STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT BY MR S. NEWMAN AGAINST THE TREASURY AND EXCHEQUER DEPARTMENT REGARDING THE VALUATION AND CALCULATION OF PENSION ENTITLEMENTS

Presented to the States on 4th August 2022
by the Privileges and Procedures Committee

STATES GREFFE

2022 R.110 (re-issue)

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Treasury and exchequer department regarding the valuation and calculation of pension entitlements.

Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

9th March 2022

Complaint by Mr. S. Newman against the Treasury and Exchequer Department regarding the valuation and calculation of pension entitlements

Hearing constituted under the Administrative Decisions (Review) (Jersey) Law 1982

Present

Board members –

S. Catchpole, Q.C., Chair
C. Beirne
G. Crill

Complainant –

S. Newman (via video link from South Africa)

Representative of the Treasury Minister –

Deputy S.J. Pinel, Minister for Treasury and Resources

G. Chidlow, Head of Shared Services, Treasury and Exchequer

S. Roberts, Director, Civil Division, Law Officers Department

G. Pollock, Chair, Committee of Management, Public Employees' Pension Fund

States Greffe –

L.M. Hart, Deputy Greffier of the States
K.M. Larbalestier, Specialist Secretariat Officer, States Greffe

The Hearing was held in public at 10.00 a.m. on 9th March 2022, in the Blampied Room, States Building.

1. Opening

1.1 The Chair opened the Hearing by introducing the Board. He advised that the constitution of the Board differed from that of the original Hearing, which had been held on 10 September 2020, in that Messrs. S. Catchpole, Q.C. and C. Beirne, both of whom were Deputy Chairs of the States of Jersey Complaints Board (Mr. Catchpole being the Chair of this particular Hearing), were joined by Mr. G. Crill, overall Chair of the States of Jersey Complaints Panel. Messrs. Crill, Catchpole and Beirne were the 3 most senior members of the Panel and Mr. Catchpole advised that both he and Mr. Crill were legal professionals and Mr. Beirne was a member of the Committee of Management for the Jersey Teachers' Superannuation Fund.

1.2 Mr. Catchpole outlined the process which would be followed, which would differ slightly from that of the previous Hearing in that the Panel would seek to understand the reasons behind the Minister's response to its Findings. Moreover, the Board wished to receive an explanation as to what, if any, legal redress a public employee who was a member of the Public Employees' Pension Fund (PEPF) had if he or she disagreed with a decision in relation to pension entitlements. Following the hearing the Board would submit a further report to the Privileges and Procedures Committee for presentation to the States.

2. Background

2.1 It was recalled that the Board had upheld a complaint made by Mr. S. Newman, a former Firefighter, who had received an optional transfer payment from PECRS calculated on the basis of factors and assumptions applicable with effect from 1st May 2018. Mr. Newman believed that he was entitled to have his transfer payment calculated on the basis of factors and assumptions prior to 1st May 2018. The Privileges and Procedures Committee had published the Board's findings (as set out within R.139/2020) and the Minister's response had been published thereafter (R.103/2021 refers).

2.2 It was recalled that, following an initial review by the Deputy Chairs, it had been concluded that Mr. Newman's complaint justified review. However, the Chair of the Committee of Management of the PEPF had advised that '… the member's referral of this matter to the [*States of Jersey Complaints Board*] is neither (i) envisaged or permitted under the PEPF's governing law and regulations; nor (ii) part of the PEPF's complaints procedure and therefore the Board has no authority or jurisdiction to hear such an appeal.' The Treasurer of the States, as Administrator of the PEPF, had indicated that he concurred with the views expressed by the Chair of the Committee of Management.

2.3 At the hearing in September 2020, the Board had concluded, among other things, that the complaint was within its jurisdiction for the reasons set out within R.139/2020 and had upheld the complaint

2.4 On 8 June 2021, the Minister for Treasury and Resources had presented a report to the States (R.103/2021) in response to R.139/2020, in which it had been confirmed that the Treasury and Exchequer Department, as administrator of the PEPF, was unable to make a higher transfer value payment to Mr. Newman as

any such payment 'would constitute a Special Payment under the Public Finances Manual' and the Treasurer of the States was not satisfied that there was a proper legal basis upon which to make such a payment. The Minister had noted the Board's concerns regarding the lack of independent oversight of the PEPF complaints procedure and had advised that the Treasury and Exchequer Department was reviewing the same to ensure that it accorded with modern best practice for pension complaints. The potential for an independent final stage to the PEPF complaints procedure via the Channel Islands Financial Ombudsman was being considered.

2.5 Following the publication of the Minister's response, Mr. Catchpole had written to her on 25 November 2021, advising that the Board considered the response 'deeply unsatisfactory' and had stated that it appeared that the PECRS Committee of Management and the Treasury and Resources Department disputed the jurisdiction of the Board in relation to the decision and actions of the Committee of Management of the PEPF; had refused to implement or act upon the recommendations made by the Board, notwithstanding the clear finding that Mr. Newman had valid grounds for complaint and had lost a significant sum of money as a result of the unlawful (in the view of the Board) decision which had been made; and, were either unable or unwilling to say whether a public employee who was a member of the PEPF had the ability, in principle, to bring a private law action for appropriate redress. The Board was extremely concerned at the lack of independent oversight and the corresponding ability to properly scrutinise decisions relating to the pension entitlement of public sector employees who were seriously adversely affected by decisions made by the PEPF Committee of Management. The Board wished to receive confirmation that its findings and recommendations in relation to Mr. Newman would be implemented (to include the provision of appropriate financial redress). If this was not the case, the Board wished to be provided with a proper explanation of the Minister's decision and the justification for acting contrary to the findings. As a consequence, the Board had taken the unusual step of reconvening the Hearing in order to hear from the Minister. It was recalled that Article 9(5) of the Administrative Decisions (Review) Law 1982, allowed the Board to reconvene a Hearing of its own motion or following a request to do so if, in its opinion, the information provided in the formal response from the Minister justified further consideration.

3. The Board's position and the response of the Minister and the PEPF

3.1 The Chair drew attention to the following –

A statement made by the Minister for Treasury and Resources to the States Assembly on 8 June 2021, in which she referred to *'the Committee of Management's duty of care to ensure the scheme was administered fairly and consistently for **all** of its membership'*

section 7, sub-paragraph 7.2 of the Board's report, which stated that –

'As a preliminary matter, drawing on their combined experience in pensions matters and public administration, the Board expressed surprise that such a significant change to the pensions process could have been implemented without there having been a notice period communicated widely to the Fund members. It was also a matter of some concern that there were no written procedures, or a Service Level Agreement, which could be applied to valuations, or indeed detail the procedure to be followed whenever that service was altered. The Board considered that clear guidance should be provided to Members, outlining the difference in approach to active and inactive employees in respect of the service delivery, as this had been mentioned several times by the Head of Shared Services. Members should have a clear understanding of how their cases would be processed. In the present case, it was unjust and oppressive for the new policy to be introduced with immediate effect on 28th March 2018, without any prior notification to Members within the meaning of Article 9(2)(b) of the Law.'

3.2 With regard to the foregoing, Mr. Catchpole stated that the Board believed that, had the matter been heard by the Royal Court, the decision would have been deemed unlawful and would have been quashed.

3.3 Mr. Pollock advised that he had qualified as an actuary 40 years previously and he apprised members of the details of his professional background, which included appearing as an expert court witness. Mr. Pollock advised that he fundamentally disagreed with the Board's finding that changes to the pensions transfer process and the assumptions and factors which related to the calculation of an optional transfer payment should have been communicated to members prior to implementation. He went on to explain that the pension scheme provided a pension and lump sum to members with an option for a transfer payment in lieu thereof and the calculation of the transfer payments changed from time to time. Transfer payments had to be cost neutral to the PEPF in order to avoid reducing funding levels, which could trigger reductions in pension increases and benefits to members. There was no question of any change to Mr. Newman's pension entitlement, which he would have been eligible to receive in full had he not opted to transfer his entitlement elsewhere and subject to there being no material changes to the funding position of the PEPF. Mr. Pollock had no experience of any scheme giving prior notice of such changes to members and members were fully aware that such changes occurred from time to time based on the actuarial valuation, inflation, longevity assumptions and investment strategies, all of which had an impact. He confirmed that he had sought the views of another senior actuary in relation to the matter and the same opinion was held. He emphasised that there had been no change to the pension scheme or the benefits payable to Mr. Newman from the PEPF. In response to a question from the Chair as to whether the Board's findings had been considered, Mr. Pollock confirmed that the Committee of Management of the PEPF had concluded that no procedural changes were necessary as this would not be consistent with best practice. In

arriving at this conclusion, Mr. Pollock stated that he had re-formed a working group to consider the findings, which had been reviewed by an independent Committee of Management member (together with 2 other such members who had been involved in the working group), following which the findings of the working group had been presented to the Committee of Management, which body had reached the same conclusion as the working group. Ultimately, physical evidence of Mr. Newman's employer contacting the Pensions Department had been sought and this had not been forthcoming.

3.4 Mr. Catchpole referred to the Board's finding that the decision to implement the new policy without prior notification to members was unjust and oppressive. Mr. Pollock confirmed that legal advice which had been received indicated that this was 'not a valid conclusion' and repeated that he had no experience of a defined benefit scheme which notified members of such changes in advance.

3.5 Returning to the basis of the calculation of transfer, Mr. Pollock stated that the transfer value basis was set out in the Statement of Funding Principles and it followed assumptions agreed by the Minister for Treasury and Resources. Whilst agreement had been reached in February 2018, by the Actuary it had not been possible to effect the change immediately due to the requirement for the actuary to calculate new transfer factors and for these to be implemented by the Treasury and Exchequer Department. This meant that implementation of the changes had not occurred until 1st May 2018, and this had highlighted the need to refine administrative processes. Mr. Pollock added that it would be remiss to make transfer payments which were not cost neutral to the scheme in cases where there was no basis to do so as this could have a detrimental impact on funding levels and, ultimately, members' benefits. There was a duty to all members to ensure cost neutrality.

3.6 Mr. Newman advised the Board that, whilst he accepted and understood that market value adjustments would be made, the change which had occurred was far more significant (1.51 to 1.03 (0.48)) and this had resulted in his transfer value being one third lower than he had expected. He added that the decision to move from a final salary scheme to a Career Average Scheme had been communicated to the membership so it was not clear why such a significant change to the basis for the transfer out calculation had not. Mr. Pollock explained that the change was not based solely on market values but on longevity assumptions and a complete re-evaluation of the liabilities of the scheme had been carried out in line with the new investment strategy. The Chair added that this was understood but what was not clear was why a change of this magnitude had not been communicated to members. He asked the Minister whether she considered this to be fair and she responded that the decision of the Committee of Management in relation to Mr. Newman's case had been based on a particular time frame and whether the application for a transfer out had been made within that timeframe. Mr. Pollock stated that if such a change had been communicated this could have generated significant interest from members wishing to transfer out of the scheme and this would have had a detrimental impact on existing members as it would reduce assets to cover liability. He repeated that in his 40 years working in defined pension schemes he was not aware of such a prior communication in these circumstances.

3.7 Mr. Catchpole stated that members believed that there should be some form of constitutional balance which would see Government Departments proactively accepting recommendations and he asked what mechanisms were in place to

achieve this. He noted that, whilst in some respects the Board had wider jurisdiction than the Royal Court, it had no powers to compel Government bodies to act and, in this context, he asked how the Treasury and Exchequer Department believed the Board should respond in a case where it viewed the decision as unlawful. Mr. Catchpole repeated the belief that the decision would have been quashed in the Royal Court and asked whether it was felt that the appropriate course was to act upon the findings or wait until the decision was quashed by the Court. Any future replacement oversight body could potentially have the powers to quash such decisions and he asked what the general policy position was as this would inform the Board in making recommendations as to what powers a replacement oversight body might need. Ms. S. Roberts, Director, Civil Division was of the opinion that this was not an appropriate forum at which to arrive at a definitive position on the powers of any future oversight body. She continued, stating that any Minister or Department receiving a report from the Board would give serious consideration to the findings and she understood that this had happened in this case. However, this did not mean that every finding would be accepted but that careful attention would be paid to the findings and that was how any reasonable body would respond. Ms. Roberts advised that, in the UK, the Ombudsman's findings were not always accepted by a public body. What was important was that careful consideration was given to the findings and recommendations. Mr. Catchpole asked Ms. Roberts to assume that the Board had identified an error of law in a process and he questioned whether this would enable a Government Department to act on that or whether the Royal Court would have to declare this error of law before action could be taken.

