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 9th December 2020
by the Privileges and Procedures Committee

STATES GREFFE

2020 R.139

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.

Deputy R. Labey of St. Helier
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

10th September 2020

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., Chairman
C. Beirne
D. Greenwood

Complainant –

S. Newman (via video link from South Africa)

Representative of the Treasury Minister –

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

States Greffe –

L.M. Hart, Deputy Greffier of the States
K.L. Slack, Clerk

The Hearing was held in public at 10.00 a.m. on 10th September 2020, in the Blampied Room, States Building.

1. Opening

1.1 The Chairman opened the hearing by introducing the members of the Board and outlining the process which would be followed. He explained that the hearing would be informal and that both parties would have the opportunity to be heard. As part of the hearing, he and Mr. Beirne (as the two Deputy Chairmen of the States of Jersey Complaints Panel) would determine whether the Board had the jurisdiction to hear the complaint, in accordance with the provisions of Article 4 of the Administrative Decisions (Review) (Jersey) Law 1982 ('the 1982 Law').

1.2 Mr. C. Beirne declared an interest to the extent that he was a member of the Committee of Management for the Jersey Teachers' Superannuation Fund, which had a link with the Common Investment Fund and, by extent, the Public Employees' Pension Fund ('PEPF') and that the daughter of Mr. Chidlow attended Beaulieu Convent School, of which he was the Headmaster. Neither party had any issue with Mr. Beirne participating in the hearing.

2. Jurisdiction

2.1 On 31st July 2020, Mrs. L.M. Hart, the Deputy Greffier of the States had written to Mr. G. Chidlow, Head of Shared Services, Treasury and Exchequer, to inform him that the Deputy Chairmen of the States of Jersey Complaints Panel had concluded that Mr. S. Newman's complaint justified review and notifying him of the date of the hearing. In response to this letter, on 25th August, the Chairman to the Committee of Management of the PEPF had written that –

> 'As the original complaint was based on the decision of the Committee of Management (the Governing Body of the Public Employees' Pension Fund) the subsequent review of that complaint by the States of Jersey Complaints Panel should be directed to the Committee … the member's referral of this matter to the [*States of Jersey Complaints*] Panel 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 Panel has no authority or jurisdiction to hear such an appeal.'

In a letter of the same date, the Treasurer of the States, as Administrator of the PEPF, had indicated that he concurred with the views expressed by the Chairman of the Committee of Management.

2.2 On 27th August, the Chair of the Board had sent an email message, via the Deputy Greffier, to the Department and the Committee of Management to the effect that the matter of jurisdiction would be considered at the hearing and that, if the objection by the Department was to be maintained, the Chair requested, as a minimum, the following –

- full copies of all relevant primary and secondary legislation, with the relevant sections highlighted;

- copies of any relevant legal decisions both for and against the Department's submissions;

- an explanation of which Department and Minister was responsible for the Decision in the Complainant's case and the policies and procedures set in relation to pension provisions. If the answer to that was that there was no such Department or Minister, a detailed explanation of how it could be said that a body deriving its powers from secondary legislation was not politically accountable;

- why the submissions contesting jurisdiction had been left until such a late stage in the process;

- submissions dealing with the question of whether the Department had consented to jurisdiction by participating in the process to date and not making the challenge at the earliest opportunity; and

- whether the Department / Committee accepted that the Complainant made a challenge by way of Judicial Review and, if he did, whether the Department / Committee would undertake not to object to any such challenge on the basis that it was brought out of time.

The Chair had also invited the Committee to make any submissions or to be represented at the hearing.

2.3 On 1st September 2020, the Treasurer of the States, as Administrator of the PEPF, had written to the Deputy Greffier, *inter alia* suggesting that it was accepted by the Complaints Board that the Committee of Management was neither a 'Minister', 'Department of the States' or 'any person acting on behalf of any such Minister or Department' (per Article 2 of the 1982 Law), which implied that the Board had no jurisdiction. A subsequent email message had been sent by the Treasurer on 4th September, in which a recent decision of the Supreme Court had been cited, namely *R v Secretary of State of Housing*. The Treasurer of the States suggested that the decision could be used to argue that the Committee of Management was not undertaking a function that would be performed by a public authority, but, rather, a financial services or pension provider.

2.4 The Chair asked the parties for their respective submissions in respect of jurisdiction, which he and Mr. Beirne would subsequently consider. The Complainant indicated that he would be disappointed if, at the last minute, it was decided that the Board did not have jurisdiction, but accepted whatever the Deputy Chairmen determined as the correct outcome. In his view, the Committee of Management was responsible to the States of Jersey in managing the pension fund and making decisions and he felt that body 'must be accountable to someone'. Mr. Chidlow stated that he had nothing further to add to the advice that he had seen.

3. Summary of the Complainant's case

3.1 The Board had been provided with a copy of the Complainant's written submission in advance of the hearing and he explained that it contained the majority of the points that he wished to make. He had joined the Airport Fire and Rescue Service in January 1990 and, having served for 28 years, had taken one year's sabbatical with effect from December 2017, in the mindset that, if it suited him, he would take early retirement. He had subsequently travelled out to South Africa to act as a carer for a close family member. In February 2018,

having spoken to a colleague who had withdrawn money from the PEPF to reinvest into a private pension scheme, he had made contact with Rossborough Financial Services Ltd., in order to seek pension advice and had subsequently emailed his line manager, Mr. Galvin, the Chief Fire Officer, Ports of Jersey, on 23rd February 2018, indicating that he would call him a few days later, because he wished to obtain a valuation of his pension. Mr. Newman informed the Board that he had never considered withdrawing from the fund until he had spoken to his colleague and, as a consequence of that conversation, believed that the money invested privately could provide him with a better pension, so wished to explore the possibility. Messrs. Newman and Galvin had subsequently spoken over the telephone and Mr. Newman had asked Mr. Galvin to obtain a Pension Transfer Valuation on his behalf, because it was difficult for him to do so, on the basis that he was in South Africa.

