

- 1) That the decisions as to the new policy for the operation of Rule 23(2) of the Pension Scheme made by the Public Sector Remuneration Committee on 17th November 2005 and 12th January 2006 are unlawful and are quashed.
- 2) That, if the Public Sector Remuneration Committee wishes to consider a change in the long-established policy for the operation of Rule 23(2) of the Pension Scheme, that Committee shall act in accordance with the principles laid down in the said judgment.
- 3) That the Public Sector Remuneration Committee shall within 21 days meet and make a determination that Mr. Bichard is entitled to the maximum enhancement of his reckonable service pursuant to Rule 23(2) for the purposes of his pension under the Rules of the Pension Scheme.
- 4) That the States of Guernsey shall ensure that Mr. Bichard is paid at the due dates such further sums as will become due and payable to him by reason of such determination by the Public Sector Remuneration Committee.

And the Lt Bailiff AWARDED costs to the Plaintiff on an indemnity basis

S. M. D. ROSS
Her Majesty's Deputy Greffier.

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between: ANDREW LEONARD BICHARD Plaintiff

-v-

STATES OF GUERNSEY Defendants

Judgment of Lieutenant Bailiff Richard Southwell QC

Advocate R I C E Harris appeared for the Defendants.
Advocate P T R Ferbrache appeared for the Plaintiff.

**Hearing date: 15 May 2006
Judgment handed down: 12 June 2006**

1. In this case Mr Bichard as Plaintiff seeks against the States of Guernsey judicial review of two decisions of a committee of the States, the Public Sector Remuneration Committee (“the PSRC”), on 17 November 2005 (made known to the Plaintiff by a letter dated 22 November 2005) and 12 January 2006 (made known to the Plaintiff by a letter dated 17 January 2006). On each occasion the decision had two limbs: (1) a decision to lay down a new general policy; and (2) a decision in relation to Mr Bichard’s individual case.
2. At the start of the hearing on 15 May 2006, I reserved the questions whether an application for judicial review is available in this case, if so, whether leave to seek judicial review is needed, and if it is needed whether leave should be granted, for subsequent determination. As the hearing was extended in length because of the need for adjournments to enable the parties to file further evidence, on 17 May 2006 I told counsel that I had decided that a motion for judicial review is available, and that I was granting leave to move for judicial review. I will set out the reasons later in this judgment.

3. Advocate Ian Harris appeared for Mr Bichard and Advocate Peter Ferbrache for the States. I am indebted to both Advocates for their clear and very helpful submissions, both written and oral.
4. Mr Ferbrache indicated in his written submissions that the States were not the correct defendant, which should have been the PSRC as the committee making the decisions. But he did not rely on or pursue this point. I express no view on it.
5. I will consider the issues arising in relation to the decisions of the PSRC on 17 November 2005 and 12 January 2006 later in this judgment. First, I need to set out a chronological account of the relevant events.

HISTORY

6. Mr Bichard was born on 30 June 1957 and entered the public service of Guernsey on 3 October 1977. He then became able to take advantage of the scheme for pension and other benefits established by The States of Guernsey (Public Servants) (Pension and Other Benefits) Rules 1972 approved by the States by Resolution of 28 September 1972 (“the Pension Scheme”).
7. The Pension Scheme was to be administered by the States Civil Service Board (“the Board”): see Rule 1. The pensions and the benefits were to be provided out of the Superannuation Fund established by Resolution of the States of 30 April 1965: see Rule 2. Membership of the Pension Scheme was to include (amongst others) employees of the States, both full and part-time, the Judges, the Law Officers, the staff of His Excellency the Lieutenant-Governor and staff of the Royal Court. Other classes of members have subsequently been added, including the staff of Guernsey Libraries, employees of States Trading Companies, and teaching and non-teaching staff of Guernsey schools. See Rules 5, 6 and 7.
8. As already indicated, the decisions of the PSRC involved a decision as to policy under Rule 23(2), and a decision as to Mr Bichard’s individual case. Counsel told me that the number of members of the Pension Scheme potentially affected by the decision on policy is between 4,500 and 5,000.

9. This case turns on the operation of Rule 23 of the Pension Scheme. This Rule in its original form provided as follows:

“23(1) If a member of the Scheme is dismissed by the Board on the grounds of redundancy or in consequence of a reorganisation to effect greater efficiency and economy and he has at least ten years qualifying service at the date of such dismissal he shall be entitled to a retirement pension and a terminal grant.

(2) *For the purposes of the last preceding paragraph the years of reckonable service of such a member may be deemed by the Board to be increased by not more than seven years, save that the aggregate of his years of reckonable service shall not exceed the number of years of reckonable service that he would have had had he retired at the age of normal retirement”.*

“The age of normal retirement” was defined in Rule 42 as meaning “the earliest age at which a member of the Scheme may retire and thereupon be entitled to a retirement pension”. It appears to be common ground that such “earliest age” was the age of 60.

10. In 1985 the Board appointed Peat, Marwick, Mitchell and Co to review the Pension Scheme, and their Report dated 2 February 1987 was published as an Appendix to Billet d’Etat IX of 1987. On 16 June 1988 the Board wrote a letter to the President of the States (“the Policy Letter”) dealing with that Report. In paragraph 86 of the Policy Letter the Board summarised the provisions, as they then stood, of Rule 23 of the Pension Scheme (paragraph 9 above). I was referred to some paragraphs connected with Rule 23, and it is convenient to quote paragraphs 97 – 106, as follows:-

“97. The Board has given detailed consideration to Peat Marwick’s comments on redundancy provisions.

98. The Board does not consider that it should recommend a separate redundancy scheme solely for States employees outside the 1972 Pension Scheme. If there is to be such a scheme then it should cover all employees in Guernsey but it is not part of the Board’s mandate to consider such a proposal.

99. *The Board has therefore looked again at the redundancy provisions of the 1972 Pension Scheme.*

100. *The Board considers that the immediate payment of pension and terminal grant on grounds of redundancy should only occur if the individual is within 10 years of normal retirement. If the member is not within 10 years of normal retirement the benefits should be deferred and paid at the age of normal retirement.*

101. *On reflection the Board considers that it would be anomalous not only to provide for immediate payment of redundancy benefits if the member is within 10 years of normal retirement but also to enhance that service, whereas the benefits of members who are not within 10 years of normal retirement not only would not be paid until normal retirement but would not benefit from any enhancement.*

102. *There should either be enhancement for both groups or no enhancement at all.*

103. *The enhancement of service is of considerable assistance to the Board in effecting reorganisations.*

104. *The Board therefore considers that the existing enhancement provisions should be retained ie that service be enhanced by up to 7 years provided that it does not exceed the service which the member could have accrued at the age of normal retirement.*

105. *The Board has consulted the various organisations which have negotiating rights on behalf of members of the scheme. The Board has been unable to obtain agreement from all organisations on its proposal that the redundancy provision be changed to allow immediate payment of benefit to occur only where the member of the scheme is within 10 years of normal retirement.*

106. *In view of the advice given by HM Procureur that a change in the scheme which adversely affects a member's rights requires his consent, the Board has concluded that the change should only apply to future members joining the scheme after the date when the amendment Rules come into force. The existing provisions as set out in paragraph 86 should continue to apply to existing members of the Scheme."*

11. The main points arising out of these paragraphs are:

- (1) The Board was recommending amendment of Rule 23(1) so that a member dismissed for redundancy or otherwise within Rule 23(1) would

receive the benefits at the age of normal retirement, unless the member was within 10 years of normal retirement.