3.8 Mr. Catchpole referred the meeting to paragraphs 6.23 and 6.24 of the Board's findings, which stated –

We would take some persuasion that public employees such as Mr Newman should be left without any form of redress in such circumstances, or that it was the intention of the States in enacting the Law to leave public bodies and servants charged with administering and making decisions in relation to the pensions of employees of the States to do so without being accountable to, it seems, anyone or to have their decisions and actions protected from public scrutiny by the Complaints Board.

Naturally, if we have misunderstood the position, and the Committee of Management, the Chief Minister, Minister for Treasury and Resources and the Treasurer agree and accept that people in the position of Mr. Newman would have a private law cause of action for damages in the event that they established any one of the grounds listed in Article 9 of the Law in relation to the administration of their pension or any other private law cause of action, it would be of considerable benefit if they said so, publicly and unequivocally, identifying the tribunal or Court within which such claims can be brought. We recommend that any such unequivocal clarification is given by way of a formal public statement to the States.

3.9 Ms. Roberts stated that the view was that Mr. Newman did not have a private law cause of action and that any payment would constitute a Special Payment under the Public Finances Manual and the Treasurer of the States could not be directed in exercising his powers in this respect. Mr. Catchpole concluded that it followed that it was not accepted that the Royal Court had jurisdiction. Ms. Roberts stated that this would be open to question and a number of hurdles would have to be overcome. However, it was unhelpful to speculate about the precise grounds which Mr. Newman might seek to rely upon. On the basis of the information

available Ms. Roberts questioned whether the case would be amenable to judicial review. Mr. Crill suggested that the distinct possibility of a judicial review must have been considered and Ms. Roberts responded by stating that any letter before action or order of justice setting out grounds would be carefully considered before advice was given. Mr. Catchpole noted that Ms. Roberts' response 'covered all bases' but it was still not clear whether the Royal Court would have jurisdiction in respect of Mr. Newman's case and he believed it should be as the grounds would be as set out in the case before the Panel. Ms. Roberts repeated that the view was that there was no basis for a private law cause of action. Mr. Catchpole asked whether the Minister believed that it was fair that there was no independent right of review. The Minister stated that there was no evidence that Mr. Newman's Manager, Mr. Galvin, had contacted the PEP Team of the Treasury and Exchequer Department in April 2018, as stated and this was the crux of the matter. The Minister agreed that independent oversight would be beneficial and she noted that the role of the Treasury and Exchequer Department was merely to administer the scheme. Mr. Pollock added that the Committee of Management was uncomfortable with the lack of independent oversight as it was sometimes required to scrutinise its own decisions. It was understood that legislation was being progressed to facilitate the creation of an independent oversight body and it was anticipated that this would be complete by the end of 2022.

3.10 Mr. Catchpole again referred the meeting to paragraphs 7.3 – 7.11, which were of particular relevance. The Board had set out detailed findings which included evidence not previously considered by the Department or the Committee of Management which had led to the overwhelming conclusion that Mr. Galvin had made a phone call to the Pensions Section and this had led to the conclusion set out in paragraph 7.16, as follows –

'…on the basis of the evidence before it, applying the revised policy as set out in paragraph 3.6 (of the report), the only conclusion to which a reasonable person properly directing themselves could have come to would be that Mr. Newman's case should have been evaluated according to the actuarial principles applicable prior to 1st May 2018. In the event that the requested reconsideration either does not take place, or does not result in such a revised evaluation, the Board will expect to be informed in detail as to why that is the case'.

3.11 Mr. Catchpole advised that the compelling testimonies from Messrs. Newman and Galvin had been considered 'utterly credible' and were completely 'unvarnished accounts' which were detailed and linked to personal events. It was understood that neither Messrs. Newman nor Galvin had been afforded the opportunity of addressing the Committee of Management. Mr. Pollock confirmed that this was correct but stated that recorded evidence of a telephone call from Mr. Galvin to the Pensions Team had not been produced. Whilst he had no reason to doubt that Mr. Newman had contacted Mr. Galvin to ask him to obtain a transfer out quote, he speculated that Mr. Galvin's knowledge of the decision not to perform any transfer out quotes for active members during a certain period could not be relied upon as evidence as this information could have been gathered from other colleagues who had requested quotes at that time. Mr. Pollock said it would be unusual for a pension scheme administrator or the Committee of Management to rely upon an oral testimony from an individual who was not part of the PEPF management or administration without actual physical evidence. However, Mr. Catchpole recalled that the Department had acknowledged that it relied upon a manual recording system. Mr. Pollock added that no physical

evidence of the call was available from the records obtained from JT and he concluded that the dispute was actually between Messrs. Newman and Galvin. Mr. Catchpole stated that if there was any question regarding the credibility of Mr. Galvin's evidence then the Committee of Management/Treasury and Exchequer Department should have interviewed him. In any case, it remained that the conclusions of the Board appeared to have been ignored and this was not considered an appropriate way for a public body to act. Mr. Catchpole stated that the Board had rarely come across a case where it had felt compelled to take such a firm stance. Mr. Crill added that the Board had delved further into the evidence and had reached a different conclusion and had established a fact which appeared to have been ignored. In response to a question from Mr. Crill, Mr. Pollock confirmed that on receipt of the Board's report no further evidence had been sought and it was not considered that the report provided any new information, aside from the fact that the Board had considered representations from Mr. Newman. Mr. Pollock believed that a low bar had been sought in terms of the evidence required by the Committee of Management, i.e., a physical record of contact with the PEP Team. Mr. Catchpole stressed that the Board had gone through a process and had established facts and these had been ignored. Mr. Pollock stated that he would have to take instruction on the matter as it did not appear that the Board had any jurisdiction over the Committee of Management based on the legal advice received nor any powers under the PEPF legislation or regulations to comply with the Board's findings.

3.12 With reference to the absence of any physical evidence of a telephone call to the Pensions Team, Mr. Newman advised that documentary evidence existed of his contact with a financial adviser in January 2018, and between him and Mr. Galvin in February 2018. He reminded the meeting that he lived in South Africa and this made it difficult to 'chase things up'. There was, however, factual evidence that he had asked for a transfer valuation and this was being ignored on the basis that a telephone record of Mr. Galvin's call to the PEP Team could not be found. Mr. Pollock stated that there was no reason to dispute that Mr. Newman had asked Mr. Galvin to obtain the transfer valuation; the question was whether Mr. Galvin had made the call or not. Mr. Catchpole was of the view that the fact that the Committee of Management had focussed solely on a certain type of proof, despite the conclusions of the Board, appeared to have closed its mind to the Board's findings of fact and this was not considered to be an appropriate way for a public body to act. Mr. Pollock stated that the Committee of Management was governed by pensions legislation and had looked for certain things in reaching its decision. Mr. Catchpole asked again whether the Committee would reconsider the findings of fact and Mr. Pollock repeated that the legal advice received indicated that the Board had no jurisdiction over the Committee of Management. Mr. Catchpole reminded Mr. Pollock that new evidence had been presented but he stated that this was not the evidence the Committee of Management was seeking. In Mr. Catchpole's professional opinion this was an error of law and he explained that the process of taking evidence involved listening to all of the proof in the round and reaching a conclusion based on the same. Mr. Crill added that the Board's findings of fact should have allowed the Committee to revisit its decision. The Minister questioned Mr. Newman's decision to delegate authority to another to make the call to the PEP Team on his behalf given the significance of the issue. Mr. Newman reminded the Minister that when he had asked Mr. Galvin to make the call he had been unaware of the significance as there had been no indication at that time of the future changes which would be made which would seriously affect the transfer value of his pension. Mr. Catchpole stated that the Board had

been extremely concerned to learn that the only remedy for members of the pensions scheme was the internal complaints process and he stated that the test of proof which had been applied was flawed and the response to the Board's findings were not consistent with a sensible, mature democracy. The mechanism for mutual respect appeared to have failed in this case and he urged the delegation to review its decision. In any case, the Board would make recommendations which aimed to ensure that a balance was struck in future in terms of how public bodies should treat findings of fact and the need for independent oversight. The Board had a great deal of sympathy for the position Mr. Newman found himself in and hoped that the Committee of Management's decision would be reviewed as it revealed inappropriate practices which left individuals in an onerous position. In this situation, an independent body had reached a conclusion based on alternative evidence and the value of this had to be weighted. The testimonies received showed huge credulity and a judgement had to be made on the basis that the Committee of Management had not previously considered this evidence. Mr. Catchpole asked Mr. Pollock if there was mechanism within the administrative process that would allow the Committee of Management to review its decision and he advised that he would need to seek legal advice in the light of the Board's findings of fact and the weight which should be attributed to these. The Board requested that it receive details of the same within 2 weeks of the date of the Hearing.

3.13 On a related matter, having identified the serious constitutional issues which arose from the case, the Panel requested that any further comments regarding this case and the relationship between the Board and Government Departments should be submitted as this would assist members when making recommendations with regard to a future replacement body. Ms. Roberts advised that general observations could be made in the context of this particular case but not in relation to policy formulation.

3.14 Mr. Newman advised the Board that he was aware of other cases where oral confirmation from a line manager had been considered sufficient to secure a revised transfer value and he questioned this lack of parity. Mr. Pollock stated that whilst he could not comment on other cases, he was aware that oral confirmation had been accepted in the case of a staff member whose line manager was a member of the Committee of Management. The Chair advised that Mr. Newman's frustration and sense of injustice were fully understood and it was noted that the position of the Committee of Management as to whether it could lawfully proceed on the basis of the Board's evidence would be sought.

3.15 In concluding, the Board thanked the delegation for attending and, in particular, the Minister as it had become normal practice in recent years for Ministers to delegate authority to public servants to attend Hearings of the Board so members were particularly grateful to the Minister for her personal contribution.

THE BOARD'S FINDINGS

(i) Introduction

1. Mr. Newman's case has raised, and continues to raise, issues of deep concern and importance, both for Mr. Newman and for the proper administration of public sector-related powers and functions in Jersey.

2. It is a reflection of the seriousness with which the Complaints Panel regards Mr. Newman's case that it took the unusual step of convening a second hearing in the light of the deeply unsatisfactory response to the Board's original findings, asked for the Minister to attend in person at that hearing and reconstituted the Board so that it was comprised of the Chair and the two Deputy Chairs of the Jersey Complaints Panel.

3. It is with very considerable regret that the Board must report that, notwithstanding every opportunity to correct the manifestly erroneous and unjust course that the Respondent and the Committee of Management have taken in the past, the Respondent and the Committee of Management have refused to do so.

4. It is also a matter of regret that we have to report that at every stage in this case, including in the run up to the second hearing, at the hearing itself and in its response to the Board's invitation to reconsider their position, the approach of the Respondent and the Committee of Management has been fundamentally flawed. Indeed, some of the arguments advanced and positions adopted by the Respondent and the Committee of Management are so obviously misconceived that the Board is, frankly, incredulous that they have been pursued at all: either the relevant officials and advisers and/or Committee of Management simply do not understand some fairly simple concepts about public administration or they must be deliberately pretending not to understand the points that have been made.

5. Sadly, the general approach of the Respondent and the Committee of Management – with the exception of the Minister's agreement to appear personally at the second hearing (for which the Board is grateful) – is symptomatic of what the Board perceives to be a wider issue that has grown over the last few years. Elected and appointed officials, public servants and public bodies have failed properly to co-operate with the Board when it has made adverse findings and simply ignored the findings and recommendations. This makes the process before the Board otiose. It denies to the citizens of Jersey an effective independent oversight of the administrative process. It denies those whose complaints are well-founded the remedy that the States must have intended when enacting the Administrative Decisions (Review) (Jersey) Law 1982 ("the Law"). As we have set out below, this is a matter that the three of us regard as so serious that it led us to consider whether to tender our resignations from the Complaints Panel. We have not done so only because it would still leave Mr. Newman (and, we anticipate, other citizens with valid complaints) without some form of redress. As we have discussed further below, however, that situation cannot continue. We have made strong recommendations as to how Ministers, public officials and public bodies should interact with a Complaints Board (and its replacement) in the future. Some of these should, in our respectful view, be put in place with immediate effect.

