officials to include it in the forthcoming review of employment tribunal procedures, on which we expect to consult publicly in the late Autumn. Your input to the review will be of great interest and my officials will liaise with you as the review progresses.

In the meantime, . . . at [the Tribunal Service] will be in touch with you shortly about information on PIDA claims currently before the tribunals.

Finally, you should be aware that I have asked officials to take steps to withdraw the appeal.

Yours sincerely

[the Minister]

[Extract from *Routes to Resolution*, page 34]

### Registering cases publicly

5.22 Currently all tribunal applications are placed on a public register within 28 days of receipt. It has been suggested that registering applications at a later stage, following a period for conciliation, may increase the chances of settlement. Once the details of the claims are made public, relations between the parties may further deteriorate and they may feel compelled to see the case through to a tribunal hearing to clear their name publicly.

5.23 Delaying registration would not prevent the collation of statistical information on the numbers and types of complaints which were made to employment tribunals. The Government invites views on such an approach.

5.24 At present, the information on the public register is limited to the identity of the parties and the type of complaint. Views are also invited on whether there is a public interest in publishing the particulars of the complaint and the response on the public register and specifically, whether this might be intrusive or deter individuals from making an application.

5.25 The impact of these proposals is considered in the partial regulatory impact assessment at Annex A. The Government welcomes views on these proposals and other options.