- (2) Because HM Procureur had advised that a change which adversely affected a member's rights required their consent, and because the organisations with negotiating rights on behalf of members had not agreed on their behalf, the changes to Rule 23 (1) were to apply only to future members joining the Pension Scheme after the changes came into force.
- (3) Mr Bichard was an existing member, and therefore not affected by the changes to Rule 23(1).
- (4) The enhancement provisions in Rule 23(2) were to apply to all members, both existing and future.
- (5) The wording of paragraphs 102 to 104 is consistent with there being already a settled practice to give the maximum enhancement under Rule 23(2). For example, in paragraph 104, the words used are "i.e. that service be enhanced by up to 7 years", and not "i.e. that service may be enhanced by up to 7 years". It seems to me, however, that it is the practice after 1988 which is of primary importance in the determination of this case.
- (6) The Board had properly consulted the organisations representing members of the Pension Scheme, before recommending changes to it. If the Board or its successor were to propose any major change in practice and policy under Rule 23, it would be expected to conduct a similar process of consultation.

12. On 24 June 1988 the Advisory and Finance Committee recommended to the States to approve the Board's proposals in the Policy Letter. On 27 July 1988 the States resolved to approve both those proposals and the States of Guernsey (Public Servants) (Pensions and Other Benefits) (Amendment) Rules 1988 which had

been appended to the Policy Letter. By those Amendment Rules of 1988 Rule 23(1) was amended as the Board had proposed, for future but not existing members of the Pension Scheme. Rule 23(2) remained unamended, as the Board had recommended.

13. On 27 July 1988 the States also resolved to authorise the establishment of a Pensions Consultative Committee (“the PCC”) as recommended in paragraphs 271-283 of the Policy Letter, which read:

“Conclusion Formal consultation procedures should be set up so that
Seventeen employee representatives are regularly consulted on
pension matters. We recommend a possible framework

271. *There are no formal consultation procedures laid down in the 1972 Pension Scheme.*
272. *Peat Marwick report that the absence of formal consultation procedures has attracted strong criticism from the representative bodies who consider that deficiencies in the 1972 Pension Scheme have not been corrected because of it.*
273. *There was a strong feeling that because the scheme is both compulsory and contributory and because it is a major employee benefit there should be consultation arrangements to permit regular discussion of the operation of the scheme between representatives of the employer and the employees.*
274. *Peat Marwick state that there are variations in the preferred form of a consultative body and that views were received that there should be full power sharing between employer and employee. Peat Marwick do not agree with these latter views as the States retain financial responsibility for the scheme. The Board endorses this view.*
275. *Peat Marwick recommend that formal consultation procedures should be established to allow discussion of those aspects of the scheme which are relevant to employees.*
276. *Peat Marwick recommend the establishment of a Pensions Consultative Committee comprising a chairman and four members appointed by the Civil Service Board and four employee representatives directly elected for two year periods by the members of the scheme. The PCC would be a forum for debating pension issues and would have the right to make formal representations to the Board. Final decision making authority would remain with the States.*

277. *The Board considers that the establishment of a Pensions Consultative Committee is desirable. It would enable the Board to formally consult representatives of members of the scheme on the operation of the scheme, the implementation of annual pension increases and changes in the Rules. It would also enable members of the scheme to make representations to the Board. The present arrangements where the Board informally consults a number of organisations is both cumbersome and unsatisfactory.*
278. *The Board does not envisage that a PCC would be a negotiating body where decisions would be taken. It would be a forum in which pension matters could be discussed and where a consensus of views of members of the scheme could be obtained.*
279. *The Board does not consider that the PCC would discuss the financing of the 1972 Pension Scheme which is the responsibility of the Advisory and Finance Committee.*
280. *The Board believes that it should form the employers' side of the PCC itself.*
281. *The Board considers that Peat Marwick's proposals for the direct election of the employees' side of the PCC are unwieldy and will not necessarily permit the various groups of members of the scheme – Civil Servants, Manual Workers, Nurses, Policemen, Firemen, Postmen – to be effectively represented. The Board considered that the various organisations should themselves determine the method by which members of the employees' side are appointed.*
282. *The various organisations have therefore consulted with one another and have decided to establish a joint body which will appoint the members of the employees' side of the PCC. The Board welcomes this joint approach.*
283. *The Board recommends to the States that a Pensions Consultative Committee be established comprising the President and Members of the Board and five representatives of the members of the scheme to be appointed in accordance with agreed procedures. The Pensions Consultative Committee would discuss pension matters affecting members of the scheme as distinct from matters which are the responsibility of the Advisory and Finance Committee.”*

14. The PCC was given a Constitution and Mandate in the following terms:

“1. Constitution

1.1 The Committee will consist of eleven members.

- 1.2 *The Employer's Side shall consist of the Chairman and four members of the Public Sector Remuneration Committee.*
- 1.3 *The Staff Side shall consist of five member representatives nominated by the Association of States Employees Organisations from time to time and one pensioner representative nominated by the Retired States Employees Association from time to time.*
- 1.4 *The Chairman/Vice-Chairman of the Committee will alternate annually between the Employer's/Staff Sides.*
- 1.5 *The quorum shall be three members of each Side.*

2. ***Mandate***

The Committee will act as a forum to discuss matters concerning the operation and design of the States of Guernsey (Public Servants) (Pensions and Benefits) Scheme including such matters as:

- (i) *Changes to the States of Guernsey (Public Servants) (Pensions and Other Benefits) Scheme.*
- (ii) *Public Sector Remuneration Committee proposals on the States of Guernsey (Public Servants) (Pensions and Other Benefits) Scheme prior to such proposals being put to the States.*
- (iii) *The quality and adequacy of benefits.*
- (iv) *The general level of members' contribution rates.*
- (v) *The annual review of pensions and deferred benefits.*
- (vi) *Communications with members of the Scheme and with pensioners.*
- (vii) *The impact of wider developments within the pensions world.*

The deliberations and recommendations of the Committee will be reported to the Public Sector Remuneration Committee."

15. For the purposes of these proceedings it is relevant to note that

- (1) the various groups and associations of members of the Pension Scheme were to be represented by five members of the PCC and also a representative of those in receipt of pensions;

- (2) the PCC was to be the forum for consultation between the employers and employees in the Guernsey public service on all matters concerning the Pension Scheme, and in particular “the operation” of the Pension Scheme: see the Mandate of the PCC in the preamble, which followed the specific recommendation in paragraph 277 of the Policy Letter (paragraph 13 above).
- (3) The PCC was for this purpose to be the “forum” for the discussion between the employers’ and employees’ representatives of matters concerning the Pension Scheme for the reasons set out in the paragraphs of the Policy Letter quoted in paragraph 13 above.
- (4) Once the PSRC had become responsible for the Pension Scheme, the Mandate was amended to provide that the deliberations and recommendations of the PCC were to be reported to the PSRC (see the tailpiece of the Mandate).
- (5) The whole purpose served by the creation of the PCC was to ensure that the employees through their organisations’ representative members of the PCC were consulted **before** changes were made in “the operation and design” of the Pension Scheme.
- (6) The observation made in paragraph 11 above concerning the expectation of consultation is founded on (inter alia) these documents and these provisions.