6. For convenience we have referred to the Respondent and the Committee of Management together. This is not least because the Respondent has largely adopted the position of the Committee of Management in any submissions to or

correspondence with the Complaints Board. It is right, however, that we should note that at the outset that the Committee of Management disputes the jurisdiction of the Complaints Board over it or any part of Mr. Newman's complaint.

(ii) Mr. Newman

7. The most important feature of the present case is, of course, the position of Mr. Newman. We can pose – and did pose to the Minister – a very simple question: on any objective view of the evidence, has Mr. Newman been fairly and justly treated? There is only one answer to that simple, uncluttered question: no.

8. In our considered judgement, and that of the first Complaints Board (of which two of us were members), Mr. Newman has been treated shabbily. As we will explain, the processes and decisions taken in relation to his straightforward request for an assessment of his entitlement to a transfer payment were wrong, premised on mistakes of fact and fall foul of every ground set out in Article 9(2) of the Law. The result has been that Mr. Newman's pension entitlement was erroneously and significantly undervalued. Notwithstanding the manifest and numerous errors in the handling of his case, nearly 4 years on, he has still not been paid the full amount to which he is entitled. Further, he is faced with a Respondent and the Committee of Management who profess to have some ill-defined duty of fairness to the members of the pension scheme (including, therefore, Mr. Newman) but resolutely deny that Mr. Newman has any right of recourse to any independent body for a remedy.

9. To put the latter point in context, the Respondent and the Committee of Management contend that they are, in effect, above the law. They contend that the Complaints Panel has no jurisdiction over the matters about which Mr. Newman justifiably complains. They contend by extension that the Royal Court has jurisdiction to entertain an application for judicial review. And they contend that Mr. Newman has no private law cause of action pursuant to which he can seek the appropriate remedy for the erroneous and flawed manner in which he has been treated and the losses that he has, as a result, sustained.

10. The foregoing is a remarkable, deeply worrying (constitutionally) and, in our judgement, an inappropriate position for the Respondent and the Committee of Management to adopt; but, without any doubt, that is the position they adopt. It is wrong, but it leaves Mr. Newman in an invidious position. Having had his complaint investigated and upheld, exposing multiple failures in the process as a result, the Respondent and Committee of Management continue to maintain that he is only subject to their arbitrary and erroneous processes. And they are not going to pay him a penny.

11. It is for others to judge but we do not believe that the foregoing reflects well on the public sector in Jersey or the individuals involved in the present case. We believe that no person is above the law. That is certainly true of the Minister, appointed officials, public servants and the Committee of Management involved in the present case. Whatever else, it is our overwhelming conclusion that Mr. Newman is entitled to and should have his pension entitlement reassessed in accordance with the criteria applicable prior to May 2018.

(iii) The central feature of Mr. Newman's case

12. Mr. Newman's complaint was determined by a simple question of fact: did his superior officer/line manager, Mr. Galvin, make contact with the Department on Mr. Newman's behalf at some point from 28 March 2018, and early April

2018, to be advised that, in accordance with the policy introduced on 28 March 2018, no evaluations would be undertaken until 1 May 2018? If that question was answered in the affirmative, Mr. Newman was entitled to have his transfer payment calculated on the basis of factors and assumptions prior to 1st May 2018, rather than on the basis of those operative after that date. That entitlement arose under the revised policy introduced later in 2018.

13. Having considered the relevant evidence, including the oral testimony of Mr. Newman, the original Complaints Board concluded unhesitatingly that such contact had been made. In summary, as set out in paragraphs 7.4 to 7.9 of the original Report, the Board found as a fact that Mr. Galvin had made contact with the Department at some point shortly after 28 March 2018, he had been informed what the policy was at that time and then accurately relayed that to Mr. Newman who, in turn, did not take any further steps to progress his request for an evaluation until he returned to Jersey in mid-May 2018.

14. We should reiterate, as set out in paragraphs 7.4 to 7.9 of the original Report, the Complaints Board found Mr. Newman to be an utterly honest and compelling witness who gave his version of events in a balanced manner. After considering all of the evidence, the Board found that both Mr. Newman's account and that set out in Mr. Galvin's witness statement were true. In answer to a question from Mr. Pollock at the second hearing, Mr. Catchpole QC explained this further and endeavoured to illustrate both how one should approach the task of assessing evidence and how impressive Mr Newman had been as a witness.

15. In the light of our findings of fact, this was one of those exceptional cases where there was only one rational conclusion to which the Respondent/Committee of Management could have come: in accordance with the terms of the revised policy, Mr. Newman was entitled to and ought to have had his transfer payment calculated on the basis of the position prior to 1 May 2018. For the reasons set out in the original Report, we made recommendations accordingly on this and other areas in which the administration of Mr. Newman's case was, in our judgment, obviously contrary to Article 9(2) of the Law. This was significant for Mr. Newman because his transfer payment had been assessed at an amount that was, he believed, some 20 to 30 per cent lower than the amount he would have received if it had been calculated on the proper basis.

(iv) <u>The response to the original Report</u>

16. This should have been a straightforward case. Given our findings and conclusions as set out in the first Report, there is and was only one conclusion to which the Respondent/Committee of Management could properly come: the mistake of fact that underlay the original rejection of Mr Newman's request for a valuation on the basis of the pre-1st May 2018, criteria should be corrected and Mr. Newman's entitlement should have been reassessed on the correct basis, applying the criteria applicable in April 2018. Mr Newman should then have been paid the additional amount due to him.

17. That simple resolution of the case did not, however, materialise, notwithstanding every encouragement to change the original decision, the Respondent/Committee of Management have adopted the firm stance of rejecting the findings of the Board and appear intent on finding any ways (no matter how spurious or misconceived the arguments for the same) in which they could avoid giving Mr. Newman the remedy to which he is (in the view of all members of 2 Boards who have looked at this matter) so obviously entitled. We

have set out details of the correspondence that led up to the second hearing in a later section of this second report because it is directly relevant to the wider criticisms that we have of the lack of co-operation with and respect for the Board which we perceive is prevalent within the senior echelons of the public sector within Jersey. It suffices at this point to note that, ultimately, the Respondent and Committee of Management decided to continue to ignore the findings of the Board and our encouragement at the second hearing properly to revisit their decision on the basis that:

We consider it important to protect the independence of the Committee and its functions from the Complaints Panel which does not have jurisdiction over the Committee and its affairs. The Committee cannot simply allow the Complaints Panel to take decisions in respect of the Committee or to adjudicate on evidence relevant to the Committee's role.

18. As alluded to in the Chair of the Committee of Management's letter to the Board dated 5 May 2022, what underlies this position was the "*differing views of the evidence available in respect of Mr. Newman's transfer value*" between both Complaints Boards on the one hand and Mr. Pollock, the Committee of Management and some of their advisers (principally, it appears to us, the Secretary to the Committee, Ms. J. Ward, and the Head of Shared Services at the Treasury and Exchequer, Mr. G. Chidlow) which were simply adopted (despite the manifest flaws in them) by the Minister and senior officers within the Treasury, about whether or not Mr. Galvin made contact with the Department at or around the end of March 2018, as the original Board had found. In simple terms, because they disagreed with the findings of the original Board, they were refusing to implement them, albeit on the pretext that, somehow, the Complaints Board was trying to take decisions in respect of the Committee or adjudicate on evidence relevant to the Committee's role. As we explain below, this is a further example of (to our eyes) a baffling inability of the Respondent, the Committee of Management, and its advisers to comprehend some basic principles of public law and governance.

(v) <u>The second hearing</u>

19. Before we turn to deal with the latter point, we should add some observations on matters that became apparent from the second hearing.

(a) The flawed approach to establishing facts

20. In an intervention during the course of the discussion, Ms. Ward revealed that when considering this matter originally, they proceeded on the basis that it would only be if there was direct documentary evidence of the request being made to the relevant official in the Department that it would constitute proof that it a request for a valuation had been made. As was pointed out to her (2 members of the second panel being experienced lawyers), this was a basic misunderstanding about how matters may be "proved" even in the context of legal proceedings, let alone for the purposes of administrative decision-making. Indeed, it was such a basic misunderstanding that whoever had given that advice or formulated that policy would not appear to have been competent.

21. Be that as it may, <u>if</u> that were the approach adopted - and adopted on the reconsideration after the hearing since the Respondent and Committee of Management have not conducted any hearings or received any further evidence other that the Report of the original Board - it would be unlawful. This is not least because, on the facts of the present case, it inevitably leads to the Committee of Management failing to take account of relevant considerations (i.e., material evidence). In any event, it would be irrational in the public law

sense (in that no competent or reasonable person properly directing themselves as to the law could have come to a conclusion that or introduced a policy that entitlement could only be proved by direct documentary evidence).

22. Further, even if the administrators and the Committee of Management have adopted the irrational approach outlined above in the case of Mr. Newman, that was not an approach that was applied to all persons in the position of Mr. Newman. As is recorded in the notes of the second hearing "*Mr. Pollock stated that whilst he could not comment on other cases, he was aware that oral confirmation had been accepted in the case of a staff member whose line manager was a member of the Committee of Management*." In other words, an oral confirmation by an employee to a line manager – which is exactly what Mr. Newman had done – was accepted simply because the line manager in the other case happened to be a member of the Committee of Management.

23. That is a prime example of "It's not what you know but who you know." It is inappropriate in modern administration or policy-making. It is (obviously) unfair and unlawful. It only serves to underline the arbitrary manner in which Mr. Newman's case has been handled. Along with the many other failings in the process to which we have drawn attention in this and the original Report, it illustrates why such a process must be transparent and fair, with proper information being made available to members, and made available for independent public scrutiny.

(b) The unwarranted speculation that Mr. Galvin was not telling the truth

24. The foregoing also leads into the speculation by Mr. Pollock that Mr. Galvin may not have been telling the truth in his written evidence. That is, with respect, wholly inappropriate. The Respondent and the Committee of Management have not held a hearing or received evidence from witnesses at any stage in this now protracted saga. Mr. Galvin is a senior public officer. He gave a witness statement that was provided to us at the first hearing. The Respondent – and the Committee of Management if it had chosen to play an active part in the first hearing – had the opportunity of requesting that Mr. Galvin attend the original hearing and to cross-examine him. They did not do so. It is not proper for public officials subsequently to cast doubt on his integrity after the event.

25. In any event, the first Complaints Board assessed Mr. Galvin's evidence in the light of all of the evidence that had been presented to us by both Mr. Newman and the Respondent. That evidence pointed (very) strongly to the fact that Mr. Galvin must have spoken to the relevant officials because he passed on accurate information to Mr. Newman about the policy that had only been adopted on 28 March 2018 and could only have come from those officials. As such, Mr. Pollock's speculation was ill-founded but the possibility that Mr. Galvin might not have accurately recalled events was considered by the first Board and discounted.

26. Further still, even if one assumes Mr. Pollock's speculation was well-founded, it is not clear how that would help the Respondent/Committee of Management. Mr. Newman did the right thing. Mr. Galvin was his line manager. Mr. Galvin was the appropriate representative of his Employer – i.e., the States. Although it would be a matter for further argument, *prima facie* we cannot see how or why, as a matter of principle, the (assumed) failure of Mr. Galvin as the appropriate representative of the Employer to make contact with the relevant official at the Department (of the same Employer) should, as a matter of principle, make any difference to Mr. Newman's entitlement or, indeed, to the

responsibility of the Employer (i.e. the States) to compensate him if he has suffered loss as a result of Mr. Galvin's (assumed) failure in his capacity as the appropriate representative of the Employer.

27. In any event, we cannot see how a policy that only allowed an assessment on the pre-May 2018 criteria where members had actually spoken about their case directly to the relevant official at the Department either personally or through their line manager could be lawful. Assume that Mr. Galvin did not speak to the official at the Department as Mr. Pollock speculates. He obviously obtained accurate information about the current policy from somewhere and then relayed that information to Mr. Newman. What principled difference is there between a line manager obtaining information directly from an official in relation to an individual case and a line manager obtaining information (perhaps from an earlier case) and relaying that accurately to the employee but without taking the unnecessary step of calling the official to speak to them about the individual case? As presently advised, we cannot see any.