3.2 Mr. Newman informed the Board that a few weeks thereafter, his wife had joined him in South Africa to celebrate their wedding anniversary and had asked him what news he had received from Ports of Jersey in respect of his pension. This had prompted the Complainant to make further contact with Mr. Galvin, who had apologised that he had been busy and had not, as yet, had the opportunity to request a valuation, but would do so and would revert to Mr. Newman. Mr. Galvin had subsequently advised Mr. Newman that he had spoken with a lady at the Pensions Team in 'early April 2018' to enquire about the transfer out value for both Mr. Newman's pension and his own. That person had informed him that no valuations were being undertaken until 'post 15th or mid-May'. Mr. Newman indicated that he and Mr. Galvin had 'discussed them being snowed under' and had spoken again in the middle of May. On 21st May 2018, Mr. Galvin had contacted Mr. Newman to inform him that the Pensions Team Leader (PECRS) had advised that a letter of authority would be required for Mr. Galvin to make the request on the Complainant's behalf. Mr. Newman had made contact with the Pensions Team Leader and had emailed across a letter of authority that day.

3.3 Around 26th May 2018, the Complainant had returned to Jersey and had obtained his pension valuation, which had been calculated as at 13th June 2018, and had been significantly lower than that received by former colleagues, who had requested their valuations shortly before Mr. Newman had made the initial request in March. He described this as 'devastating' and had been deeply shocked. A representative from Alexander Forbes had subsequently approached the Pensions Team to request a valuation for Mr. Newman, but the outcome had been the same.

3.4 As a consequence, the Complainant had raised a grievance with the Pensions Team on 21st June 2018, writing -

> 'It would appear that the reason that I was not given a valuation when I requested one in March is that the scheme was going through a revaluation exercise. I believe my pension statement as of the 13th June is between 10-20% less than it would have been if I had been given my valuation in March. … Therefore, I believe I have been disadvantaged by not being given my statement when I requested it … Previous changes have always been subject to consultation, which this was not. Had I been made aware that the valuation methods were being reviewed, I would certainly have considered my financial position at that time.'

In the response from Mr. Chidlow, dated 22nd June 2018, it had been stated that the Committee of Management had decided to place all requests for valuations received in March 2018 on hold until 1st May 2018, because they did not wish for members of the scheme to receive 'inaccurate transfer quotations whilst the changes were being implemented' and he had explained that actuarial valuations could result in members' benefits both increasing and decreasing.

3.5 Mr. Newman informed the Board that whilst he could understand quarterly changes being implemented without notifying members, this change had been significant, reflected by the decision to suspend valuations for the first time. He indicated that the Committee of Management had been aware that the change would result in the loss of values for members and referenced the minutes from the Committee's meeting on 28th March 2018, in which it was noted that '… as the impact of the new factors resulted in a reduction in transfer values … those quotes for active members would not be completed until 1 May'.

3.6 Mr. Newman had consequently lodged a formal complaint with the Committee of Management on 1st July 2018 and had been advised that his - and a number of other complaints - were being escalated to Stage 4 under the complaints procedure of the PEPF. On 5th October, Mr. Chidlow had written to Mr. Newman –

> 'The Committee has reconsidered its decision on 28 March 2018 to suspend transfer value quotations for active members during the period between 28 March and 30 April 2018 (the Relevant Period) and has decided that requests made by active members during the Relevant Period should have been processed applying the actuarial factors applicable to transfers prior to 1 May 2018.
>
> In relation to your particular complaint, the Committee notes your comment that you requested a transfer value quotation before 1 May 2018 but the Administrator has no record of such a request. From the information reviewed, your request for a transfer value quotation was made to your employer on 21 May 2018 and was then communicated to the Administrator on 29 May 2018. Your request was therefore made <u>after</u> the Relevant Period and in particular after the introduction of new actuarial factors on 1 May 2018 which were implemented and need to be applied in accordance with the scheme Regulations. Accordingly the Committee has not upheld your complaint.'

3.7 Mr. Newman described the situation as 'unsatisfactory' and questioned how it could be fair that the Committee of Management was responsible for arbitrating its own decision. He had subsequently engaged a law firm, but to progress with litigation would have been expensive. Mr. Newman informed the Board that he was aware of several people who had been provided with retrospective valuations, despite being informed that they were not being undertaken during the 'relevant period'. He cited the case of an individual who had been discouraged from contacting the Pensions Team at that time, on the basis that valuations weren't being undertaken and was aware that that person had been provided with a retrospective valuation, without even having made a call. 'I am being obliged to meet a higher burden of proof than others', he suggested.

3.8 Mr. Newman stated that whilst he was unable to provide definitive evidence that Mr. Galvin had made the telephone call to the Pensions Team, he had no reason to doubt that it had occurred. 'I believe him, as I know him and his

integrity', he said. He queried why the Chief Fire Officer would have concocted a story, particularly as 'we weren't aware of valuation issues'. Moreover, Mr. Galvin had informed him that a letter of authority was required and he questioned where that information would have been obtained from, if contact had not been made with the Pensions Team.

3.9 Mr. Newman indicated that if he had been aware that the valuation process was being suspended, he would have made a formal request for a valuation. 'If you get a letter from pensions to say that if you apply now your pension will be greater than in a few months, you would take the money now', he stated. He emphasised to the Board that the impact of the actions of the Committee of Management had been 'detrimental' to him. He questioned how it could be said that he had been treated in a fair, reasonable and non-discriminatory way when the written evidence from Mr. Galvin had not resulted in him receiving a re-quote when others had received them, based on verbal evidence alone.

4. Summary of the Minister's Case

4.1 Mr. Chidlow informed the Board that, in attending the hearing, his role was to explain how the Treasury and Exchequer Department had administered the decisions of the Committee of Management, rather than to answer how that Committee had reached its decisions.

4.2 The submission prepared by Mr. Chidlow and circulated to the Board members in advance of the hearing, indicated that, in accordance with the provisions of Regulation 19(1) of the Public Employees (Pension Scheme) (Administration) (Jersey) Regulations 2015 ('the 2015 Regulations') the role of the Treasurer of the States was to administer the PEPF and to calculate the value of transfer payments using the relevant factors as supplied by the Actuary in accordance with Regulation 22(2) of the 2015 Regulations. The Committee of Management of the PEPF was required to instruct the Actuary to prepare an actuarial valuation of the fund under Regulation 3(1) of the 2015 Regulations. The Committee of Management of the PEPF comprised a Chair, 5 employer representatives, 4 member representatives, 2 pensioner representatives and one admitted employer representative.