16. By Resolutions of the States of 16 May and 31 October 2003 the States made The Machinery of Government (Transfer of Functions) (Guernsey) Ordinance 2003. The functions of the Board were transferred to the Policy Council, except that its functions in relation to the Pension Scheme under the 1972 Rules as amended were transferred to the PSRC. I have been shown the constitution and mandate of the PSRC taking effect from 1 May 2004 by Resolution of the States of 31 October 2003. In my view nothing turns in this case on the wording of this

document. But Mr Ferbrache emphasised paragraphs (b) and (e) of the mandate, and I quote paragraph (e) which reads:

“(e) To be accountable to the States for the management and safeguarding of public funds and other resources entrusted to the Committee.”

17. A new Redundancy Directive for public servants was published on 1 May 2004 effective from 1 March 2004. It was headed “ESTABLISHED STAFF DIRECTIVE: REDUNDANCY PROCEDURES FOR ESTABLISHED STAFF”. Section A, the Preamble, reads as follows:-

“The States of Guernsey is subject to continuous review to improve efficiency and provide value for money. Consequently situations can arise whereby enforced redundancies are unavoidable. It is acknowledged that such situations need to be managed in an ordered, fair and sympathetic manner so as to minimise the social, psychological and economic effects it has on the individuals concerned and to ensure the maintenance of morale amongst those employees remaining in employment.

The HR Unit, Policy Council has, in consultation with the Association of Guernsey Civil Servants, produced this set of procedures in order to:

*explain the principles which the Policy Council
will abide by in redundancy situations
and
detail, as far as is possible, the procedures which
it will follow in dealing with those circumstances.*

The HR Unit and the Association hope that the existence of these redundancy procedures will help to reduce both the need for redundancies and the stress which can arise in redundancy situations”.

18. Sections B and C of the Redundancy Directive read:

“B. REDUNDANCY SITUATIONS

The procedures set out in this document will be followed in cases where Established Staff posts disappear because of:

Redundancy
ie where there is a need to reduce the number of jobs.

Reorganisation to effect greater efficiency and economy

ie where there is a genuine reorganisation of work making it unnecessary to continue someone's employment.

(The procedures will not apply to cases where a Department would work better if a member of staff was not there; they are not intended to be a means of getting rid of unsatisfactory staff.)

Redundancy situations may affect both individuals and groups of staff in specific Departments.

The procedures will need to be flexible having regard to the different circumstances.

B. PRINCIPLES

In operating the redundancy procedures, the Head of Human Resources, Policy Council will apply the following principles:

- *the HR Unit will consult the Staff Side on redundancy situations at the earliest stage.*
- *the HR Unit will make every effort to avoid having to dismiss staff as a result of redundancy situations; dismissal will be a last resort.*
- *the HR Unit will consult the Staff Side on the detailed operation of the redundancy procedures in each redundancy situation."*

19. The procedures laid down were standard procedures of a kind common in Guernsey and the United Kingdom in both governmental and commercial organisations. In paragraph 21 of the Redundancy Directive, provision was made for graduated redundancy payments (in addition to the benefits prescribed under the Pension Scheme) to employees becoming voluntarily or compulsorily redundant below the age of 65 and having at least two years' continuous service.

20. On 25 June 2004 Mr Brian Castle, the Chief Officer and the Head of Human Resources of the Policy Council, wrote to Mr Bichard indicating that his current work was coming to an end, and that attempts would be made to find Mr Bichard a post on a supernumerary basis in accordance with the Redundancy Directive. Mr Castle in a further letter of 14 July 2004 told Mr Bichard that he would be transferred from the Health and Social Services Department ("the HSSD") to the

Treasury and Resources Department from 9 August 2004 on a supernumerary basis, initially for three months, as Project Accountant.

21. At this point reference can be made to the position of another member of the Pension Scheme, Mr David Orton. On 2 July 2004 Mr Castle wrote to Mr Orton indicating that Mr Orton might be made redundant when his current supernumerary contract was likely to end on 31 October 2004. In his letter Mr Castle confirmed:-

“details of the benefits that you would be entitled to [my underlining] under the Pension Scheme and Redundancy Directive should you be made redundant. In accordance with your request I set out those figures below. The figures are accurate as of 4 June 2004:-

<u>Pension</u> (Enhanced - in accordance with Rule 23(2)) -	£	per annum
<u>Terminal Grant</u> (Enhanced – in accordance with Rule 23(2)) -	£	per annum
<u>Redundancy Payment</u>	-	£ per annum

The figures given by Mr Castle are excluded by me for confidentiality. I should add that in fact Mr Orton has not been made redundant.

22. The redundancy of another member of the Pension Scheme was considered in 2005. On 9 June 2005 the PSRC met to discuss the position of this member, and the Court has seen an extract from the minutes (but without any indication who was present, except Mr Castle). The PSRC agreed to enhance the member’s reckonable service by the maximum, which in his case was four years, under Rule 23(2). The member was made redundant on 30 September 2005.
23. The PSRC have provided a schedule of all the established staff who were made redundant between 1988 and October 2005 showing the Rule 23(2) benefits granted:

“Year	Grade	Reckonable Service (years)	Enhancement (years)
1989	Executive	39 $\frac{1}{3}$	$\frac{2}{3}$ *
1991	Executive	36 $\frac{1}{2}$	1*
	Executive	30	6*
	Senior Officer	35	3*
1992	Senior Officer	35	3*
1993	Senior Officer	31	4*
1994	Senior Officer	26	3*
	Executive	29 $\frac{1}{2}$	$\frac{1}{2}$ *
2000	Senior Officer	33	1 $\frac{1}{2}$ *
2005	Senior Officer	23	4*

* In each of these cases the enhancement granted was the maximum permissible under Rule 23(2).”

24. I infer from the evidence before this court, including the details set out in this schedule, that from 1988 onwards it was the settled practice of the Board, and the PSRC as the Board’s successor, always to make the maximum enhancement under Rule 23(2) when established staff were made redundant.

25. Mr Ferbrache on behalf of the States accepted that there was this settled practice adopted under Rule 23(2) at all relevant times until the PSRC first considered Mr Bichard’s position in November 2005. But he submitted that the Court was not entitled to infer that that was the “policy” of the Board or of the PSRC, its successor. Not much may turn on whether it is described as a “settled practice” or as a “policy”. In my judgment, however, it is plain that the grant of maximum enhancement of reckonable service during the 17 years between 1988 and November 2005 was both a settled practice and a firm policy of the Board and the PSRC.

26. The PCC meets about three times a year. At its meeting on 22 September 2005 there was no mention of any change in the operation of Rule 23(2). But there was

extensive discussion of the prospect of changes being made to the Pension Scheme. In the course of that discussion, as the minutes show, the Chairman (Deputy Le Tocq)

“confirmed that the PCC would be the forum for discussing the benefits provided under the scheme(s) and any proposed changes.”

And the Senior Negotiator also stated that the

“PSRC were responsible for the terms of the Scheme and would recommend any change only after consultation within the PCC.”