(c) The flawed approach to the issue of the jurisdiction of the Complaints Board

28. The approach of the Respondent and the Committee of Management to the issue of the jurisdiction of the Complaints Board over the matters which were the subject of Mr. Newman's complaint is misconceived. We should not have to explain the reasons why this is the case to elected or appointed officials, senior public servants or public bodies. Unfortunately, it is apparent that we have to do so in the case of those involved in Mr. Newman's complaint. In summary:

    28.1. The Board has jurisdiction to determine its own jurisdiction. The contrary is unarguable. The original Board determined that it had jurisdiction and gave detailed reasons for that conclusion. That should have been the end of the matter.

    28.2. If the Respondent or the Committee of Management remained of the view that Board did not have jurisdiction, it / they should have sought an appropriate Declaration from the Royal Court in the exercise of its supervisory jurisdiction. Neither did so. In those circumstances, it is inappropriate for the Respondent and the Committee of Management to refuse to implement any findings and recommendations of the Board on the grounds that the Complaints Board did not have jurisdiction to hear the complaint and/or did not have "*jurisdiction over the Committee and its affairs*."

29. We will return to this in more detail below. For present purposes, it follows that the basis for the refusal to take the findings of the original Board as set out in the Minister and Mr. Pollock's letters of 6 and 5 May 2022 are flawed and unlawful.

(d) The suggestion that what was being sought was a special payment

30. As we have set out below, the original attempt by the Respondent to dismiss the findings of the original Board was set out in her report to the States on 8 June 2021. This was to the effect that the only way in which Mr. Newman could obtain a financial remedy was by way of a special payment but this was not permitted by the principles set out in the Public Finances Manual. This was repeated at the second hearing and, as a secondary argument, in the Minister's letter of 6 May 2022.

31. Either this is a fundamental misunderstanding of the position or was/is an attempt to deflect attention from the real issue in the case. It was also potentially misleading to the States. As would be apparent to almost anyone reading the findings in the original Report - and as should certainly be apparent from the discussions at the second hearing and in this Report - it entirely misses the point. As we set out in the original Report (see paragraph 7.10) and above, when one puts aside the other flaws in the process, the main issue in the case was a straightforward question of fact: if Mr. Galvin made the call in March/April 2018, Mr. Newman was entitled under the revised policy issued by the Respondent/Committee of Management to have his transfer payment assessed on the pre-May 2018 criteria. There is and was no issue of a special payment. It was simply about whether the policy that the Respondent had itself determined been applied properly. The unequivocal finding of the Complaints Board at the original hearing was that it had not. That was determined by our finding of fact that Mr. Galvin had made contact, as Mr. Newman and Mr. Galvin had said in their evidence. It followed inevitably that, under the Respondent's own revised policy, Mr. Newman was entitled to have his entitlement assessed on the pre-May 2018 criteria.

32. It really is that simple. If it is correct that senior officials in the Treasury and the Minister have not understood that point, then it is very worrying indeed. If they did understand it but nevertheless presented the report in the terms summarized above, that would have other implications which are not for us to comment upon.

(d) The misconceived rejection of the Board's findings and recommendations

33. The explanation that is now advanced by the Committee of Management for not taking account of our findings is equally misconceived. That explanation has already been referred to in summary above; the full explanation is fairly reflected in the following passages from Mr. Pollock's letter of 5 May 2022:

The Committee of Management has sought advice on matters arising in relation to Mr. Newman's complaint and the Panel's role in relation to the Committee of Management. Whilst we are advised that the Complaints Panel has no jurisdiction over the Committee and therefore its decision in relation to Mr. Newman's complaint, the Committee has, as a matter of professional courtesy, considered the Complaints Panel's findings and the requests outlined above.

In both instances, whilst there is no legal requirement for us to do so, we have convened a Working Group made up of a small number of Members of the Committee to consider the findings and then make a recommendation to the full Committee for discussion at a special meeting convened to discuss only the Complaints Panel's findings.

In summary, the Committee of Management, whilst it has the utmost respect for the Complaints Panel and the work it undertakes in respect of matters of public administration, has determined not to overturn its decision in respect of Mr. Newman's complaint.

We consider it important to protect the independence of the Committee and its functions from the Complaints Panel which does not have jurisdiction over the Committee and its affairs. The Committee cannot simply allow the Complaints Panel to take decisions in respect of the Committee or adjudicate on evidence relevant to the Committee's role. This applies not only to Mr. Newman's complaint but the precedent it creates for the role of the Panel in respect of the Committee and the PEPF should any future complaints arise.

We trust that the Panel will understand the Committee's position, notwithstanding the differing views of the evidence available in respect of Mr. Newman's transfer value request.

We respectfully confirm that we will not participate in any further hearings or engage further in the matters pertaining to this Complaint instigated by the Complaints Panel.

34. We have already commented on the erroneous approach to our jurisdiction over the matters raised by Mr. Newman earlier in this report. In short, whatever the contents of the undisclosed advice to which Mr. Pollock refers, if the Committee of Management wished to challenge the Complaints Board's finding that it had jurisdiction, it should have sought a declaration from the Royal Court to that effect. It has not done so. That should have been the end of the matter.

35. The suggestion that, somehow, the Complaints Board is trying to "*take decisions or adjudicate on evidence relevant to the Committee's role*" is, with respect, nonsense. Indeed, it is such nonsense, that it has left the three members of the second Complaints Board in a state of incredulity that it could have been made and deeply concerned about the quality of the advice that is apparently being given to the Committee of Management. We should not have to spell this out to those involved in the public sector and certainly not to those at the level of seniority who were involved in Mr. Newman's case; but, once again, it appears that we must do so.

36. The Complaints Board has a supervisory jurisdiction which is set out in Article 9 of the Law. It does not have power to "take decisions" in respect of matters which are for the Committee to decide. It does, however, have both jurisdiction and power to hear and receive evidence in relation to complaints which have been properly brought before it. That includes hearing and making findings of fact and law on evidence submitted to it, and to form conclusions as to whether the decision or process under scrutiny to see whether, in its opinion, the decision, act or omission in question, the relevant grounds in Article 9(2) being that the relevant matter:

(a) was contrary to law;

(b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;

(c) was based wholly or partly on a mistake of law or fact;

(d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or

(e) was contrary to the generally accepted principles of natural justice,

37. As will be apparent from even the briefest scrutiny of the above sub-paragraphs, our jurisdiction and power, unsurprisingly, is wide ranging. It expressly includes the power and duty of determining whether actions or decisions were wholly or partly based on mistakes of fact. It expressly includes the power and duty to determine whether the relevant decision or actions could not have been made/done by a reasonable body of persons after proper consideration of all the facts.

38. In the present case, the decision and process adopted fell foul of every sub-paragraph in Article 9. Indeed, it is a remarkable feature of the case that it has been consistently so incompetently handled. In summary:

38.1. It was contrary to law for multiple reasons;

38.2. On any view it was unjust and oppressive to Mr. Newman, something that was only reinforced by the confirmation of the arbitrary "it's who you know" policy about notifications that was adopted;

38.3. For reasons we have summarised, it was based on some fundamental misunderstandings of the law;

38.4. We remain of the view that the whole process, including the review undertaken after the second hearing, was contrary to the principles of natural justice – a conclusion that was only reinforced by the second hearing as we discuss below;

38.5. Critically, it was based on a mistake of fact;

38.6. Once that mistake of fact is corrected, the decision is and remains one of those exceptional cases where the decision and the subsequent refusal to revalue Mr. Newman's transfer payment on the basis of the pre-May 2018 assumptions was one which "*could not have been made by a reasonable body of persons after proper consideration of all the facts*". In other words, the decisions and actions of the Respondent and the Committee of Management are, in public law terms, perverse: in this exceptional case, there is only one conclusion to which the Respondent and the Committee of Management could have come once their mistake as to the facts was corrected. That is not the Complaints Board attempting to take decisions for the Committee, it is merely stating that, on the facts as found by the Board, there was only one decision that a body could rationally take when applying its own policy to Mr. Newman.

39. The Complaints Board does not have power to give orders or directions to the Respondent/Committee of Management. That is not our function under the Law as currently formulated. We discuss this further below. Even though our findings and recommendations are not binding on the Respondent/Committee of Management, their approach to our findings is flawed and contrary to Article 9(2) of the Law. In summary:

39.1. At no stage either before or after the original Report has the Respondent or Committee of Management held a hearing or sought to interview or take evidence from key witnesses nor has it established its own independent review system to do so. We explained that the failure to do this in relation to the original decision was a breach of Article 9(2)(e) of the Law in paragraph 7.13 of the first Report. There would be a breach of the same provision of the Law if and to the extent that any reconsideration of the case after the original Report or the second hearing was made on the basis that Mr. Galvin's evidence to us was not true. The failure to adopt such a process would, on the facts, be a breach of Article 9(2)(e): Mr. Newman had the right to address them directly on that issue and, as a matter of common fairness, it should have taken evidence from Mr. Galvin directly, putting to him the allegation that his evidence was wrong and/or that he was lying. Convening "*a Working Group made up of a small number of Members of the Committee to*

consider the findings and then make a recommendation to the full Committee at a special meeting convened to discuss only the Complaints Panel Findings" does not, in the circumstances of the present case, discharge the duty to act fairly and in accordance with the principles of natural justice if and to the extent that the reconsideration involved reviewing the relevant material and making a fresh decision to reject on the facts.

39.2. Having said that, despite general wording to the contrary in the Minister and Mr. Pollock's letters of 6 and 5 May 2022, there is no evidence that the "*Working Group made up of a small number of Members of the Committee*" or the full Committee of Management did actually give proper consideration to the findings in the original Report. Mr. Pollock's letter of 5 May 2022 gives no detail as to the consideration that was given. The expressed basis for not overturning the original decision is the one that we have already quoted namely, the misconceived jurisdictional challenge, with the "differing views" on the facts relegated to a subsidiary note:

We consider it important to protect the independence of the Committee and its functions from the Complaints Panel which does not have jurisdiction over the Committee and its affairs. The Committee cannot simply allow the Complaints Panel to take decisions in respect of the Committee or adjudicate on evidence relevant to the Committee's role. This applies not only to Mr. Newman's complaint but the precedent it creates for the role of the Panel in respect of the Committee and the PEPF should any future complaints arise.

We trust that the Panel will understand the Committee's position, notwithstanding the differing views of the evidence available in respect of Mr. Newman's transfer value request.

To that extent the reconsideration is flawed for failing to take account of relevant considerations namely the fact that the original Complaints Board held a detailed investigation into Mr. Newman's case, received and assessed relevant evidence including (but not limited to) the evidence on which the Committee of Management made its original decision, held a hearing at which the Respondent (and the Committee of Management if it had elected to take part) had the opportunity to present evidence and cross-examine witnesses, and made unequivocal findings of fact in favour of Mr. Newman.

39.3. Further, unless they had received some new evidence that undermined our unequivocal findings (which they have not), the "*Working Group made up of a small number of Members of the Committee*" or the full Committee of Management, properly directing themselves, could not rationally have come to the conclusion that their original view of the facts was correct. We considered the evidence on which they relied as part of the wider assessment of all of the (wider) evidence that was submitted to us at the original hearing. As we have now said repeatedly, the original panel was more than satisfied that Mr. Galvin made contact with the Department in late March/early April 2018 as he and Mr. Newman said. This was not a case where there was a difficult weighing exercise to be done and the scales were just tipped in favour of the complainant's version of events "on the balance of probabilities." The evidence was, in our judgement, clear. It led inexorably to the conclusion that Mr. Galvin made contact with the Department in late March or early April. We accepted that the telephone records that were

available did not show a call from Mr. Galvin's work number. That does not, however, alter the overwhelming conclusion that we reached in the light of all of the evidence available. That was reinforced by the fact that, as Mr. Chidlow for the Respondent at the original hearing accepted, there were flaws in the system for recording calls to the Department. This was recorded in paragraph 7.8 of the original Report:

We also note that the Department's process for logging calls was not ideal, with calls being logged manually. Mr. Newman had clearly spoken to the Pensions Team Leader on 21st May 2018 regarding the letter of authority, yet there was no record of contact with the Department until 29th May. There was, therefore, clear evidence that the system that was in place in March/April/May 2018 for logging calls was inadequate. Although we were told that the Department had asked JT for call logs and there was no record of Mr. Galvin calling during the relevant period, calls from, for example, a work telephone number were not the only way in which Mr. Galvin could have contacted the Department. On the evidence before us, we are not able to say how or when he did make that contact at the beginning of April, but we are satisfied that it did happen as described by him.