4.3 The Actuary had undertaken a valuation of the scheme as at 31st December 2016, and had reported the results to the Committee of Management. The valuation had been signed by the Actuary on 23rd February 2018, and, thereafter, they had been required to update the factors for calculating transfers out of the scheme, to ensure that they continued to be cost neutral to the scheme, based on the most recent actuarial valuation assumptions. The policy for calculating transfers out of the PEPF was contained within the Funding Strategy Statement, which had been agreed by the Committee of Management in 2017.

4.4 At the meeting of the PEPF Committee of Management on 28th March 2018 (as referred to at paragraph 3.5 above), the decision had been taken that any new or outstanding transfer out quotes for active members of the Scheme would not be produced until 1st May 2018. On 12th April 2018, the Actuary had provided the Administrator (the Treasurer of the States) with the forms and factors for non-Club transfer calculations to be undertaken with effect from 1st May 2018. Transfers out, which had been calculated on or before 30th April 2018, were to be undertaken using the old factors. From 1st May 2018, the Pensions Team

had begun to process the transfer out quotes that had been put on hold on the instruction of the Committee of Management. Mr. Chidlow informed the Board that, as administrators, they had to 'abide by that decision, so stopped doing quotes for active members.' However, the Team had continued to log any requests for quotes. 'We have an admin system, so if someone phones, writes or sends an email it starts a workflow', Mr. Chidlow indicated.

.5 Under questioning from the Board, over the storage of telephone records, Mr. Chidlow subsequently clarified that when an individual called the Pensions Team and made a request, that was manually typed into the system. 'If it was a general query, perhaps not' he conceded. When asked what improvements had been identified since complaints had been made in June 2018, Mr. Chidlow informed the Board that all telephone calls were now automatically recorded.

4.6 In the middle of June, the Team had started to receive complaints from members in respect of the calculations of the transfers and the delays. These complaints had been taken through the following 4-stage process –

Stage 1 – complaint to the Pensions Team;

Stage 2 – complaint to the Head of Service responsible for the Pensions Team;

Stage 3 – complaint to the Scheme secretary; and

Stage 4 – complaint to the PEPF Committee of Management. This stage was final and binding.

4.7 At the September 2018 meeting of the Committee of Management, the Committee had reconsidered its decision not to perform any transfer out quotes for active members, received between 28th March and 30th April 2018, and had agreed that all members, who had requested a quote on, or before, 30th April would be provided with re-quotes, using the old factors and in line with the approach recommended by the Actuary. All members, who had been affected by the original decision (from March) had been written to by the Pensions Team, giving them 3 months to make the decision to accept the offer and then a further 3 months in which to leave employment in order to be able to take the transfer out of the Fund, with appropriate interest. The decision on whether to provide a re-quote, or not, had been made by the Chair of the Committee of Management and whilst some people had received them, others had not. 'We just took the instructions of the Chair of the Committee of Management', stated Mr. Chidlow.

4.8 The first record that the Pensions Team had of a transfer out quotation for the Complainant was on 29th May 2018 – after the cut-off date of 30th April – in an email from Mr. Galvin, which forwarded an email from Mr. Newman, dated 21st May 2018. It was acknowledged that Mr. Newman had complained to the Pensions Team in respect of the valuation and that this complaint had progressed through the PEPF Committee of Management 4-stage complaints process. In October 2018, Mr. Newman's financial advisor had sent the Pension Team email correspondence from Mr. Galvin, in which it was stated that he had called the Team in April 2018. The Pensions Team had, consequently, contacted Jersey Telecom, to request a record of all incoming calls made to the Team between 1st March 2018 and 30th September 2018 and there had been no record of Mr. Galvin having made a call during April 2018. The first recorded call had been made on 29th May.

4.9 It was submitted that the Treasury and Exchequer Department had undertaken its statutory duty in administering the Complainant's transfer out, in accordance with the policy set by the PEPF Committee of Management and the instructions provided by the Actuary. The Treasurer of the States could not require the Pensions Team to pay a different level of benefits from that required under Regulations, or determined by factors supplied by the Actuary. Mr. Newman's complaint had passed through the 4-stage process and it had been determined that there was no basis to make a payment to him of benefits based on the pre-1st May 2018 factors. That decision, made at the 4th stage, was final and binding.

4.10 The Board questioned what factors had been taken into consideration when deciding whether to provide a re-quote, when there was no evidence of a member having made contact (as in the case referred to by Mr. Newman at paragraph 3.7 above). Mr. Chidlow stated that each case would be assessed on its merits and would be determined according to the level of detail and evidence provided. Most had been undertaken as a consequence of the evidence on the administrative system, but a small number of requests had been placed on a case by case basis before the Chair of the Committee of Management. The Board suggested that Mr. Newman had written confirmation from a senior officer, who had been in service at the time, that he had made the phone call to the Pensions Team and that this should have been sufficient for him to have received a re-quote. Mr. Chidlow reiterated that there had been no evidence from Jersey Telecom of telephone contact until 29th May 2018, which had been after the cut-off date. When questioned, he confirmed that the Chair of the Committee of Management would have received Mr. Galvin's testimony when considering whether to authorise a re-quote. 'The Chair had all information available to them in respect of phone calls and emails. Everything was provided', he stated.

4.11 The Board asked Mr. Chidlow whether he believed that he had proved beyond all doubt that no telephone call had been made by Mr. Galvin. The latter was a senior officer, who had confirmed, in writing, that he had made the call to the Pensions Team in April and the Board queried why he would place himself in that position if he had not made the call. Mr. Chidlow responded that he had not made the decision not to provide a re-quote. He was confident that the Chair of the Committee of Management had been provided with all of the relevant information. 'We just administer the decisions of the Committee of Management', he said. Where there was evidence that someone had been discouraged from applying for a quote, consideration would have been given to the circumstances. Ultimately, many quotes did not translate into payments out of the fund and were requested for information purposes only. He informed the Board that there was no requirement under the 2015 Regulations to provide quotes for active members of the scheme.