27. On 1 November 2005 the Budget Report for 2006 of the Treasury and Resources Department was sent to the Chief Minister and laid before the States in December 2005. This is relied on by Mr Ferbrache as being relevant to the financial position of Guernsey.
28. On some date, presumably late in October 2005, the Policy Council decided to make Mr Bichard redundant: see Mr Le Tocq’s affidavit, paragraph 16. The relevant documents have not been placed before the Court. Mr Bichard seems to have been informed by Human Resources staff at a meeting on 2 November 2005, and this was confirmed by Mr Castle in a letter to Mr Bichard dated 4 November 2005. Mr Castle gave three months notice of the compulsory redundancy effective on 8 February 2006. Mr Castle set out the benefits Mr Bichard would receive in any event, and added the additional amounts receivable if the PSRC were to enhance Mr Bichard’s length of service by the maximum of seven years under Rule 23(2). Mr Castle’s use of the word “if” seems with hindsight to have been a possible indication that a change of approach might be under consideration.
29. The PSRC was to meet on 17 November 2005. The papers for its meeting included a report by the Chief Negotiator Mr S A Naftel concerning Mr Bichard’s redundancy. He referred to both the mandatory and the discretionary payments. In relation to both, he referred relevantly to persons who joined the Pension Scheme before 31 July 1988 (Mr Bichard was such a person), but also irrelevantly to those who joined after that date. In relation to discretionary payments he

referred relevantly to the PSRC's "discretion to enhance service such that benefits are based on up to an additional 7 years".

30. He then referred to the practice that the Department of the States in which the States employee was serving had to make a payment into the Superannuation Fund in the case of redundancy pensions to meet the additional cost arising because the pension benefits were brought into payment earlier and/or were based on enhanced service. He summarised the costs of Mr Bichard's redundancy as being for the entitlement £253,130 and for enhanced service £134,000. These costs, he stated, were to be met by the HSSD who were aware of the figures. He made no reference to any financial difficulties which might ensue for the HSSD or for the States generally if the additional sum of £134,000 had to be met.

31. In relation to past practice he stated this:

"The Committee is advised that, whilst to date redundancies have been relatively rare, in almost all cases discretion has been exercised to enhance service to the maximum permissible and this case appears no different to others".

Mr Ferbrache accepted that the words "almost all cases" were not correct, and asked the Court to ignore the word "almost", because (as he confirmed) this had occurred in **all** the relevant previous cases.

32. Mr Naftel did not advise the PSRC that it should give Mr Bichard the opportunity to make representations before the PSRC reached any decision on his case, particularly if the PSRC were minded not to grant him enhancement of his reckonable service. Mr Naftel did not advise the PSRC as to what would be involved if the PSRC were minded to reverse the previous practice and policy, or what steps the PSRC needed to take in those circumstances. In fairness to Mr Naftel, that was probably because he did not have in mind any such reversal of the previous practice and policy. These matters would presumably have required the input of legal advice, and there is no indication that Mr Naftel or the PSRC took the advantage of obtaining legal advice.

33. The meeting of the PSRC was on 17 November 2005. The Court has been shown a relevant extract from the minutes, but, for example, without the list of those present at the meeting, except that from the extract it can be seen at least that Deputies Le Tocq, Adam and Brehaut, the Senior Negotiator (Mr T Harnden) and Mr Castle were present. Mr Harnden referred to the Chief Negotiator's Report:-

“and said that as there may be further redundancies in the near future he [the Chief Negotiator] had set out in some detail the roles of parties in redundancy situations before detailing the specific case”.

It appears that Mr Harnden did not spell out in any more detail how many further redundancies there might be or how much money these might involve. Mr Harnden then emphasised that the role of the PSRC “in specific cases was restricted to deciding whether the pension was based on enhanced service”.

34. Deputy Brehaut asked whether the “War Chest” could be used to meet the cost. This was (I was told) a reference to a Reorganisation and Restructuring Fund (“the R&R Fund”), which was in fact not created until the 2006 Budget debate in the States in December 2005, when the States approved a transfer of £5 million from the Contingency Reserve Fund to this new fund. Mr Castle responded that this new fund “was to be used for future financial difficulties not for redundancies arising from the 2004 Machinery of Government changes”.

35. In fact, as will appear later in this judgment, in February 2006 it was decided to use the R&R Fund to meet most of the payments in respect of Mr Bichard.

36. I next quote in full the rest of the extract from the minutes of the meeting on 17 November 2005:

“The Chairman said that the decision was whether or not the Committee were prepared to offer an enhancement and he felt that in light of the current financial situation that this should not be agreed.

The Senior Negotiator said that the enhancement had been agreed in the past including a case effective from the previous month and that the situation could be challenged. He said that should the Committee's

decision be challenged it would need to be able to demonstrate that it had exercised its discretion in a reasonable manner.

The Chairman said that the situation had now changed and that the decision would be based on the fact that the States' finances were in disarray.

The Committee agreed not to award the enhancement."

37. Though I will be dealing later with the issues arising on a judicial review of the decision-making process at the 17 November 2005 meeting, it is convenient here to gather together some observations on that process:

- (1) What was decided on was both a new policy for the operation of Rule 23(2), and a refusal of any enhancement under that Rule for Mr Bichard in pursuance of this new policy.
- (2) Though the existing practice and policy had been in existence for at least 17 years, and had been uniformly applied, no prior consideration was given to the reasons why the practice and policy had been adopted in the first place and adhered to for at least 17 years.
- (3) There was no consideration within the employers' side in the public service of Guernsey as to the advantages and disadvantages of this rather major change in policy, which would potentially affect any of the 4,500 to 5,000 members of the Pension Scheme who might become redundant.
- (4) The question whether there should be such a new policy was not presented to the PCC for consultation between the employers' and employees' representatives on the PCC in accordance with the Constitution and Mandate of the PCC and the recommendations in the Policy Letter which had led to the creation of the PCC.
- (5) No opportunity was given to Mr Bichard to make representations before the PSRC reached a decision on his case, though the financial effect on

the remainder of Mr Bichard's life as a result of the decision would be substantial.

- (6) There appears to have been no discussion at the meeting as to the new policy proposed by the Chairman.
- (7) The new policy appears to have been proposed by the Chairman simply on the spur of the moment.
- (8) No consideration appears to have been given to the question whether, in the context of the income and expenditure of the States, the States could in fact afford to spend £134,000 in respect of a maximum enhancement for Mr Bichard, or a smaller sum in respect of an enhancement of less than the maximum.
- (9) In deciding on the new policy, and in deciding not to grant enhancement to Mr Bichard, the PSRC took account of the financial issues for the States for the future, but without any analysis of those issues or of their impact on any policy as to the operation of Rule 23(2).

38. Mr Ferbrache stated that the decision reached on 17 November 2005 could not stand, primarily because of the failure to give Mr Bichard the opportunity to make representations, but subject to two "caveats":

- (i) that this would only arise if relief by way of judicial review is available, and he contended that it is not available; and
- (ii) that this is in any event irrelevant, because it is the subsequent decision taken at the meeting on 12 January 2006 which is the relevant decision for purposes of judicial review.

Point (i) does not arise for reasons set out below, and I will deal with the inter-relation of the two decisions also below.