39.4. In the circumstances of the present case, from the Respondent/Committee of Management's perspective, the proceedings before and the findings of the original Complaints Board were not only relevant factors that they should have considered in any reconsideration of Mr. Newman's case, they were, in the circumstances of this particular case, very strong evidence that the crucial factual basis for Mr. Newman's claim to have his transfer payment valued on the pre-May 2018 criteria, had been made out. As we will discuss later, the constitutional balance that must apply in relations between bodies like ourselves and the public sector should have demanded that, in the absence of new evidence to undermine our findings (of which there was none), the Respondent/Committee of Management would accept our findings of fact. Even, however, putting that aside, we do not believe that a body properly directing themselves could rationally have come to the conclusion that Mr. Galvin did not make the relevant contact in late March / early April 2018: we carried out a much more detailed and robust exercise of gathering and reviewing the evidence than the Respondent/Committee of Management has done at any stage; we were under a statutory duty to assess whether, amongst other things, the original decision was premised on a mistake of fact; we heard live evidence; and the members of the Complaints Board had a skill set that was significantly better than any available to the Respondent/Committee of Management for assessing both written and oral evidence. In addition, the Committee of Management's original assessment of the facts was, if Ms. Ward's interjection in the second hearing is correct, based on an irrational and incorrect view of what was necessary to "prove" that such contact was made.

39.5. It follows in our judgement that the "*Working Group made up of a small number of Members of the Committee*" or the full Committee of Management could not rationally have upheld their original decision on the facts in Mr. Newman's case even putting aside the issue of the appropriate "constitutional balance" to be struck. That is true even if (contrary to our firm view) the Board does not have jurisdiction over

the present complaint. In that event, the matters set out in the preceding sub-paragraph would still be relevant considerations for a Committee of Management and would still lead to the same conclusion *on the facts*. It follows that, assuming we do have jurisdiction, if the Committee of Management's decision not to "*overturn its decision in respect of Mr. Newman's complaint*" was based on a disagreement on the facts or the suggestion that there was no new evidence available to them, the decision was at the very least irrational under Article 9(2)(d) of the Law. It seems highly likely that it was also premised on other mis-directions as to the law since that would be the only basis on which we can see that the Committee could have come to such a conclusion.

39.6. More likely, however is that, as Mr. Pollock's carefully crafted letter of 5 May 2022 suggests, the Committee of Management have simply rejected the findings of the original Report on the misconceived basis that we have already quoted, namely that they believed they had to "*protect the independence of the Committee and its functions from the Complaints Panel*" because, in their view, the Complaints Panel does not have jurisdiction to consider the complaint and, as such, they have simply refused to give any weight or recognition to our findings and recommendations and reflects the Respondent/Committee of Management's belief that it is above the Law, with there being no jurisdiction in any entity, whether ourselves or the Courts (in either a private law or public law action) to consider Mr. Newman's valid complaint. For the reasons we have explained at length, that decision is flawed on multiple levels and should not stand.

39.7. Even if, however, it was right that there is no jurisdiction in this Board, it does not detract from the fact that both the original decision and the reconsideration are riddled with errors with the result that Mr. Newman has been unjustly treated. All it would mean is that there was no remedy for a public servant such as Mr. Newman for the damage sustained by such arbitrary decision making by a body that is supposed to be looking after his interests. Whether that is how the States of Jersey wishes to conduct itself is not for us to decide.

(e) The rejection of the recommendation for transparency in decision making

40. Turning to more general matters, we note Mr. Pollock's strong disagreement with the finding in paragraph 7.2 of the original report:

As a preliminary matter, drawing on their combined experience in pensions matters and public administration, the Board expressed surprise that such a significant change to the pensions process could have been implemented without there having been a notice period communicated widely to the Fund members. It was also a matter of some concern that there were no written procedures or a Service Level Agreement which could be applied to valuations or indeed detail the procedure to be followed whenever that service was altered. The Board considered that there should be clear guidance provided to Members, outlining the difference in approach to active and inactive employees in respect of the service delivery, as this had been mentioned several times by the Head of Shared Services. Members should have a clear understanding of how their cases would be processed. In the present case, it was unjust and oppressive for the new policy to be introduced with immediate effect on 28 March 2018 without any prior notification to Members within the meaning of Section 9(b) of the Law.

41. We note Mr. Pollock's considerable experience and recognise that he is entitled to his opinion.

42. Having said that, we do not agree with Mr. Pollock's opinion. All members of the 2 Complaints Boards who have heard this matter remain of the view set out in paragraph 7.2 of the original Report. It is our very firm opinion that public sector employees who are members of the fund would expect - and are entitled in a modern progressive society - to the minimum procedural protections to which the original Board referred.

43. We would also note the 4 members of the Complaints Boards who have been involved in this matter also have between them considerable general experience in administrative law, human resources, complaints and public pensions: Mr. Greenwood (a member of the original panel) is a senior executive responsible for Risk Management at HSBC and, for many years, had been responsible for the customer complaints and the strategy relating to the proper handling of such complaints; Mr. Crill is a former senior partner in a local law firm has been the Chair of the Complaints Panel since 2014 and was, for example, a member of the Carswell Review Panel appointed to review the role of the Bailiff and Crown Officers in Jersey; Mr. Beirne is Headmaster and Chief Executive of Beaulieu Convent School, is an employer and, amongst many other appointments, is a Member of the Management Board of the Jersey Teachers' Superannuation Fund (i.e. the equivalent Board to the Committee of Management in Mr. Newman's case but with responsibility for teachers' pensions) and Deputy Chair of the Complaints Panel since 2014; Mr. Catchpole is a practising English QC who is a former Deputy High Court Judge in the Administrative Court and Queen's Bench Division and a former Crown Court Recorder who had also spent many years advising and acting on behalf of a wide range of public authorities in the UK and beyond in public law matters and public inquiries and has also been Deputy Chair of the Complaints Panel since 2014.

44. We therefore acknowledge the Minister's emphasis in her letter of 6 May 2022 on Mr. Pollock's "expert actuarial knowledge". We also agree that it was clear that Mr. Pollock has very considerable expert actuarial knowledge and that it was helpful to us for him to appear at the second hearing. We note, however, that it would have been more helpful if he/the Committee of Management had participated actively at the first hearing.

45. If, however, it is being suggested that Mr. Pollock's expert actuarial knowledge means that he is the only person qualified to express an opinion on the process that he and his colleagues adopted in Mr. Newman's case (or more generally as to the appropriate process that should be adopted), we respectfully disagree.

46. We also disagree, if it is being suggested, that the 2 Complaints Boards are or were not qualified to assess the process or express the views that they have; but whether we are correct in that conclusion is a matter for others to decide.

(f) The Respondent/Committee of Management's belief and contention that they are above the Law

47. The final area on which we would wish to report is the approach adopted by the Respondent and the Committee of Management to the rights and remedies of Mr. Newman. Although it took an inordinate amount of time and questioning finally to get the Respondent/Committee of Management and their legal advisers to confirm that this was their position, it was finally confirmed that the position being adopted was:

47.1. The Complaints Board had no jurisdiction to hear Mr. Newman's complaint;

47.2. Although not expressed with the clarity that one might have hoped for from a public body, it appears that it is contended that the Royal Court's supervisory jurisdiction would not cover Mr. Newman's complaint either, so that he could not seek judicial review. As has been recorded above, Ms. Roberts stated in relation to a potential application for judicial review:

Ms. Roberts stated that this would be open to question and a number of hurdles would have to be overcome. However, it was unhelpful to speculate about the precise grounds which Mr. Newman might seek to rely upon. On the basis of the information available Ms. Roberts questioned whether the case would be amenable to judicial review.

The reality is, however, that given the similarities between our jurisdiction and the supervisory jurisdiction of the Royal Court, and the authorities/arguments addressed by the Respondent to us at the first hearing to support the contention that the Complaints Board had no jurisdiction, it must logically follow that the same position would be adopted in relation to the jurisdiction of the Royal Court;

47.3. Mr. Newman does not have a private law cause of action. As recorded above:

Ms. Roberts stated that the view was that Mr. Newman did not have a private law cause of action…

… Ms. Roberts repeated that the view was that there was no basis for a private law cause of action.

48. On the basis of the Respondent/Committee of Management's view of life, therefore, Mr. Newman is left in the position of having no right to any independent complaints/review process and no legal right to challenge the decisions of the Respondent/Committee of Management arising out of their administration and management of the fund of which he is a member. That is despite the fact that the overwhelming conclusion on the facts of the present case is that every stage of the process, from the initial failure to consult through to the response to the second hearing before the Complaints Board is fundamentally flawed and wrong. But the position of the Respondent/Committee, apparently based on advice from senior public servants in the Treasury and Exchequer Department and lawyers, is that, no matter how arbitrary, discriminatory, unjust, unfair, irrational, perverse or premised on mistaken assumptions the process/policy/decision may be, there is no independent oversight of it and Mr. Newman has no remedy at all not least for the very significant financial loss that he contends he has suffered as a result.

49. In our collective and very strong view, that position is, wholly unacceptable in a modern democracy.

50. We will say again that it is our firm belief that, subject to obvious limitations in sensitive cases (such as those involving children or issues of national security), there is an overwhelming public interest in transparent, fair, and just public sector decision-making and for proper, public, independent oversight of processes and decisions that affect the rights and interests of both citizens and public sector employees.

51. As we set out in our first report, that intention was reflected in the enactment of the Law. It is expressly part of our function to provide some of that oversight.

It is what underlay the decision on jurisdiction in the first Report. In relation to public sector employees, we repeat paragraphs 6.23 and 6.24 of the first Report:

6.23 We would take some persuasion that public employees such as Mr. Newman should be left without any form of redress in such circumstances or that it was the intention of the States in enacting the Law to leave public bodies and servants charged with administering and making decisions in relation to the pensions of employees of the States to do so without being accountable to, it seems, anyone or to have their decisions and actions protected from public scrutiny by the Complaints Panel.

6.24 Naturally, if we have misunderstood the position, and the Committee of Management, the Chief Minister, Minister for Treasury and Resources and the Treasurer agree and accept that people in the position of Mr. Newman would have a private law cause of action for damages in the event that they established any one of the grounds listed in Section 9 of the Law in relation to the administration of their pension or any other private law cause of action, it would be of considerable benefit if they said so, publicly and unequivocally, identifying the tribunal or Court within which such claims can be brought. We recommend that any such unequivocal clarification is given by way of a formal public statement to the States.

52. We also have serious doubts as to whether the possible expansion of "the remit of the Channel Islands Financial Ombudsman" will completely allay our concerns:

52.1. First, that does not assist Mr. Newman nor deal with the flawed and unjust decision in his case;

52.2. Second, while the expertise of the Financial Ombudsman may well be helpful in appropriate cases, it seems unlikely that it would have a jurisdiction that, at least in principle, is as wide as that of the Complaints Panel or, indeed, the supervisory jurisdiction of the Royal Court;

52.3. Third, it is not clear what (if any) power the Financial Ombudsman will have to ensure that appropriate compensation is paid in cases where, like that of Mr. Newman, it is clear not only that the relevant process and decision were and remain fundamentally flawed, but also that the individual complainant has suffered significant loss and damage as a result of the unlawful actions of the Respondent/Committee of Management;

52.4. Fourth, the almost complete failure of the Respondent/Committee of Management to co-operate with us or to respect our findings and recommendations, coupled with what appears to be a reluctance to change decisions when challenged, does not leave us with any confidence that the Respondent or the Committee of Management will co-operate with or respect the investigations of another body which has no power to give them directions or order compensation or that they will implement the decisions or recommendations of such a body if they disagree with them. Certainly, the impression that we formed was that our adverse findings in the first report were taken personally by Mr. Pollock and Ms. Ward and led to an overly defensive position where, so certain were they that they were right, that they would not accept

even the possibility that they were wrong even in an extreme case such as the present where there were multiple, fundamental flaws in the processes and decisions that have been taken. In our opinion, there is no room for that mentality in a modern public administration;

52.5. Fifth, if, as appears to be the case, the Respondent and/or the Committee of Management and the public servants assisting / advising them are actively involved in the negotiation of the terms / limits of the Financial Ombudsman's role and their submission to the scrutiny of that body, we are not confident that it will result in effective, appropriate and transparent scrutiny of important decisions. It is clear from our experience that none of those involved welcome detailed or critical scrutiny of their actions and from the submissions made to us that the starting point should be that there is no aspect of the decision making process that should be subject to what is perceived to be interference from an outside body and that does not bode well for agreeing to subject themselves to the degree of scrutiny that is, in our view, appropriate for the public sector (as opposed to commercial entities) in the modern day.