4.12 The Board questioned whether all members had been notified of the decision taken by the PEPF Committee of Management in March 2018, to suspend the calculation of transfer values and if they had been made aware of the impact of that decision on the risk of not requesting a quote. Mr. Chidlow stated that there had been no general communication and that transfer out factors changed regularly. This particular change had arisen as a result of an actuarial valuation (in 2016), rather than a quarterly update and it was acknowledged that its impact was 'more significant'. However, 'sometimes changes work in one person's favour and not another', he said. He accepted that whilst the Committee of Management had not instructed the Pensions Team to advise the members of

the change, there could have been more communication to members to the effect that factors could result in changes to pension valuations.

4.13 'We have administered all transfer out quotes in line with the Committee of Management's instructions', he concluded.

5. Closing remarks from the Chairman

5.1 The Chairman thanked both parties for attending and for their input. He stated that a report of the hearing would be prepared in due course, which would be circulated to both parties for their feedback on the factual content. Thereafter, the Board's findings would be appended thereto.

6. Determination on Jurisdiction

6.1 In accordance with Article 3 of the Administrative Decisions (Review) (Jersey) Law 1982, the Chairman and Mr. Beirne (as the two Deputy Chairmen of the Complaints Panel) have considered the issue of jurisdiction as a threshold question – i.e. whether or not the present complaint, is or is not, within the jurisdiction of the current Board. This part of the Decision sets out their joint conclusions on the issue of jurisdiction.

6.2 Having carefully considered the submissions made, principally by the Respondents, Mr. Catchpole and Mr. Beirne concluded that the complaint was within the jurisdiction of the Board.

6.3 As a preliminary matter, we note that the jurisdictional objections were raised for the first time very late in the proceedings, many months after the complaint had first been made and referred to the Respondents. This is inappropriate. It should not happen in future cases unless there is some extremely good reason to justify the delay in raising the issue. In litigation generally, if a jurisdictional challenge is going to be made, it must be made promptly. The same is true for proceedings before a Board.

6.4 Any other procedure – and certainly challenges as late as the one made in the present case – risk unfairness to the complainant in an individual case who, as here, had been proceeding for a very considerable period of time on the basis that the merits of the complaint would be investigated in a public hearing, only then to be told at the eleventh hour that the very entity about which the complaint was being made was now objecting to that investigation proceeding. It also risks wasting cost (both to the public purse where civil servants have been involved in preparing for the hearing and legal costs in those cases where any of the parties are legally represented). Further, not every Board will be chaired by someone with legal experience and many complainants do not have the benefit of legal representation.

6.5 In future, therefore, any challenge on jurisdiction should be formulated and submitted to the Chairman of the Panel as soon as is reasonably possible after the papers are referred to the putative Respondent and should, as a minimum, contain a fair and balanced explanation of the relevant facts and copies of <u>all</u> relevant legislation and policies, together with any legal submissions, to enable

the Chairman or one of the Deputy Chairmen to make an informed decision on the issue in accordance with Article 4(a) of the Law.

6.6 We now turn to the question of jurisdiction in the present case.

6.7 The jurisdiction of a Jersey Complaints Panel and any Board constituted to determine a complaint derives solely from the Administrative Decisions (Review) (Jersey) Law 1982 ('the Law'). The provisions of the Law that are particularly relevant for present purposes are as follows:

> *2. Where any person (referred to in this Law as the "complainant") is aggrieved by any decision made, or any act done or omitted, relating to any matter of administration by any Minister or Department of the States or by any person acting on behalf of such Minister or Department, the person may apply to the Greffier to have the matter reviewed by a Board.*
>
> *…*
>
> *9. …*
>
> *(2) Where a Board after making enquiry as aforesaid is of opinion that the decision, act or omission which was the subject of the complaint –*
>
> *(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;*
>
> *the Board, in reporting its findings thereon to the Minister, Department or person concerned, shall request that Minister, Department or person to reconsider the same.*
>
> *…*
>
> *(8) In any case where a Board requested reconsideration of any matter, the Board may, if it considers its findings have been insufficiently considered or implemented, present a report to that effect to the Privileges and Procedures Committee.*
>
> *…*

> *11. The provisions of this Law shall be in addition to, and not in derogation of, any other remedy which may be available to a complainant.*

6.8 The policy of the Law is clear. It was enacted to provide a mechanism by which those aggrieved by, in simple terms, any matter of administration by a public authority could, in appropriate cases, have that decision investigated in public by an independent Tribunal comprised of individuals from the community. It provides for an open and transparent review, at no cost to the complainant, of the decisions, acts or inaction of those who are in the service of the public, which have adversely affected the complainant in question. Through the mechanism of the Complaints Panel's consideration of individual complaints, it also provides the opportunity for public scrutiny, consideration and recommendations by an independent body drawn from members of the community in Jersey. Importantly, the Complaints Panel has no power to grant financial or other relief, beyond reporting its findings to the public entity about whom a complaint has been made, to request a reconsideration of any matter, to report to the Privileges and Procedures Committee and to make recommendations in such reports on individual cases or more generally in its annual report to that Committee. This leaves the ultimate decision as to whether to give redress to a complainant in an individual case, to investigate or reform apparent examples of administration and practice which fall below the requisite standard, and whether or not to sanction any individuals or departments involved, with the elected members of the States and those in public service charged with responsibility for the same.

6.9 As will be apparent from that brief summary, the Jersey Complaints Panel is a relatively unique body. It is made up of volunteers from members of the community in Jersey. It is not exercising the powers of a Court or a Tribunal: our 'power' is simply to expose the administration in an appropriate case to public scrutiny, ensure that any failings on the part of the administration are made public but, ultimately, drawn to the attention of those who are democratically elected in Jersey to control and direct the administration of the Island. The fact that the Complaints Panel is not intended to be a substitute for a Court, or Tribunal, is reinforced by Article 11 of the Law, which expressly provides that the right of any complainant to invoke the jurisdiction of the Complaints Panel is in addition to, and not in derogation of, any other remedy which may be available to a complainant.