39. In the course of the hearing Mr Harris asked for leave to amend the Cause on about three occasions. On each occasion I gave leave, reserving questions relating to costs, giving both parties leave to adduce further affidavit evidence, and allowing extensive adjournments so as to ensure that neither party was disadvantaged. For the States there were filed three affidavits from Mr Castle. For the Plaintiff there were filed two further affidavits from Mr Bichard, and an affidavit from Mr Adrian Lewis, who has been the President of the Association of Guernsey Civil Servants (“the AGCS”) since November 2003 (representing over 1,100 members in the Guernsey public service), and since 12 January 2006 the Chairman of the PCC. It is clear from the evidence of Mr Lewis (and accepted by Mr Ferbrache) that the PCC and the AGCS were not consulted about the new policy for the operation of Rule 23(2) either before 17 November 2005 or at any time thereafter, whether before or after the meeting on 12 January 2006. It is therefore unnecessary for the Court to deal in any detail with the evidence in the further affidavits filed during the hearing.

40. Following the meeting on 17 November 2005, on 22 November 2005 Mr Castle wrote to Mr Bichard to tell him of the decision. In the second paragraph Mr Castle stated:

“I can confirm [there had apparently been discussions with others previously] that the [PSRC] considered your case on 17 November and decided that it would not be appropriate to exercise its discretion under Rule 23(2). This means that your pension benefits will be based on your actual service only”.

So Mr Castle at that stage gave no reasons for the decision, did not refer to the financial difficulties of the States which had formed the basis of the change from the previous policy, and did not refer to the change of policy or the new policy at all.

41. On 25 November 2005, Mr Bichard replied asking, first, for the reasons, and secondly, whether he had any remedy. He referred to the Administrative Decisions Tribunal (I was told by both counsel that this Tribunal does not have jurisdiction if there is a remedy available in the courts) and to the Scrutiny

Committee, another standing committee of the States (I was told that this committee would have no *locus standi*).

42. It appears that Mr Castle met representatives of the AGCS on 28 November 2005. Mr Castle says that Mr Lewis and two others attended for the AGCS, but it is not suggested by Mr Castle that he did anything relevant to this case, other than to give a brief outline of the decision made in relation to Mr Bichard and the reasons for the decision. If so, he gave those reasons to the AGCS before giving them to Mr Bichard himself.

43. On 30 November 2005 Mr Castle replied to Mr Bichard's letter of 25 November 2005. As to the request for the reasons, Mr Castle stated:

“I can advise you that the central reason for the [PSRC's] decision was the overall cost of the “redundancy package” and the States current financial situation”.

Thus Mr Castle, in giving these reasons, did not inform Mr Bichard that at the meeting the PSRC had abandoned the previous long-standing practice and policy, and had decided on the new policy of refusing enhancements of reckonable service.

44. On the same day (30 November 2005) the States resolved (*inter alia*) to direct the PSRC and the Treasury and Resources Department to review the Pension Scheme and to report back jointly to the States with their proposals by no later than September 2006.

45. That the real decision of the PSRC on 17 November 2005 was that there was to be a new policy not to grant any more enhancements is confirmed by what Mr Castle said at the end of the meeting on 12 January 2006 when dealing generally with potential redundancies. He is recorded as saying (*inter alia*) this:

“He added that the AGCS had been informed that in the event of actual redundancies the PSRC would not in general be exercising its discretion over the enhancement of redundancy payments in view of the current financial circumstances”.

46. Mr Castle in his additional evidence refers to various meetings from about 12 December 2005 onwards with the AGCS concerning possible redundancies in the Education Department and the HSSD. Mr Castle indicates that during these meetings:-

“There were discussions then concerning the fact that, subject of course to any appeal and reconsideration [presumably of Mr Bichard’s case], it was not likely that enhancements would be given to pension holders in the future”.

47. Whether Mr Castle said to AGCS representatives either what is recorded at the end of the minutes of 12 January 2006 (paragraph 45 above) or made the somewhat different statement attested to in his further evidence (paragraph 46 above) is disputed by Mr Lewis in his evidence in reply.

48. But in any event it is accepted on behalf of the States that there was no consultation with the AGCS about the establishment of the new policy.

49. So far as concerns Mr Bichard, his evidence in his affidavit in reply is that:

“At no time prior to or at the 12 January 2006 meeting was I made aware that the PSRC had adopted a new policy of not in general enhancing reckonable service in redundancy situations. It now seems that mine was the first case in which this new policy was applied. It is fair to say that it was apparent that letters to me of 22 and 30 November 2005 from Brian Castleindicated a change in the PSRC’s approach. In that sense there was concern, which I believe was shared by the AGCS, that my case might be viewed as some sort of precedent. However, I was not aware that my own case was being decided in the light of any decision to adopt a new policy”.

50. Mr Castle’s answer to Mr Bichard’s second question in his letter of 25 November 2005 was to suggest:-

“that in the first instance you, together with any advisor from the AGCS, request a meeting with the [PSRC]”.

51. This suggestion was taken up by Mr Bichard. The meeting was originally fixed for 22 December 2005, but was put over to 12 January 2006 to enable an AGCS representative to attend.

52. Mr Naftel wrote another report in preparation for the PSRC meeting on 12 January 2006. It is unnecessary to deal with anything in this report, except the last paragraph which reads:-

“There are now several other redundancies in the pipeline and whatever finally happens in this case is bound to establish a precedent”.

It seems to be implicit in this paragraph that the PSRC had to make up their minds whether to follow the previous policy of granting enhancements, or to maintain their new policy of granting no enhancements. Mr Naftel was excluding the alternative, that the PSRC might grant an enhancement to Mr Bichard (who would plainly have anticipated continuance of the previous established policy), while keeping open the position in relation to subsequent redundancies. Presumably this was because there might be difficulty in departing from the “precedent” set in dealing with Mr Bichard’s case.

53. Though it is reasonably clear, as set out above, that Mr Castle was treating the November decision as a change of general policy, Mr Naftel made no reference to this in his report for the 12 January 2006 meeting.

54. The meeting of the PSRC on 12 January 2006 was taken (so far as relevant to this case) in three parts:-

First, the PSRC met in the absence of Mr Bichard.

Secondly, the PSRC received the oral submissions of Mr Bichard and of Mr Orton for AGCS on his behalf.

Thirdly, the PSRC again met in the absence of Mr Bichard.

The way in which the meeting was organised is relevant to the question whether the procedure adopted was fair.

55. Those present at the meeting were Deputy Le Tocq (Chairman), Deputy Adam (Vice-Chairman), Deputy Brehaut and Deputy Mahy as members of the Committee, and Mr Castle, Mr Harnden, Mrs Tullier and Miss Simon.

56. I set out here a full quotation of the whole of the relevant part of the minutes, including the last part to which I have already referred:

“MR A BICHARD – HSSD – REDUNDANCY

The Committee considered a report by the Chief Negotiator which had been circulated with the Agenda.

The Vice-Chairman said that he had been led to believe that the Health and Social Services Department had offered Mr Bichard two alternative posts within the Department, but he had refused both of them, and in view of this, the Department considered that it should not be responsible for the redundancy payment.

The Chief Officer said that, as far as he was aware, there had been no formal job offer of a suitable post from HSSD.