53. Coupled with our experiences in other cases, the above strongly suggests to us that there is an institutional resistance to independent scrutiny, transparency and challenge to decisions public servants and bodies are making and we can see no reason why that will change simply because the entity with oversight of them changes from the present Complaints Panel to the Financial Ombudsman or, indeed, a general Ombudsman who is set to replace the Complaints Panel in due course.

54. That leads into a more general and deep-seated concern that the three of us, as the Chair and Deputy Chairs of the Complaints Panel have based on our experience in Mr. Newman's case and others that we have heard over the last 8 years or so. In the foreword to the Complaints Panel Report for 2020, Mr. Crill stated:

Once again, I feel obliged to report a perception by the Panel that it is not taken seriously by Ministers, that is to say that the findings of Complaints Panels - and by extension the Administrative Decisions (Review)(Jersey)Law 1982 - are not an integral part of the Island's administration and core in the continual improvement of service delivery to Islanders. This is evidenced by the persistent failure of some departments to adhere to timetables for submissions, by challenges to the jurisdiction of the Board, and the failure of Ministers to give due consideration to a Board's findings and/or recommendations.

In its report in relation to the establishment of a Jersey Public Service Ombudsman, the Jersey Law Commission referred to a "worrying pattern in relationships with Ministers, with many findings and recommendations rejected and an atmosphere of mutual distrust." It may be that if Ministers had been more willing to give proper and non-defensive consideration to certain of the Boards' findings, considerable Ministerial time and public expense could have been saved. The decisions in relation to the Alwitry and the foreshore complaints spring easily to mind.

The Panel has repeatedly and consistently stated that it sees its function as essentially constructive, seeking to work alongside the Island's administration, to make that administration more efficient and more understandable to its users, the general public. I have to say that I cannot see that being a view shared by Ministers. Ministers never

attend hearings to justify their decisions or support their officers, and in exceptional cases an Assistant Minister has appeared. Our hearings are few and far between, but are one of the rare opportunities members of the public have to speak directly to those making decisions which affect them directly.

The findings and recommendations of Complaints Boards not only serve to address an individual's concern over a decision affecting them directly and frequently to highlight inefficiency or inequity in a policy or process, but they are a clarion call to States Members to pick up where a Board has left off. By requiring a Minister to respond to a Board's findings in the Chamber and be subject to questions without notice, an opportunity arises for shortcomings highlighted by a Board's decision to be kept under scrutiny. States Members are therefore as essential a part of the complaints process as the Complaints Panel itself.

It was extremely disappointing that 2020 saw no progress made in relation to some historical complaints, in some cases years after the Board hearing at which the complaint was upheld. The Panel remains in contact with several complainants who continue to seek the redress recommended by Complaints Boards, ranging from compensation to a simple, but genuine, apology. That anyone should be waiting years for the resolution of their complaint, should be a matter of great concern to the Chief Minister, his Council of Ministers and to all States Members.

55. Mr. Newman's case provided a yet further, stark example of the failure of public servants (whether elected, employed or appointed) willingly to submit to independent scrutiny by the Complaints Panel in accordance with the Law or respect and implement its findings. Save for the personal appearance of the Minister at the second hearing, at every stage in the process, the Respondent and certainly the Committee of Management have sought ways of avoiding any independent scrutiny of their processes and decisions and have, in effect, simply ignored the Complaints Board's original findings and its attempts to encourage them to make the obvious and correct decision in relation to Mr. Newman at the second hearing.

56. Mr. Newman's case follows others in a similar mould, including where very senior Ministers and officials have been complicit in the refusal to implement the findings and recommendations of a Complaints Board, of which the Alwitry case is perhaps the most obvious. The Alwitry case provides a stark example of just how much time and public money can be wasted when a Minister refuses to accept or implement valid criticisms of themselves or their department in a timely way or at all. It, together with Mr. Newman's case and others that we could list, illustrates why it is in the public interest to have transparent decision making, with proper, independent scrutiny by an appropriate body.

57. Mr. Newman's case on its own illustrates why, in our opinion, policies, processes and decisions by public bodies, whether of the character of the Committee of Management or otherwise, must be subject to such scrutiny. It provides a sharp reminder, if one is required, why individuals like Mr. Newman cannot be left without independent oversight of decisions and actions that affect them. It should lead any sensible observer to conclude that people like Mr. Newman should not be left without any remedy where such decisions and actions are both legally and factually flawed. Whatever else, the fact that Mr. Newman is still without a remedy nearly 4 years after the erroneous valuation was made and some eighteen months after the first Report is a disgrace. The

fact that the Minister and the Chair of the Committee of Management are, at least publicly, unwilling to acknowledge that Mr. Newman has not been treated fairly or justly should be a matter of censure.

58. It will be apparent from what we have just said how seriously we regard the present apparent impasse between the public service (in Mr. Newman's case and more generally) and the Complaints Panel. As we have already indicated, we are driven to the conclusion that there is an inappropriate institutional culture that pervades much of the (senior) public service in Jersey, which is resistant to transparency, independent scrutiny, challenges, or even to the basic principle that public sector decision-making should be fair and just. We have been driven to the conclusion that much of the (senior) public service in Jersey regards the Complaints Panel at best as an irrelevance and at worst as "the enemy." That must be changed. It can, however, only be changed if those occupying senior positions in the public service (whether elected, employed or appointed) drive that change and modernisation of those attitudes.

59. It is our conclusion, based on our experience (underlined by Mr. Newman's case), that the constitutional balance that is required for proper scrutiny of the public sector is not functioning:

59.1. It is inevitable that there is a delicate balance that has to be struck – what we referred to as the constitutional balance in the discussions at the second hearing – between the public sector and those responsible for scrutinising or policing it. In the case of bodies such as the Complaints Panel (or indeed an Ombudsman or the Royal Court) that requires mutual respect and co-operation;

59.2. The public sector entity or officers under scrutiny should be open and co-operative with those charged with scrutinising their actions and should respect the findings and recommendation made;

59.3. There should be exceptions to the latter in an extreme case, for example, where the public entity/officers are advised by the Law Officers that they have no lawful power to implement the recommendation (although even that should be subject to potential challenge and scrutiny in the Royal Court);

59.4. The same would apply to the supervisory jurisdiction of the Royal Court but is particularly important where the statutory body charged with independent scrutiny has no power to direct the public body/officer to act in a particular way or to award compensation: that is the position of the Complaints Panel and would, on the basis of what we understand to be the current proposals, be the position of the paid Ombudsman who will in due course replace us.

60. The short point is, unless the Respondent to a complaint before us or before a future Ombudsman is proactive and open with us, and is prepared to implement our recommendations even if it does not like them, the system does not work. Conversely, the body charged with scrutiny has also to respect the fact that it is not the entity who is charged with exercising the duty, power or function that is under scrutiny and that it may well not have all of the information necessary to make criticisms or proposals for reform of policies or administration

61. That mutual respect co-operation is, however, very much lacking in Jersey. Our experience is that, while we frequently have words from Ministers and officials (as in the present case) assuring us that they are committed to independent

scrutiny and respect the work of the Complaints Panel, these are hollow, unmatched by the actions of the relevant public entity. Mr. Newman's case is a stark example of this:

61.1. At the 11th hour before the first hearing, the Respondent and the Committee of Management very belatedly challenged the jurisdiction of the Complaints Board. Those arguments were rejected in Section 6 of the original Report.

61.2. Notwithstanding the foregoing, the Committee of Management refused to participate in the hearing involving Mr. Newman. The first report set out some clear, unequivocal, and trenchant criticisms of the handling of Mr. Newman's case and explained why, on the facts, there was only one conclusion that could properly have been reached in his case. That was rejected. A letter from Mr. Pollock (via Ms. Ward) to Mr. Bell, the Treasurer of the States, dated 19 February 2021, was forwarded to us:

As you are aware, the Committee is advised that the Board does not have jurisdiction over decisions made by the Committee, although the position may be different in respect of the Treasury Department. It seems unlikely that the Committee and the Board will reach agreement on this matter.

However, given this complaint is against the Treasury Department and not the Committee, we thought it would be helpful for the Committee to confirm its position to you, so that you can take account of this in your response if needed.

Ultimately, the crux of Mr. Newman's complaint is evidential; it comes down to whether or not contact was made with the Treasury Department (through the Public Employees' Pension Team) in the relevant timeframe.

As part of our consideration of the Report (and given that the Committee is mentioned specifically), the Committee established a Complaints Working Group (made up of the Chairman, the Scheme Secretary and three Committee members). As a matter of good governance given the unusual circumstances of this situation, the Group reconsidered all of the available evidence and read the content of the Report in detail.

The outcome of the Working Group's review, which has been discussed with and approved by the Committee of Management at a special meeting, is that the Committee's decision in respect of the Stage 4 complaint is unchanged, principally because that no new or material evidence was brought to the Committee as part of the Report which would cause the Committee to alter its original decision.

As you are aware, the Committee has a duty to ensure that the PEPF is administered fairly and consistently for all of its membership and its duties are owed to the membership, not to Government. It would be unfair to the membership as a whole to pay additional benefits in respect of Mr. Newman in circumstances where there is no evidence, other than verbal assurances, that a request was made on his behalf in the relevant timeframe.

We note that in paragraphs 7.3 and 7.4 of the Report it is stated "The determining factor in Mr. Newman's case had been that the Department had no record of any phone calls relating to his case made before 29 May 2018 .... It was, however, clear to the Board that contact was made prior to this date." We are extremely surprised that such a conclusion was drawn by the Board based solely on the account of Mr. Newman and his line manager and where there is express evidence (in the form of the call logs provided to the Treasury Department) that no contact was made with the Public Employees' Pension Team in the relevant timeframe.

As a separate point, the Committee was concerned to see a considerable amount of factual inaccuracy in the Report. We have elected not to address those inaccuracies in this letter.

I trust that the Committee's position in this matter is clear.

61.3. In simple terms, therefore, the position was that (a) the Committee of Management repeated its erroneous assertion that the Complaints Board did not have jurisdiction to hear the matter despite our rulings, (b) it disagreed with the Complaints Board's findings of fact simply because they differed from the conclusions which had been reached by the Committee of Management and its advisers on a more limited review of the evidence, and (c) indicated that its own findings on the facts were influenced by the irrational view about how contentious matters can be demonstrated or proved. We noted the reference to the *"considerable amount of factual inaccuracy*" in the first Report. This has never been explained to us and we do not believe it to be true. We suspect it reflects the misunderstanding of the role of the Board which is to find facts where there are competing views of the same. That is what we did. Unfortunately, the facts as found were not to the liking of either (we infer from her interjections at the second hearing) Ms. Ward or the Committee of Management.

61.4. Mr. Pollock's letter was forwarded to us by Mr. Bell under cover of a letter dated 13 May 2021 – some 3 months after Mr. Pollock had written to him. While agreeing that a person in the position of Mr. Newman ought to have a right of independent appeal, Mr. Bell simply confirmed that "*the Committee are unable to make a higher payment to Mr. Newman for the reasons stated*" in Mr. Pollock's letter.

61.5. That response was unsatisfactory. The Deputy Greffier of the States sent a letter on behalf of Mr. Catchpole QC on 7 June 2021 which read, in so far as material, as follows:

The Deputy Chair of the Complaints Board has asked me to write to you in the following terms -

"The Deputy Chair notes the unhelpful response from the Committee of Management. The question is not whether the Committee of Management or its advisers can advise the complainant on his ability or otherwise to bring a private law claim in respect of his complaint relating to his transfer value. The question is whether the Committee of Management accepts that in principle a complainant in the position of Mr. Newman could challenge the assessment made in his case in a private law action and, if so, on what basis (i. e. what is the appropriate cause of action)? The question is asked because, in the light of the Committee of Management's position that the Complaints Board does not have jurisdiction over it, the Board is considering making a recommendation that the law should be amended to ensure that the Committee of Management is expressly made accountable in either public and/or private law proceedings for the decisions it makes. Whether such a recommendation is made and, if so, the terms of the recommendation, will be influenced by the answer to the question posed.

This matter has now dragged on long enough, please provide an answer to the question raised within seven calendar days, failing which we will convene a virtual hearing to which you and the Chair of the Committee of Management will be invited to explain the position in person".