6.10 The jurisdiction of a Board is drawn widely. The reference to '*any Minister or Department of the States or by any person acting on behalf of such Minister or Department'* is a broad description which covers the decisions, actions or inactions of any person engaged in the public service. Although it appears to be suggested that the Board's jurisdiction to intervene in this (and other) cases is limited to those limited category of cases in which the supervisory jurisdiction of the Royal Court could be engaged (i.e. by an application for judicial review), that is incorrect. Had that been the intention of the States in enacting the Law, it would have said so. Such a limitation on jurisdiction is straightforward to formulate: to take but one example, in the UK Terrorism Act 2000, the Proscribed Organisations Appeal Commission has jurisdiction to hear appeals against a refusal to overturn the proscription of entities as terrorist organisations and provides that the '*Commission shall allow an appeal against a refusal to*

deproscribe … if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review'.

6.11 As will be apparent from the terms of the Law set out above, the States has not limited the jurisdiction of the Complaints Panel in such a way. It has done the opposite. That is evident from the fact that the grounds on which a Board may make recommendations is expressed in much wider terms than the grounds on which an application for judicial review might succeed. The grounds in Articles 9(2)(c) to (e) summarise the grounds on which an application for judicial review might historically succeed (certainly at the time the Law was originally enacted).

6.12 The grounds in Articles 9(2)(a) and (b) go wider than that.

6.13 The reference in Article 9(1)(a) as being 'contrary to law' must be a reference to law in the wider sense (i.e. to encompass private law issues) because otherwise the subsection would be otiose (since errors of law in the public law sense are covered by Articles 9(2)(c) to (e)).

6.14 The grounds in Article 9(2)(b) are deliberately framed to cover 'unfairness' in a more general sense, including where there has been injustice (by the standards of ordinary persons), oppression or discrimination including circumstances where the individual may have been acting lawfully in the sense that there was an underlying law or practice which they were following. Further, the concepts of 'unjust' and 'discrimination' in particular may be relevant to an application for judicial review, but they also cover matters which are covered by other enactments (for example, unfair dismissal and discrimination on the grounds of sex, age or race). They also afford a Board the opportunity to enquire into and make recommendations in relation to actions which appear to be unfair, or oppressive, or discriminatory, even if there is not public law or private law remedy available to the complainant. That is consistent with a clear public policy underlying the Law that the consequences of decisions, actions, or omissions by those in the service of the public should not *prima facie* be unfair, in the sense of being unjust, oppressive, or improperly discriminatory, whether that is in relation to issues which raise matters of public or private law, or more generally.

6.15 One would have thought that such a statement should be uncontroversial. If there are cases which cause unfairness/injustice or are oppressive or appear to discriminate against a citizen, or group of citizens, there must, at the very least, be a real public interest in having that decision scrutinised by an independent body and in public; and if that body finds that there has been such unfairness/injustice, oppression or discrimination, there must be real public interest in the public servant or Department responsible for it being required to reconsider it or to justify it, this time under the particular scrutiny of the public and the States. That underlines the unique status of the Complaints Board to which we have referred above: we cannot change the decision or substitute our decision for that of the public service or Department in question; all we can do is identify failings where we conclude that they have occurred, require those responsible for making the decision or taking the action to rethink it or justify themselves in public and/or before the States and make observations and recommendations to the Privileges and Procedures Committee about matters that have come to our attention which they, or other appropriate public servants, may wish to investigate or change.

6.16 We should, however, record our concern at what is, in our view, a recent tendency of some public servants and Departments to avoid public scrutiny of their actions by the Complaints Panel. This is not the only case where issues of jurisdiction have been (belatedly) raised, or by not fully engaging with the process once a complaint has been referred for consideration by a Board. With respect, such attempts should stop: if the States wishes to limit the jurisdiction of the Complaints Panel, it should change the Law accordingly and explain in public why it is opting for less transparency and public scrutiny of the public service in Jersey; unless and until that happens, those charged with the administration of the Island who are appointed by the States should be prepared to have their decisions considered by an independent body, in public and should co-operate fully with that process. That should, we would expect, promote best practice in administration and the public service rather than hinder it; and will certainly give the public greater confidence in the public administration in Jersey more generally.

6.17 Our attention was drawn by the Department to a UK Supreme Court case, R (on the application of Palestine Solidarity Campaign Ltd and another) (Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent) [2020] UKSC 16. The issue in that case is succinctly summarised in the opinion of Lord Wilson at paragraph 1 of the Judgement:

> *This appeal concerns the type of investments which those who administer the local government pension scheme are permitted to make or to continue to hold. More particularly, it concerns the breadth of the ethical investments which they are permitted to make or to continue to hold. By an ethical investment, I mean an investment made not, or not entirely, for commercial reasons but in the belief that social, environmental, political or moral considerations make it, or also make it, appropriate. Parliament has conferred on the respondent, the Secretary of State for Housing, Communities and Local Government ("the Secretary of State"), the power to issue guidance in relation to some of the functions of the administrators of the scheme, in accordance with which they are required to act. The issue arises out of two passages in the guidance which he has issued to them in relation to their making or continuing to hold ethical investments. By the second passage, which, as I will show, covers the ground covered by the first and indeed goes further, the Secretary of State provides that they "[s]hould not pursue policies that are contrary to UK foreign policy or UK defence policy". The claim is that the issue of that guidance was unlawful. It was lawful only if it fell within the power conferred by Parliament on the Secretary of State. The issue therefore requires the court to analyse the scope of the power. Pursuant to the decision of the House of Lords in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, the court must analyse the power by construing the words by which it was conferred on him in their context. From the words in their context Parliament's purpose in conferring the power can be identified; and the purpose will illumine its scope.*

6.18 The case was, therefore, concerned with the extent to which the Secretary of State could lawfully limit the power of another body to make investments on the basis of non-financial considerations and included consideration of the Law Commission guidance on such cases.