The Senior Negotiator explained that the issue to be decided by the Committee was whether or not the benefits to which Mr Bichard would be entitled on redundancy should be based on actual or enhanced service – the subsidiary issue of which Department met this cost was of no concern to Mr Bichard. The Senior Negotiator added that comments about whether or not suitable posts were available which Mr Bichard had not taken up could not be considered relevant to the exercise of the Committee’s discretion. Indeed, if suitable alternative posts had been offered and unreasonably refused Mr Bichard would be considered to have dismissed himself rather than be made redundant.

The Committee then discussed again what criteria it should adopt for this and future redundancy payments and agreed in general that enhancements could not be applied at present due to the States financial position, but that it would listen to the arguments put forward by Mr Bichard.

Mr A Bichard and Mr D Orton, the AGCS Representative, joined the meeting.

Mr Bichard felt that he had a very strong case for enhancement given his background in the civil service. He then outlined this background, pointing out that as he was not actually a qualified accountant – he was qualified by experience – he would have difficulty in gaining

employment in the private sector at a comparable salary. He also referred to his medical condition which again would restrict his chances for obtaining comparable employment. In view of this, he considered enhancement to be vital. He said that he was disappointed that he had not been able to secure alternative employment within the Service, despite applying for a number of vacant positions. Mr Bichard also commented that he had a reasonable expectation of enhancement given the express intent of the Scheme (as detailed in the booklet) to provide financial security to members and their families; that he and his representative had been advised that enhancement had applied in all previous cases; and, in particular, that he had been provided with detailed figures based on maximum enhancement.

From the Association's point of view, Mr Orton said that it was taking a keen interest in the case, but would reserve any comment until after the Committee had given its decision.

There was an exchange between Mr Bichard and the Chief Officer concerning whether the Redundancy procedures had been followed correctly at all stages.

The Committee agreed to reconsider Mr Bichard's case and thanked him for his service.

Mr Bichard and Mr Orton left the meeting.

The Committee discussed Mr Bichard's case but although sympathetic, felt that in view of the financial situation it was unable to agree to any enhancement and, therefore, upheld its previous decision.

REDUCTION OF EMPLOYMENT IN THE PUBLIC SECTOR

The Chief Officer updated members on the latest position and stressed that procedures were being followed closely. He said that the AGCS had been consulted at all stages. He added that the AGCS had been informed that in the event of actual redundancies the PSRC would not in general be exercising its discretion over the enhancement of redundancy payments in view of the current financial circumstances."

57. With regard to the last paragraph, consultation with the AGCS concerned potential future redundancies. There was, as I have already set out, no consultation with the AGCS about the new policy to refuse enhancements.

58. Though I will be dealing later with the issues arising on a judicial review of the decision-making process at the 12 January 2006 meeting, it is convenient here to gather together some observations on that process:

- (1) The allegation that Mr Bichard had been offered and refused two alternative posts, an allegation made by Deputy Adam, had no basis in fact. Though the Chief Officer and the Senior Negotiator had tried to answer this allegation, it might be thought that, in fairness, it should have been put squarely to Mr Bichard so that he could answer it. Otherwise it could have continued to play some part in the minds of PSRC members present in leading them to reject Mr Bichard's request for a decision different from the November decision.
- (2) The PSRC did not inform Mr Bichard that it had decided on a new policy for the operation of Rule 23(2) on 17 November 2005, and that before he and Mr Orton joined the meeting on 12 January 2006, the PSRC had decided to maintain that new policy. If Mr Bichard and Mr Orton had been told of this, they would have been able to deal with the new policy at that meeting or at an adjourned meeting.
- (3) Though nearly two months had passed since the 17 November 2005 meeting, the PSRC had not raised the new policy for the operation of Rule 23(2) with others on the employers' side, and there had been no consideration or analysis of the advantages or disadvantages of the change of policy, or of the ability (or otherwise) of the States to finance Mr Bichard's redundancy payments if they included an enhancement of reckonable service, or the equivalent payments to any others who might be made redundant, or whether enhancements of less than the maximum might be made.
- (4) The representations made by Mr Bichard related in part to his own special circumstances, including his lack of a specialist accountancy qualification and his diabetic condition, which would make it difficult to obtain other employment at a comparable salary. The PSRC discussed criteria for individual applications at the January meeting, but did not decide on any criteria as to special circumstances for exemption from the new policy, so that Mr Bichard could not know what criteria he had to

meet, and the PSRC could not assess whether he met any such criteria. In the absence of such criteria, it is not clear from the brief note of the discussion after he left the meeting whether any weight was given to his representations in this regard. In the absence of any relevant criteria, it is difficult to know what relevance the “sympathy” of the PSRC had, if any.

(5) There had been no consultation with the representatives of the 4,500-5,000 members of the Pension Scheme and the new policy had not been put to the PCC for consideration.

59. On the same day (12 January 2006) immediately after the PSRC meeting, there was the next meeting of the PCC. The minutes show that the PSRC members and the States officers present made no mention of the new policy.

60. On 17 January 2006 Deputy Le Tocq as Chairman of the PSRC wrote to Mr Bichard as follows:

“I write following the meeting which you and your Association representative David Orton had with the Committee on 12 January 2006.

At the meeting you advanced the reasons why you believed the Committee should reverse the decision it made on 17 November and exercise the discretion it has under Rule 23(2) of the Public Servants’ Pension Scheme to enhance the service on which your redundancy pension will be based.

In summary, the case you advanced was:

- *Your experience of and performance during States employment had resulted in a reasonable expectation of employment with the States until retirement age;*
- *Your age and health would mitigate against your attaining a position with comparable remuneration in the private sector;*
- *One of the purposes of the Scheme (as detailed in the explanatory booklet) is to provide financial security for the member and his family;*

- *You were relying on the enhancement of service to assist in your difficult circumstances; and*
- *You had had an expectation of enhancement because benefits detailed in a letter to you dated 4 November 2005 included figures for enhancement if discretion were applied.*

On behalf of the Committee I should first like to state that it regrets that it has not been possible to redeploy you within States employment and that in consequence it has been necessary for the Policy Council to terminate your employment. The Committee hopes that you will be successful in attaining employment in the private sector.

In undertaking its responsibilities the Committee has noted the payments to which you will be entitled as a result of your redundancy and the cost of these payments. The payments of nearly 24 weeks salary and immediate implementation of your accrued pension benefits will be at a cost of approximately £250,000 to the public purse.

It is against this background that the Committee has given careful consideration to your request for your pension to be enhanced.

In its consideration the Committee has had to weigh its sympathy for your personal circumstances against the current financial circumstances of the States – which, as you will know, are resulting in restrictions on expenditure, reductions in service and the loss of jobs.

I have to advise you that in these financial circumstances the Committee believes that it would not be appropriate – and it could not justify – enhancing your benefits at considerable further cost to the States.

The Committee knows that you will be disappointed by the decision but trusts that you will fully appreciate the reasons why it is considered appropriate.”

61. Mr Le Tocq did not mention in this letter the adoption of the new general policy on 17 November 2005 or the reaffirmation of that policy on 12 January 2006.