61.6. The response from Mr. Bell again enclosed a letter from Mr. Pollock which, in effect, sought to avoid answering the question as to whether or not the Committee of Management accepted that Mr. Newman would have a private law right of action and suggesting that the question was referred to the Law Officers. As has been set out above, it was confirmed at the second hearing that the Respondent/Committee of Management's view is that there was no such private law right of action. Mr. Bell's covering letter dated 23 June 2021, went further and stated:

As for the question of justiciability I have been advised that this is ultimately a matter for the Royal Court. The PEDF Committee of Management will administer the scheme under whichever legal framework is determined to apply.

61.7. This was a somewhat bemusing statement since, as we have set out above, the logic of the Respondent/Committee of Management's submissions at the first hearing, confirmed in our view at the second hearing, was that they do not accept that the Royal Court would have jurisdiction over Mr. Newman's complaint in the exercise of the Court's supervisory jurisdiction. Further, to the extent the suggestion being made was that the question of whether the original Board was correct in determining that it had jurisdiction was a matter to be determined by the Royal Court, the Respondent/Committee of Management had not made any application to challenge our findings and would now have been out of time for so doing. As such, logically, if Mr. Bell's statement was correct, the PEDF Committee of Management should have been administering the scheme under the legal framework which included jurisdiction of the Complaints Panel to determine the issues in Mr. Newman's appeal. As we have set out above, however, contrary to Mr. Bell's statement, the Committee of Management was strenuously refusing to administer the scheme in accordance with that legal framework and continues to refuse to do so to this day.

61.8. As has been set out above, on 8 June 2021, the Minister presented her report to the States in response to the Complaints Board's original report. This was some 8 months after the original report was presented. As we have set out above, that report erroneously sought to present Mr. Newman's case being one which would constitute a Special Payment under the Public Finances Manual which the Treasurer of the States was not satisfied could lawfully be made.

61.9. Mr. Catchpole QC wrote to the Minister in the light of that report on 20 July 2021. We set out the material passages from that letter in full:

It is with much regret that I am compelled to write to you regarding the ongoing situation concerning Mr. Stuart Newman and his Public Employees Contributory Retirement Scheme (PECRS) evaluation.

As you may recall, a Complaints Board was convened late last year to hear a complaint by Mr. Newman, a former Firefighter who had received a reduced pension entitlement as a consequence of changes to the PECRS evaluation system. The Board upheld his complaint (R.139/2020 refers)

Since the publication of our Report, we have noted your published response and listened to the statement you made and the subsequent question period during the States Assembly meeting on 8 June 2021.

We have arrived at a situation which is, in our view, unacceptable. It appears to be the case that the PECRS Committee of Management and the Treasury and Resources Department -

- *dispute the jurisdiction of the Complaints Panel to have oversight in relation to the management and decisions taken in relation to a public sector pension fund,*
- *refuse to implement or act on the recommendations of the Complaints Panel notwithstanding some clear findings that Mr. Newman has valid grounds for complaint and has lost a significant sum of money as a result of the (in our judgement) unlawful decision taken,*
- *by inference would not accept that they are amendable to Judicial Review (because if they were, they would be subject to our jurisdiction) and*
- *now are either unable or unwilling to say whether a public employee who was a member of the fund and for whose benefit it should be acting even has the ability in principle (i.e. putting aside the merits of the individual case) to bring a private law action for appropriate redress.*

All of the foregoing is deeply unsatisfactory. It, in effect, means that decisions relating to the pension entitlement of a public sector employee is subject to literally no independent oversight whether that be by the Court (whether in in its public or private law jurisdiction) or the Complaints Board. That removes the ability for proper scrutiny of their decisions and potentially leaves people like Mr. Newman who have been seriously adversely affected by their unlawful decisions without a remedy.

We strongly recommend that this position is rectified to make it clear that the decisions and actions of the PECRS Committee of Management and those who act on their behalf are expressly made subject to the jurisdiction of the Court, that a private law statutory remedy is established to enable an aggrieved member to seek redress, and that they are expressly subject to the jurisdiction of the Complaints Panel (and, in due course, the Ombudsman).

We also seek from you confirmation that you are prepared to ensure that the findings and recommendations of the Board in relation to Mr. Newman will be implemented (including providing the appropriate financial redress that inevitably follows from our findings) and, if not, provide an explanation as to why not. We would also ask that you provide the justification for the Committee of Management and your Department acting contrary to those findings.

Whilst we are aware that the powers we have are very limited, we are very concerned that this matter will remain unresolved. We are able to respond formally to your response and intend to do so. That of course will make our feelings on this matter public, but it will not necessarily change the current impasse. We therefore write to you in the hope that you will respond to our aforementioned requests. A copy of this letter has also been sent to the Privileges and Procedures Committee coupled with an appeal for members of that Committee to consider taking action to ensure there is a satisfactory outcome, not just for Mr. Newman, but for other public sector employees who could find themselves in a similar situation if the existing system is not changed.

61.10. The Minister responded on 20 August 2021. She repeated the flawed reasoning that had been advanced previously and asserted that the matter was now closed:

I write in response to your letter dated 20 July 2021. The PEPF Committee of Management do not hold a belief that any additional payment is due and I have no evidence to go against the view of the PEPF Committee of Management. No new or material evidence has been provided to change the original decision and the Treasury are therefore unable to provide any financial redress.

It is regrettable that we are at this impasse. The Treasury and Exchequer Department have put forward their position on previous occasions and we believe that there is no further action that we can take on this matter.

Without any wish to be inflammatory, it remains a matter for Mr. Newman to take private law advice on the matter and to seek whatever legal remedy he/his advisers see fit. We are mindful that the Complaints Panel remains an impartial actor in such matters - it is neither an advocate for a complainant nor a defender of a public body. The Panel in turn will appreciate that any special payment that is not justifiable would be against the principles set out in the Public Finances Manual.

With regard to the oversight and independence of the complaints procedure for the public service pension schemes of the Government of Jersey, discussions have taken place with the Financial Services Department around plans to bring in legislation for the Channel Islands Financial Ombudsman to independently review complaints that have been through the internal complaints procedure. We very much hope that good progress will be made in respect of the legislative changes which will provide independent oversight of future scheme member complaints. As previously stated, this would be consistent with the approach taken in the UK through the use of the Pensions Ombudsman who reviews complaints that have been through an internal dispute resolution process.

In our view this brings the matter to a conclusion.

We note in passing that the letter was encouraging Mr. Newman to take independent legal advice about a private law claim whilst refusing to answer the direct question as to whether the Respondent accepted that, in principle, he had a private law right of action. We now know from the answers given at the second hearing that the Respondent's actual position is that Mr. Newman does not have a private law right of action. Why the Minister or the Committee of Management could not simply have said so in answer to Mr. Catchpole QC's questions is unexplained. It would have been far more straightforward for them simply to say that it was their position that Mr. Newman literally had no remedy available to him for the flawed decisions and processes that had been adopted in his case.

61.11. Mr. Catchpole QC did not find the Minister's answer satisfactory. On 25 November 2021, he wrote to the Minister in the following terms:

Thank you for your letter of 20 August 2021. My apologies for the delay in replying. I had not appreciated until recently that Mr. Newman had literally had no redress. I note that you have concluded that there is:

"... no evidence to go against the view of the PEDF Committee of Management. No new or material evidence has been provided to change the original decision and the Treasury are therefore unable to provide any financial redress."

I was surprised by that statement. I am enclosing a copy of the findings of the Board in relation to this matter in case you have not had the opportunity to review it personally. As you will appreciate, we conducted a hearing and received evidence from both parties. We concluded that, contrary to the conclusions of the Department, contact had been made by Mr. Newman's line manager before 29 May 2018. My colleague, Mr. Beirne, the other Deputy Chairman of the Complaints Panel stated in the Press Release

"It was clear to the Board that, contrary to the Department's conclusion, contact had been made prior to this date and Mr. Newman's account was entirely credible".

It seems to me, with respect, impossible to conclude that there is "no new or material evidence to change the original decision". It was concluded by a panel of three independent persons, following a detailed review of the evidence submitted by both parties, that the factual premise on which the Department's decision was made was misconceived. The position is, therefore, that you do have new and material evidence before you namely the evidence from Mr. Newman and his line manager and our findings which were unequivocal on this point. As far as I can see, without wishing to be inflammatory, your statement amounts to little more than saying that because the PEDF Committee of Management disagrees with the findings of the Board, you and it are going to ignore it. You will appreciate that I do not believe that is an appropriate manner for a Minister or Department to respond to a detailed investigation and finding of the Board (or any independent body with oversight over the decisions of public bodies).

As you will appreciate, your response does not provide a proper explanation for your decision nor does it provide any justification for the Committee of Management and your Department acting contrary to those findings, both of which were expressly requested in my letter. This matter, is therefore, not closed.

I repeat my observations in my letter of 20 July that we have arrived at a situation which is, in our view, unacceptable. It now appears to be confirmed that the PECRS Committee of Management and the Treasury and Resources Department and yourself-

- *dispute the jurisdiction of the Complaints Panel to have oversight in relation to the management and decisions taken in relation to a public sector pension fund,*
- *refuse to implement or act on the recommendations of the Complaints Panel notwithstanding some clear findings that Mr. Newman has valid grounds for complaint and has lost a significant sum of money as a result of the (in our judgement) unlawful decision taken,*
- *by inference would not accept that they are amendable to Judicial Review (because if they were, they would be subject to our jurisdiction) and*
- *now are either unable or unwilling to say whether a public employee who was a member of the fund and for whose benefit it should be acting even has the ability in principle (i.e., putting aside the merits of the individual case) to bring a private law action for appropriate redress.*

That position is deeply unsatisfactory and troubling. Although I note the indication that "discussions" have taken place with a view to giving the Channel Islands Financial Ombudsman jurisdiction to review complaints at some undetermined point in the future, that does not address the point of concern. What you are saying, in effect, is that at present decisions relating to the pension entitlement of a public sector employee is subject to literally no independent oversight whether that be by the Court (whether in in its public or private law jurisdiction) or the Complaints Board and that you are not prepared to abide by decisions and recommendations of the Complaints Board if you do not like them. That is certainly not the position that I believe should apply in Jersey and, if that remains your position, we will be recommending that urgent changes should be made to ensure the position is rectified.

I still struggle to believe, however, that a Minister or the relevant public officials genuinely believe that they are above both the law and public scrutiny in the manner which your response (both in the letter and generally) suggests. I would, therefore, wish to invite you personally to attend a public meeting before the Board at which you can

explain to us what steps you have taken to consider our findings and why, if it remains the case, you refuse to implement them. I will ask the Deputy Greffier to arrange appropriate dates.

At that hearing, and again without wishing to be inflammatory, I will expect an answer to the question in the final bullet point. This is not a request for you to tell Mr. Newman what sort of legal advice he should seek. It is a request for you to explain what (if any) legal redress (i.e., cause of action) a public employee who was a member of the fund in principle has ifs/he disagrees with a decision in relation to his/her pension entitlements.

My colleagues and I look forward to discussing the above matter with you in person in the near future.

61.12. The Minister did not respond to that letter until 31 January 2022. Her response took the matters no further forward and reiterated her position that an aggrieved employee should raise the grievance with the Committee of Management and that such an employee could take legal advice as to what "*additional avenues lie open to him/her*." The Minister asserted that she had no power over the Committee of Management and that the Treasury would not and could not make a special payment to Mr. Newman:

Thank you for your letter dated 25 November 2021.
I have arranged for a copy of the letter to be shared with the PEPF Committee of Management. I have also obtained further legal advice which reconfirms that I do not have powers of direction over the PEPF Committee of Management.
In relation to the question posed, my answer is as follows:

(1) An aggrieved public employee is free to raise such grievance with the Committee of Management;

(2) As previously explained, I have tasked officers to actively explore with the Channel Islands Financial Ombudsman ("CIFO") whether any such grievances/complaints may be capable of being considered by the CIFO in the future. I am hopeful that early steps can be made to progress this;

(3) Beyond this, an aggrieved public employee is free to take legal advice as to whether any additional avenues lie open to him/her;

(4) Your letter anticipates that a payment should be made by officers in the absence of an actionable cause of action. Any such payment would constitute a Special Payment for the purposes of the Public Finances Manual and may itself be unlawful and/or raise questions of regularity.

You have invited me to a public meeting before the Board to answer specific questions, however, my answers would not extend beyond the points made above.