6.19 In the course of their speeches, members of the Court made observations as to the nature of the investment process and the functions of administrators of the scheme. The Court was split. The majority (Lord Wilson, Lady Hale and Lord Carnwarth) allowed the appeal. The following passages from the opinions of Lord Wilson and Lord Carnwarth illustrate the reasoning of the majority and the relevance of the nature of the functions of the administrators to their reasoning:

6.19.1 Lord Wilson:

> *30. In my view there has been a misconception on the part of the Secretary of State which probably emboldened him to exceed his powers in issuing guidance which included the two passages under challenge. The misconception relates both to the functions of scheme administrators in relation to investment decisions and, linked to their functions, to the identity of those to whom the funds should properly be regarded as belonging. As the Law Commission observed, administrators of local government schemes have duties which, at a practical level, are similar to those of trustees and they consider themselves to be quasi-trustees who should act in the best interests of their members. The view, superficial at best, that the administrators are part of the machinery of the state, and are discharging conventional local government functions, fails to recognise that crucial dimension of their role. And it is equally misleading to claim that pension contributions to the scheme are ultimately funded by the taxpayer. As Sir Nicolas Browne-Wilkinson VC said in Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589, 597:*
>
> > *"Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases ... membership of the pension scheme is a requirement of employment. In contributory schemes ... the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty."*
>
> *The contributions of the employees into the scheme are deducted from their income. The contributions of the employers are made in consideration of the work done by their employees and so represent another element of their overall remuneration. The fund represents their money. With respect to Mr Milford, it is not public money.*
>
> *31. Irrespective of whether the misconception to which I have referred played a part in leading the Secretary of State to*

include in the guidance the two passages under challenge, I conclude that his inclusion of them went beyond his powers. HOW does not include WHAT. Power to direct HOW administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct (in this case for entirely extraneous reasons) WHAT investments they should not make.

6.19.2 Lord Carnwarth:

41. I agree with Lady Arden and Lord Sales (para 86) that the scope of the guidance (under Schedule 3, paragraph 12 and regulation 7(1)) cannot be necessarily confined to purely procedural or operational matters, but I do not understand that to be the intended effect of Lord Wilson's words. In particular there is no reason why the guidance should not extend to guidance on the formulation of the investment strategy, including the social and other matters appropriate to be taken into account under regulation 7(e). However, I cannot agree that this opens the door, as they seem to suggest, to "the delineation of the functions of central government in relation to the fund", if by that they imply the broadening of the role of central government to include the imposition of its own policy preferences. In my view it is unhelpful to observe, as they do (paras 78, 87), that such a pension scheme is "liable to be identified with the British state" or that the administering authority is "part of the machinery of the state". The fact that the authority may for certain purposes be seen as a state agency tells one nothing about the legal powers and constraints under which it operates. Nor does it give the Secretary of State any decision-making role beyond that express or implicit in the relevant statutory framework.

42. Any guidance must respect the primary responsibility of the statutory authorities as "quasi-trustees" of the fund, as Lord Wilson puts it (para 12, echoing the words of the Law Commission). That the primary responsibility rests with the authorities is emphasised by the guidance itself. As it says in the Foreword:

> *"One of the main aims of the new investment regulations is to transfer investment decisions and their consideration more fully to administering authorities within new prudential framework … The Secretary of State's power of intervention does not interfere with the duty of elected members under general public law principles to make investment decisions in the best long-term interest of scheme beneficiaries and taxpayers."*

Responsibility for investment decisions thus rests with the administering authorities.

43. The same must be true of policy choices made under regulation 7(e). As Lord Wilson says (para 17) the guidance in that respect follows the approach of the Law Commission's report (Law Com No 350). That report in turn may be seen as having settled a long-running debate as to the extent to which pension trustees could take account of non-financial factors, dating back to cases such as Cowan v Scargill [1985] Ch 270 (see for example Lord Nicholls Trustees and their Broader Community: where Duty. Morality and Ethics Converge (1996) Australian Law Journal Vol 70, p 206). There appears now to be general acceptance that the criteria proposed by the Law Commission are lawful and appropriate. I agree. Thus administering authorities may take non-financial considerations into account -

> *"… provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision."*

These are judgements to be made by the administering authority, not the Secretary of State. The attempt of the Secretary of State to impose policy choices was objectionable, not so much because they were not "pensions purposes" (in the judge's words - see above), but because they were choices to be made by the authorities, not by central government.

44. In this respect I agree with the submissions of Mr Giffin QC for the appellants:

> *"What the Secretary of State sought to do in the guidance was to promote the government's own wider political approach, by insisting that, in two particular contexts related to foreign affairs and to defence, administering authorities could not refrain from making particular investments on non-financial grounds, regardless of the views held by the scheme members.*
>
> *The analogy drawn by the Court of Appeal between the basis upon which the administering authority may properly act, and the purpose for which the Secretary of State may properly issue guidance, was therefore founded upon a misconception of the administering authority's position in law. Whilst the Secretary of State was entitled to give guidance to authorities about how to formulate investment policies consistently with their wider fiduciary duties, he was not entitled to use the guidance-giving power, conferred by the Investment Regulations, to make authorities give effect to the Secretary of State's own policies in preference*

> *to those which they themselves thought it right to adopt in fulfilment of their fiduciary duties."*
>
> *45. For these reasons I also would allow the appeal and restore the order of the judge.*

6.20 Interesting though that case may be, it is irrelevant to the question of the jurisdiction of a Board in Jersey in the present case. It was concerned with an attempt by the Secretary of State to introduce policies which limited the power of the body entrusted with responsibility for developing policies and criteria for a public employees pension fund in the UK to invest in certain areas which were deemed to be unacceptable to the then government. The question was whether the Secretary of State had the power to give directions as to the *investment* decisions to be made by that body. The majority of the Supreme Court held that the Secretary of State could not lawfully limit the remit of the investment body in that way. It is correct that part of the rationale for that decision was that the body was required to approach the question of formulation of investment policy in a manner akin to those making similar decisions in the private sector rather than in accordance with the political policies or wishes of the government in power at any given time. That has nothing to do, however, with the powers, duties, or obligations of the Committee of Management, which is established under Jersey Law. It has still less to do with the jurisdiction of the Complaints Panel in Jersey.