62. On 8 February 2006 Mr Bichard was dismissed from the service of the States.

63. On 28 February 2006 the Treasury and Resources Department met. For this meeting the States Treasurer wrote a report dated 22 February 2006 dealing with the costs of Mr Bichard’s redundancy. So far as material, this reads:

“MR A – REDUNDANCY COSTS

Mr A has recently been made redundant from the States (he is aged 48 and had nearly 30 years service). His most recent permanent appointment was as Central Services Manager at the Children Board. As part of the restructuring following the Review of the Machinery of Government, his post effectively disappeared and the established staff redundancy procedures have been followed but it has not been possible to place him in a suitable post (he was temporarily placed in Treasury and Resources Department, Housing Department and Public Accounts Committee). This redundancy process has not been simple and has involved many people from several States Departments.

The redundancy costs are:

- *A severance payment of £23,130, and*
- *Early payment of pension benefits - £230,000 (actuarially calculated amount to be transferred to the Superannuation Fund). There is a discretionary provision to enhance the service on which the pension benefits are calculated which would cost an additional £134,000. The Public Sector Remuneration Committee has decided not to exercise this discretion but this is currently subject to appeal.*

There has been confusion over where these costs will be funded from and in order to finalise this matter, it is suggested that the Health and Social Services Department meet the costs of the severance payment and the payment into the Superannuation Fund is met from the Restructuring and Reorganisation Fund. The Health and Social Services Department will delete 1 FTE from its establishment in lieu of his redundant post.

IN VIEW OF THE UNUSUAL CIRCUMSTANCES THE DEPARTMENT IS RECOMMENDED TO:

- *Agree that the Health and Social Services Department will meet the costs of the severance payment.*
- *Agree that the payment into the Superannuation Fund will be met from the Restructuring and Reorganisation Fund.”*

64. The minutes of the meeting on 28 February 2006 read as follows:

“REDUNDANCY COSTS

The States Treasurer commented that the Human Resources Unit had been involved throughout the process and that now the pertinent question was one of accounting treatment.

The Minister noted that the Public Sector Remuneration Committee (PSRC) had not exercised its discretion over the basis of calculation of pension benefits.

Members agreed that the Treasury and Resources Department should continue to support the actions of the PSRC.

Members noted that the Health and Social Services Department is to delete one FTE from its establishment in lieu of the redundant post.

Members agreed that the Health and Social Services Department should meet the costs of the severance payment and that the payment into the Superannuation Fund should be met by the Restructuring and Reorganisation Fund. Members also agreed that any future discretionary payments should not be met from the R & R Fund.”

65. These proceedings were begun on 31 March 2006.
66. It is to be noted that in paragraph 22 of his affidavit sworn on 28 April 2006 Mr Le Tocq who is chairman of the PSRC swore that the R&R Fund (the “War Chest”) had “not been approved for redundancies arising from the 2004 Machinery of Government changes”. A letter from Mr Ferbrache’s firm received shortly before the hearing explained for the first time the decision taken on 28 February 2006 by the Treasury and Resources Department. Though Mr Le Tocq knew of that decision (and appears to have forgotten about it when he swore his affidavit), Mr Le Tocq did not provide a correcting affidavit.
67. Mr Bichard and the civil servant referred to in paragraph 22 of this judgment are the only two civil servants made redundant under the Machinery of Government changes. Mr Orton would have been the third, if he had been made redundant, but he has not been.
68. Those, in summary, are the main matters in the history relevant to the application for judicial review. I now turn to the issues raised by the parties.

Is Judicial Review available?

69. Mr Ferbrache argued that what is in issue in this case relates solely to the private law rights of Mr Bichard as an employee of the States. His submission was that the only relief available to Mr Bichard is a claim for damages for breach of his employment contract, and that public law questions appropriate for judicial review do not arise. In answer to Mr Harris' argument that the primary questions here relate to the general policy adopted by the States in relation to the Pension Scheme, and in particular the general operation of Rule 23(2), Mr Ferbrache still contended that the questions related to policy arose solely in the context of a dispute between Mr Bichard and the States as to his employment contract.

70. Mr Ferbrache relied on some English authorities in support of his argument, and I will refer to some of the authorities relied on by either party:

(1) *Evans v University of Cambridge* (2002) EWHC 1382 (Admin), [2003] ELR 8 Scott Baker J. Dr Evans was a lecturer at Cambridge University complaining about the alleged failure of the University to use its statutory power in relation to promotion to professorships fairly in relation to her. In that case it was clear that the complaint concerned the private law rights of Dr Evans, and did not involve a decision of general application by the University. This first instance decision, not reported in the standard law reports, is far from the present case.

(2) The cases cited show that the primary question to be asked is – what was the function which the decision-maker was exercising. That is more relevant than merely focusing on the status and nature of the decision-making body. See for example *R v Panel on Take-Overs and Mergers ex p Datafin plc* [1987] 1QB 815 CA.

(3) If an employee of a public body is adversely affected by a decision of general application by the employing body, he or she can be entitled to challenge that decision by way of judicial review on one of the usual

judicial review grounds: *McLaren v Home Office* [1990] ICR 824 CA per Woolf LJ at para.38.

(4) In an apparently unreported first instance decision of Pitchford J, *R v Liverpool Health Authority et al* (30 July 2002), the Judge said in para.39 that:

“there is a need to identify: first, whether the Defendant is a public body exercising statutory powers; second, whether the function being performed in exercise of those powers was a private or public one; and third, whether the defendant was performing a public duty owed to the Claimant in the particular circumstances under consideration.”

That statement was not a full statement of the distinguishing features of a matter appropriate for judicial review. Judicial review can be appropriate where there is no statute, and the powers being exercised are derived from the prerogative or otherwise, as in *Datafin* (above). There are many cases in which the public duty is a duty owed to the public at large or to a large body of persons. That is why Woolf LJ in *McLaren* referred to a decision of general application.

(5) *R v Chief Constable of Ministry of Defence Police ex p Sweeney* (28 October 1998) was an apparently unreported decision of the Court of Appeal. Sweeney was an officer of the Ministry of Defence Police. He was disciplined following a disciplinary hearing which he did not attend. He had an entirely appropriate remedy by way of appeal under the disciplinary regulations. Jowitt J and the Court of Appeal rejected an application for judicial review on this primary ground, holding that there were no exceptional circumstances justifying recourse to judicial review in place of the usual route of an appeal.

71. In my judgment this matter is appropriate for judicial review. True it is that Mr Bichard wishes to secure a remedy in respect of his own individual position. But the primary question raised relates to decisions by the PSRC to change a long-

standing general policy applying to all the members of the Pension Scheme to the potential detriment of any of those members if made redundant in future. The case is being treated as one brought by Mr Bichard in the interests of those members of the Pension Scheme whom AGCS represents. It equally could affect the position of the other members. The broad question whether the change of long-standing policy was lawfully made is one which has to be decided in the interests of all the members and of the States. Both sides need to know where they stand on this important question, particularly because the evidence shows that the States have further redundancies in mind. The question therefore needs to be decided speedily. I add that Mr Ferbrache submitted that an equivalent remedy could not be obtained by Mr Bichard in an ordinary private law civil action. That emphasises the need for the general question to be decided on judicial review.