The Minister's assertion that she had no power of direction over the Committee of Management therefore means that, on the Respondent's case, the Committee of Management is not subject to the jurisdiction of the Complaints Board, is not subject to the supervisory jurisdiction of the Royal Court, is not subject to any private law cause of action in the Royal Court or any other statutory body and is not subject to any direction by the Minister (or any other body). In other words, it leads to the conclusion that the States has created a body responsible for, amongst other things, the administration and valuation of pensions which is, in effect, a law unto itself, not subject to any outside scrutiny or power and not answerable to anyone, not even the members of the scheme on whose behalf it is supposedly operating or the States which created it.

61.13. The reaction of Mr. Catchpole QC and other members of the Board to the above was one of considerable concern at the positions taken by the Minister and the Committee of Management. Indeed, in relation to the Minister's letter, it brought to mind the words of the Law Lord, Lord Reid in Haughton versus Smith many years ago: "the law may sometimes be an ass but it cannot be so asinine as that." As such, the Board was determined to hear submissions and determine whether the position really was as the Minister asserted. That led to the second hearing which in turn resulted in this Report. The Deputy Greffier of the States wrote to the Minister on 14 February 2022 notifying her of the date and time of the second hearing and continuing:

The Deputy Chair of the Complaints Panel, Mr. Stuart Catchpole QC, who will again Chair the hearing, wishes to express his disquiet and deep concern at the way that this complaint has been addressed and it is with some regret that the Board has had to take this action to reconvene after the publication of its findings, which has not been necessary in any other case in recent memory. He has respectfully asked that you attend the reconvened meeting in person to make representations to the Board regarding the steps you have taken to consider the findings and to explain why you refuse to implement them.
The Chair wishes to emphasise that at the hearing he and the Board will expect an explanation as to what (if any) legal redress a public employee who was a member of the fund in principle has if he or she disagrees with a decision in relation to his/her pension entitlements. Following the hearing, the Board will consider whether to submit a further Report to the States on this matter.

As we have noted, the Minister did attend the hearing in person. That is something for which we were and are grateful.

61.14. The second hearing then led to the flawed "reconsideration" of Mr. Newman's case by the Working Group made up of an unspecified but small number of members of the Committee of Management to maintain their original, unlawful decision in Mr. Newman's case; a position that was supported by the Minister and the Committee of Management's statement that it felt "*it important to protect the independence of the Committee and its functions from the Complaints Panel*" and that "*we respectfully confirm that we will not participate in any further hearings or engage in further in the matters pertaining to this Complaint instigated by the Complaints Panel*".

62. What the above illustrates is the limits on the effectiveness of a body like the Complaints Board when faced with the refusal of a Minister, officials, and public bodies to give effect to its findings and recommendations. That is what we are facing in Jersey at present. We have no doubt that, unless there is a fundamental change in the attitude of senior members of the public sector towards independent oversight and scrutiny, any future replacement body without effective powers, whether that be an Ombudsman or some other body, will be faced with the same problem.

63. What it means for the present Complaints Board is that the system is not effective. While it enables complaints at least to be considered in public and brought to the attention of the States where appropriate, a complainant does not have an effective remedy where, as is frequently the case, the Respondent in question does not want to comply with our findings and recommendations. As

we said at the outset, that has led us to the position where, after 8 years of seeing this unacceptable behaviour, the three of us have been driven to consider whether we should resign our positions on the Panel. We have not done so precisely because that would leave people like Mr. Newman with no opportunity of raising legitimate complaints in public without embarking on expensive legal proceedings which they would have to fund themselves and at least exposing some of the fundamental issues that remain in the public service on this Island.

64. We do believe, however, that we have reached the point where the States has a choice, either:

64.1. The States should simply abolish the Complaints Panel forthwith and accept publicly that it is the policy of the States that administrative decisions should not be transparent and should not be subject to meaningful independent scrutiny; or

64.2. The States should take steps proactively and immediately to redress the constitutional imbalance and attitudes that are evident in the present system.

65. Further, even if the States opts for the latter, and continues with its currently stated intention to create a professional Ombudsman or other entity to replace the Complaints Panel, we would certainly recommend that consideration should be given to conferring on any replacement body to the Complaints Panel a wide jurisdiction covering all aspects of public sector activity (including, for the avoidance of doubt, pensions, and employment, quangos and state-owned corporate or other entities), meaningful powers to compel co-operation with investigations by the relevant supervisory body, coupled with the power to grant remedies in appropriate cases.

RECOMMENDATIONS

66. In the light of the above we make the following recommendations:

66.1. Insofar as Mr. Newman's complaint is concerned:

66.1.1. We recommend that the Treasury and the Committee of Management are directed to implement findings and recommendations of the Board in relation to Mr. Newman (including providing the appropriate financial redress that inevitably follows from our findings);

66.1.2. If that is not possible, we recommend that, by whatever means is lawful, the States provides Mr. Newman with appropriate financial redress for the manifest injustice to which he has been subjected. This would be an amount at least equivalent to the difference between the value of his transfer payment assessed on the erroneous basis of the post-May 2018 criteria and the value that it would have been had it been assessed on the correct basis, namely the pre-May 2018 criteria, together with an appropriate sum to reflect the fact he has improperly been kept out of money to which he is entitled.

66.2. More generally:

66.2.1. We recommend that a general direction is given to all Ministers, departments, civil servants and appointees to public offices or bodies established under Jersey law (i.e., including "quangos" and bodies corporate established under Jersey law and effectively under the control of the States) that the presumption is that their acts, omissions, processes, and decisions are subject to the jurisdiction of the Complaints Panel in accordance with the Law and any successor body. If it is felt that it is necessary to amend the Law in order to give effect to this, we recommend that the amendment is brought forward as a matter of urgency. We would imagine it would be a very straightforward amendment.

66.2.2. We recommend that complaints should not be divided up rigidly between different independent supervisory bodies at least as a matter of jurisdiction, particular where (as appears to be the case in relation to the discussions between the Treasury and the Channel Islands Financial Ombudsman), the terms of the jurisdiction of the supervisory body are apparently being negotiated by the public entity that will be subject to scrutiny. A more appropriate position would be to ensure that cases which are best heard by a specialist body are determined by them and that a body such as the Complaints Panel exercising a more general jurisdiction should not generally entertain complaints at least until that alternative remedy has been exhausted.

66.2.3. If, in an exceptional case, it is felt necessary, notwithstanding the presumption set out above, to dispute the jurisdiction of the Complaints Panel in an individual case, we recommend that a direction is given that the relevant Respondent should make that challenge immediately on receipt of notification of the relevant complaint or of the essential facts and matters that give rise to the objection to jurisdiction. It should never be appropriate to delay raising the challenge until late in the process as occurred in the present case.

66.2.4. Further, in a case where, following a challenge to its jurisdiction, a Complaints Board rejects the challenge and rules that it has jurisdiction, we recommend that a direction is given that the relevant Respondent must either accept the finding of the Complaints Board or itself challenge that finding by seeking a Declaration from the Royal Court in a claim for judicial review of the Complaints Board's decision. If it elects to seek judicial review, the relevant Respondent should only do so on the basis of a disclosed opinion from one of the Law Officers justifying the application and should pay

the entire costs of the judicial review proceedings (i.e., including that of the complainant as the only other interested party). Obviously, the Complaints Board would not be represented or appear at any such hearing.

66.2.5. We recommend that a policy should be introduced which provides expressly that all Ministers, departments, civil servants and appointees to public offices or bodies (i.e., including "quangos" and bodies corporate established under Jersey law and effectively under the control of the States) should co-operate fully and proactively with any investigation undertaken by the Complaints Board, including a transparent explanation of the relevant processes and full disclosure of any documentary evidence that may be relevant to the consideration of the individual complaint or any wider policy issues that may arise out of it. This should be a positive duty of co-operation and candour. If there are genuine reasons why disclosure should be limited (e.g., in sensitive cases involving children), these should be raised at the earliest possible stage with the Complaints Board heading the matter so that an appropriate procedure to determine the complaint can be determined.

66.2.6. We recommend that a policy and direction should be given to all Ministers, departments, civil servants and appointees to public offices or bodies referred to in para 61.2.5 that there is a strong presumption that a Respondent to a complaint will accept the findings of and implement forthwith the recommendations of a Complaints Board in an individual case. It is recognised that there may be cases where this is not possible or where it is felt there is a more effective manner in which to achieve the intent of a recommendation made in an individual case. In cases where the relevant Respondent believes that it cannot lawfully implement the recommendation (e.g. because it is *ultra vires* any power conferred on it), it should adopt the procedure set out above in relation to jurisdictional challenges, namely it should seek a Declaration from the Royal Court in a claim for judicial review of the Complaints Board's decision and pay all of the costs associated with that application, including that of the complainant. Any such application should be supported by a disclosed opinion from one of the Law Officers explaining the basis on which it is believed the relevant Respondent does not have power to implement the recommendation. In any other case, a detailed report should be provided both to the Complaints Board and to the States explaining why the findings and recommendations should not be implemented either at all or precisely in the manner set out by the Board in its original report. That may lead to further hearings before and reports to the PPC from the Complaints Board.

66.2.7. We recommend that a (very) senior official or group of officials are given responsibility for changing and modernising the attitudes of the public sector in Jersey towards transparent and good administration and the interaction with those charged with scrutinising their actions and decisions. This would be aimed at changing the attitudes that we have identified above. We have been deliberately vague in defining the terms of that recommendation because we recognise that it is for others to determine what is required in the interests of good, fair, and effective administration but if, as we believe, that includes a role for bodies such as the Complaints Panel, then it is clear that steps are urgently required to change what we perceive to be a widespread cultural resistance to independent oversight at the senior levels (elected, employed and appointed) in the public sector. Our collective experience also suggests that public administration generally will be significantly improved if such steps are taken.

66.3. We have also touched on the issue of compulsory powers being given to any independent entity charged with supervision of the public sector. We do not make any recommendation that such powers should be conferred on the present Complaints Panel. It is not for us to determine what powers we should be given. We do, however, recommend that further, detailed consideration is given to the question of whether it would be appropriate to confer on any entity that replaces us (whether that is an Ombudsman or some other body) a limited power to make compulsory orders, including to pay financial compensation. We can see the benefits of a system where, in a case such as Mr. Newman's, the independent body had power to order the public sector entity to pay compensation up to an amount capped at a relatively modest amount which the complainant was free to accept or reject; if it was accepted the Respondent would be bound to pay the amount (i.e. without any right of challenge) in full and final settlement of all claims that the complainant might have; if the complainant rejected the award, no money would be due from the Respondent and the complainant would have to pursue legal proceedings to obtain the desired remedy.

66.4. We (strongly) recommend in the case of the PECRS and equivalent schemes, that all members are given an express, statutory right to appeal any decisions to an independent body whether that is the Court or another body with power to make binding decisions, including quashing decisions and awarding compensation, interest, and costs. Given what we have seen in Mr. Newman's case, we have no faith that the scheme is being administered properly or that rational decisions are being made nor do we believe that the rights and interests of members will be adequately protected if matters are simply left to scrutiny by a body which does not have compulsory powers, whether that is ourselves, a future Ombudsman, or the Channel Islands Financial Services Ombudsman. That is not to say that there is no role for bodies such as ourselves or an Ombudsman. They/we can and should be able to

provide a relatively cost-effective way of trying to resolve a complaint. Mr. Newman's case teaches us, however, that any such system has to be underpinned by express obligations on the Respondent and Committee of Management to members of the scheme which are capable of being enforced by a private law right of action in the appropriate case. At the very least, given the attitude of the Respondent and the Committee of Management, the legislation should be amended to confirm what we believe to be obvious, namely that decisions and processes such as those in the present case are amenable to the supervisory jurisdiction of the Royal Court. No person is or should be above the law. That includes the Minister, the Respondent's officers, and the Committee of Management. The fact that none of the individuals in the present case appear to recognise that fundamental proposition should be a matter of both deep regret and profound concern.

Signed and dated by

G. Crill, Chair …….

Dated: ……

S. Catchpole Q.C., Deputy Chair* …….

Dated: ……

C. Beirne, Deputy Chair …….

Dated: ……

*It should be noted that Mr. Catchpole Q.C. chaired the two hearings in relation to this complaint.

Re-issue Note

This report has been re-issued to fix a number of grammatical and numbering errors in the main text.