6.21 Further, if and to the extent it is being suggested that, in the UK, the Committee of Management of the funds from a public employees' pension fund are or are not, at least in relation to their investment decisions or the formulation of investment policy and strategy, susceptible to judicial review because they are exercising powers which are more akin to a private law investment manager or trustee, we make no decision nor observation. Such cases are, however, irrelevant to the present complaint. The present complaint is not about an investment decision by the Committee of Management. It is a complaint about the way in which the scheme was administered and applied to one of its members. That seems to us to be a matter which is expressly covered by Article 2 of the Law.

6.22 For the reasons we have set out in this section, our conclusion is that, in principle, a Board has jurisdiction in relation to the decisions, acts and omissions of the Committee of Management and those charged with administration of the pension scheme. Our jurisdiction in relation to the latter is clear. It is not necessary to decide the precise ambit of the jurisdiction in relation to the Committee of Management, but it is correct to record that we can see that there may be certain areas where the question of a Board's jurisdiction may be more debateable, for example on the question of whether or not to make a particular investment, but that is not what is in issue in this case. Although this case does, to some degree, involve consideration of the procedure adopted in relation to evaluation of entitlements in late March 2018 following the decision of the Committee of Management, the primary claim relates to the alleged failure properly and fairly to apply to Mr. Newman's case the revised policy decided upon in September 2018 which, in our view, clearly falls within Article 2 of the Law. Further, the processes and procedures, by which decisions are made, the policies adopted and the consideration and evaluation of members' entitlements, including by the Committee of Management, are, by way of non-exhaustive examples, all matters which would seem to us to fall

within the ambit of Article 2 of the Law. As set out above, a Board's jurisdiction is cast in wide terms and for good reason. Indeed, as we understood the Respondent's case, it was to the effect that Mr. Newman has no remedy available to him in the present case: on the Respondent's case, the matters about which he complains would not have been matters that could have been raised in an application for judicial review; and it was implicit in the case as advanced before us that there could be no private law remedy (whether for breach of contract, negligence or breach of fiduciary duty) since the civil servants and Chairman of the Committee whose actions are under scrutiny were, on the Respondent's case, simply applying a policy set by the Committee (which cannot be challenged and must therefore be lawful).

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 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.

6.25 It will be clear from what we have said already, however, in the present case, we have concluded that the Board has jurisdiction to consider the complaint including, to the extent necessary, in relation to policy decisions about which requests for evaluation of entitlement were to be addressed in the period March to October 2018, including decisions, acts and omissions by the Committee of Management. Such cases concern complaints by persons aggrieved by things done or omitted to be done in the administration of the Public Employees Pension Scheme established by the States pursuant to the Public Employees (Pensions) Law 2014, with the Committee of Management being established under the Public Employees (Pension Scheme) (Administration) (Jersey) Regulations 2015.

6.26 Even a cursory review of the latter reveals that the Committee of Management derives all of its powers relating to the administration of the scheme from primary or secondary legislation, its principal decisions are subject to the approval of the Chief Minister or the Minister for Treasury and Resources, its budget is subject to approval by the Minister for Treasury and Resources and the duty of the Committee of Management to set out the policies and principles governing the Committee's decisions in relation to assets of the fund derives solely from subordinate legislation. Further, the duty on the Committee of Management to review its statement of investment principles annually and '*to make such revisions as are appropriate following a material change in its policies and principles in relation to any of the matters contained in the*

statement' derives solely from Regulation 17(3), with such reviews and revisions being undertaken in consultation with the Treasurer, a public official and, although it is required to publish its investment principles and any revisions thereto, it can only do so with the approval of the Minister for Treasury and Resources. Those are classically public law functions which would fall within Article 2 of the Law.

6.27 Further, Part 3 of the Public Employees (Pension Scheme) (Administration) (Jersey) Regulations 2015 provides detailed provisions for the 'administration' of the schemes by, in so far as relevant to the present case, the Treasurer – i.e. the Respondent to the present complaint. In our judgement, it cannot sensibly be contended that the 'administration' that is expressly dealt with under that part of the Regulations somehow falls outside the scope of the phrase '*relating to any matter of administration'* for the purposes of Section 2 of the Law: it clearly and unarguably does fall within our jurisdiction. Since the principal focus of the present complaint is on the administration of the scheme in relation to Mr. Newman, it follows that the Board has jurisdiction to entertain the key elements of the complaint even if we were wrong in our conclusion that our jurisdiction extends to the decisions, acts and inactions of the Committee of Management.

7. Findings

7.1 The Deputy Chairmen, having unanimously decided that there is jurisdiction for a Board to consider the complaint raised by Mr. Newman as a preliminary matter, the constituted Board proceeded to consider the substance of the complaint made by Mr. Newman.

7.2 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 28th March 2018 without any prior notification to Members within the meaning of Article 9(2)(b) of the Law.

7.3 The Board recognised that there were several facets to this case. There were concerns regarding the way in which the decision had been determined and the basis for that decision. 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 29th May 2018.

7.4 It was, however, clear to the Board that contact was made prior to this date. Mr. Newman's account was entirely credible. The Board noted that Mr. Newman had represented himself before the Board and had not had the benefit of legal advice. The result was, as is often the case, an unvarnished and clearly true

account of events. That account is set out in paragraph 3.2 above. In summary, he explained that he had initially made contact with Mr. Galvin at the end of February 2018. He was prompted to telephone him again when his wife came to visit him in South Africa to celebrate their wedding anniversary and asked him whether he had heard back from Mr. Galvin. Given the fact that the contact resulted from Mrs Newman's visit to South Africa, he was able to identify the time at which he had had the conversation with Mr. Galvin with some precision – it was in the second half of March 2018. His was the type of oral testimony that was compelling: he was detailed, candid and the fact that the events in question were linked to memorable personal events (for example, his wife travelling to South Africa to celebrate their wedding anniversary and prompting the follow up call to Mr. Galvin) reinforced our conclusion that it was reliable. We have no hesitation in accepting his evidence as a true and accurate statement of what happened.

7.5 Mr. Newman explained that when he telephoned Mr. Galvin at that time, Mr. Galvin apologised, saying that he had not dealt with the matter but would get on to it. Mr. Galvin then telephoned Mr. Newman back within a week. That is important to note: it was Mr. Galvin who made the follow up call. During that call, Mr. Galvin relayed the information to Mr. Newman that valuations were not being given until mid-May. As such, Mr. Newman decided to leave the matter until he returned to Jersey in mid-May 2018. As is apparent from the documentary record summarised in Section 3 above, that is consistent with Mr. Newman's actions: almost as soon as he returned to Jersey in mid-May 2018, he obtained a valuation of his entitlement.

7.6 What is also important to note is that, at the time of the discussions between Mr. Galvin and Mr. Newman, it was not publicly stated that new valuations were not being accepted. The decision to introduce the policy was only made on 28th March 2018. It follows that Mr. Galvin could only have obtained that knowledge at the beginning of April from someone with the relevant responsibility at the Department. In other words, Mr. Galvin must have been advised by someone about the suspension of the evaluations process. This was consistent with the correspondence presented.

7.7 Furthermore, Mr. Galvin, who occupied a responsible and respected role, had provided written confirmation that he had contacted the Department in early April 2018 and had been advised that no evaluations were being conducted until the middle of May. It was unclear to the Board what motive Mr. Galvin had to have deliberately sought to mislead anyone in relation to this matter. All of the evidence pointed to the opposite conclusion. Mr. Galvin appears to have been discharging his duty as a responsible line manager. It is incredible (in the literal sense of the word) that he would have telephoned Mr. Newman back simply to relay a story that he had made up about what he had been told about the evaluations process; it is even more incredible (in the literal sense of the word) if that made-up story happened, by complete chance, to be an accurate description of the policy that had indeed been introduced a few days before. The reality is that, on the evidence presented to us, the only way Mr. Galvin could have obtained that information was from someone with appropriate responsibility in the Department.

7.8 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.

7.9 The Board therefore finds as a fact that Mr. Galvin's evidence and Mr. Newman's account of what he relayed to him by telephone is true. Mr. Galvin did indeed, make contact with the Department as was told what is set out in paragraph 3.2 above, and that information was then relayed to Mr. Newman in a telephone call made by Mr. Galvin to Mr. Newman in early April 2018. As a result of what Mr. Galvin had been told by the Department, Mr. Newman did not take any further steps to progress his request for an evaluation until he returned to Jersey in mid-May 2018.

7.10 It follows from that single finding that, in our judgment, the subsequent refusal to evaluate Mr. Newman's case on the basis of the actuarial factors applicable to transfers prior to 1 May 2018 was flawed. As set out in paragraph 3.6 above, the Committee of Management decided that, where requests for evaluation had been made in the period 28th March to 30th April 2018, they should be evaluated according to the actuarial factors applicable up to 1st May 2018. Mr. Newman's request was, however, rejected on the basis that he had not made such a request during the Relevant Period. That conclusion is based on a mistake of fact. Mr. Newman had made such a request via Mr. Galvin during the Relevant Period and was told, in effect, not to apply. The decision to refuse to consider Mr. Newman's case on the basis of the actuarial factors prior to 1st May 2018 was, applying the Committee of Management's revised policy as set out in paragraph 3.6 above, therefore, unjust, based on a mistake of fact and not one that could have been made by a reasonable body of persons after proper consideration of all of the facts, contrary to Articles 9(2)(b), (c) and (d) of the Law.

7.11 Further, to the extent that it is being argued that the rejection of Mr. Newman's request was based on the fact that he had not submitted a formal request for such an evaluation in the Relevant Period, that decision would also be flawed since it would misapply the revised policy of the Committee of Management (at least as explained to us) which did not make such a distinction, would be unjust in circumstances where the applicant had been actively discouraged from applying by a responsible member of the Department. This would be contrary to Articles 9(b) and (c), and potentially a mistake of law (as to the meaning and effect of the relevant revised policy) under Article 9(d).

7.12 We also understand that there <u>may</u> have been cases similar to Mr. Newman's in which no formal application was made, because the member had been discouraged from making such an application by a member of the Department either on the telephone or orally but which were evaluated on the basis of the actuarial factors applicable to 1st May 2018 because it was accepted that such advice or information had been given during the Relevant Period. If that was correct (and we have insufficient evidence before us to determine whether or not it is correct), it would give further grounds for finding that the decision was

flawed, not least because it would be unjust and, potentially, improperly discriminatory (if, which we reserve for another day, that category in Article 9(2)(b) of the Law applies to discrimination in the general sense of treating persons differently for no good reason rather than discrimination that is contrary to the law).

7.13 There was also some disquiet that the Chair of the Committee of Management had made the decisions regarding the Level 4 appeal on his own, without broader reference to the Committee of Management. The Board considers it inappropriate that there was no consultation with the Members' representatives of the Committee and that the decision was based solely on advice given by the officers who had administered the case. The Board is concerned about the internal procedures which were in place and considers that there should be some independent oversight of the appeals process and/or consideration of appeals. On the evidence before us, the process would appear to breach generally accepted principles of natural justice contrary to Article 9(e) of the Law: even putting aside the question of whether or not there was an obligation to provide for an internal appeal, once the process was established, there was an obligation to ensure that the appeal body was independent and that the process ensures a fair and balanced consideration of the particular case.

7.14 Further, it is not entirely clear to the Board as to whether the actual procedures, as explained by Mr. Chidlow, for a Level 4 appeal were followed in the present case. As set out above, it appears that the Chairman of the Committee of Management alone considered the appeal in Mr. Newman's case. We are not clear how that accords with the appeal being to the 'PEPF Committee of Management' as set out in paragraph 4.6 above. In the absence of more detailed information as to the terms of the appeals process, however, we are not able to comment further on this point.

7.15 In the light of the above, the Board requests that there is a reconsideration of Mr. Newman's case pursuant to Article 9(3) of the Law.

7.16 The Board adds that, on the basis of the evidence before it, applying the revised policy as set out in paragraph 3.6 above, the only conclusion to which a reasonable person properly directing themselves could have come 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.

Signed and dated by –

S. Catchpole, Q.C., Chairman ..... Dated: .....

C. Beirne ..... Dated: .....

D. Greenwood ..... Dated: .....