Permission to proceed by way of judicial review

72. Before April 2004 there was no direction as to how claims for judicial review were to be pursued in the Courts of Guernsey. That is why in *Jersey Fishermen's Association Ltd et al v States of Guernsey* (unreported, 9 June 2005) the Court of Appeal of Guernsey, in paragraph 76 of its judgment delivered by me, held that in that case (commenced on 12 November 2003) there was no requirement for leave to be obtained to pursue judicial review proceedings, and that the decision of the Royal Court to the contrary in *Old Government House Hotel Ltd v President of the Island Development Committee* (unreported, 9 December 2004) was incorrect.
73. On 26 April 2004 a Practice Direction (No.3 of 2004) was issued by the direction of the Bailiff relating to judicial review. Paragraph 2(a) of the Practice Direction requires that every Cause in which a claim for judicial review is made "must seek permission to proceed with the claim for judicial review contained therein". It follows in my judgment that such permission is, and has since 28 April 2004 been, required.
74. In the present case I decided to take the issue whether permission should be granted together with the substantive questions at a single hearing. In cases such as the present (in which at the outset it is not entirely clear what are all the

substantive questions sought to be raised, but it seems probable that there are questions of general application to be decided) this is a convenient way of proceeding which leads to a saving of time and costs.

75. In the present case I have granted permission because (1) there are important questions of general application relating to the Pension Scheme to be decided; (2) the case put forward by Mr Harris for the Plaintiff is plainly an arguable one; (3) this case is an appropriate one for judicial review.

The Issues

76. In a case such as this, which comes on for an early hearing, it is almost inevitable that the issues will be developed as the hearing proceeds, on both sides, so that the issues to be considered at the end of hearing are rather different from those in contemplation at the start of the hearing. That is one reason why, as already indicated, I permitted amendment of the Cause and filing of further affidavits on both sides, with appropriate adjournments, so as to ensure that the real issues were ready for decision. Accordingly I now consider in turn the issues raised in the re-amended Cause.

States' Finances

77. The first head of claim rested on the contention that the current financial circumstances of the States were not a relevant factor for the PSRC to take into account when exercising its discretion under Rule 23(2). In support of this head Mr Harris relied on (inter alia) these factors:

- (1) The Pension Scheme is not, and is not required to be, fully funded. Costs arising from the redundancy provisions of the Pension Scheme are to be met from the funds available to the States. The availability of such funds derives from tax revenues and spending decisions by the States. Such matters of public finance are irrelevant to the proper scope of the exercise of the Rule 23(2) discretion.

(2) Rule 23(2) was introduced in 1972 and retained in 1988 expressly to assist the States in effecting reorganisations. The relevant factors relate to the management of such reorganisations, to the fairness of the redundancy procedures, to the effect of such procedures on the Guernsey public service, and particularly to the effect on each redundant employee. Such factors do not include the effect on the public finances.

78. Mr Harris argued persuasively for this contention that, in exercising its function under Rule 23(2), the PSRC could not take account of the effect on the public finances of Guernsey of the additional cost of enhancements to reckonable service under that Rule. However, I put to Mr Harris a test of his argument by a reduction and absurdum. Suppose that the States' finances were seriously in deficit, and it had become necessary to make a large number of States' employees redundant. In those circumstances it would be absurd for the financial consequences of decisions under Rule 23(2) to grant maximum enhancements to be ignored by the PSRC, since those consequences might well include a spiral of higher deficits and an increased number of redundancies. I had drawn to the attention of Counsel the passage in Wade and Forsyth on Administrative Law, 9th edition, at pages 385-387, headed "Relevance of resources", and the cases there cited. As Wade and Forsyth commented at page 387, in situations in which the exercise of a public discretionary power is involved, "it is more likely to be unlawful to disregard financial considerations than to take account of them." The cases cited by Wade and Forsyth were not cited by either Advocate to this Court. These cases were *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898 CA, and *R v Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1999] 2 AC 418 HL(E), and I have taken account of the summary of and quotations from those cases in Wade and Forsyth.

79. In my judgment it could in certain circumstances be a relevant factor in the exercise of the Rule 23(2) power to consider the effect on the public finances of Guernsey. I therefore reject Mr Harris' widest argument that this was an irrelevant factor. But there is a more difficult question, which I will consider later, as to how the public finances may be taken into account by the PSRC.

80. The second way in which Mr Harris sought to attack the taking into account of the State of the public finances was to focus on the circumstances leading to Mr Bichard's redundancy. As I have indicated above, Mr Bichard was one of only two employees made redundant by virtue of the 2004 Machinery of Government changes, the other being the senior employee made redundant on 30 September 2005. In addition, Mr Orton's possible redundancy would have arisen in the same way, but in the event he was not made redundant. In the case of the other employee and Mr Orton a maximum enhancement under Rule 23(2) was decided on. It was only in Mr Bichard's case that enhancement was refused on financial grounds, and, Mr Harris submitted, this was an illegitimate inconsistency in the exercise of the power. Further, the decision in Mr Bichard's case was predicated on an inability to use the R&R Fund to meet the extra cost of enhancement, though in the event that Fund was used to meet the major part of the cost of Mr Bichard's redundancy, with the consequence that the cost of enhancement (which would not have been met from that Fund) would have fallen more lightly on the departmental funds. Mr Harris relied on both these elements as leading to the conclusion that the failure to grant Mr Bichard an enhancement was unfair and an abuse of power by the PSRC.

81. Mr Harris relied on two main authorities as to unfairness in the exercise of a public power. The first is *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 HL (E). He cited Lord Scarman's speech at p.851 where Lord Scarman said:

"..... I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public office or authority in purported exercise of a power conferred by law."

Lord Scarman then stated four propositions, of the third of which he said:

"My third proposition is that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power."

Mr Harris also cited Lord Templeman's speech at pp.864-867. In that passage Lord Templeman began by saying this:

“The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that “the unfairness” of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.”

Lord Templeman dealt with “unfairness” in public decision-making by saying that there would be unfairness amounting to an abuse of power if the conduct of the public authority would, if done by a private individual, entitle the claimant to an injunction or damages based on breach of contract of estoppel by representation.

82. The second case on which Mr Harris relied is *R v Inland Revenue Commissioners ex p Unilever plc* [1996] STC 681. In that case there had been an unchallenged pattern of late submission of claims by Unilever. The Inland Revenue, without prior notice, treated the claims one year as having been made too late, thereby gaining “an adventitious windfall” of £17 million additional tax. The Court of Appeal held that the circumstances were so exceptional that the treatment of Unilever amounted to an abuse of power. That was a special and exceptional case which, on its facts, provides little guidance for other cases (see the main judgment of Bingham MR), and that is why it is not reported in any of the main series of law reports. But Mr Harris relied on an important passage in the judgment of Simon Brown LJ:

“ ‘Unfairness amounting to an abuse of power’ as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in R v ITC, ex p TSW: ‘The test in public law is fairness, not an adaptation of the law of contract or estoppel’.

In short, I regard the MFK category of legitimate expectation as essentially but a head of Wednesbury unreasonableness, not

necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based.

Still less is it necessary to force such a challenge into the straight-jacket of a private law plea of misrepresentation, waiver, acquiescence or some form of estoppel. It may no doubt be helpful to consider whether a person could in private law act with impunity in the manner complained of as unfair in public law proceedings: people's conduct and relationships are, after all, generally regulated in private law according to accepted tenets of fairness. But one must beware of placing too great reliance upon any suggested parallels: they may mislead more than assist.

.....

And there is this too to be said. Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens. This approach is exemplified in cases such as R v Tower Hamlets London BC, ex p Chetnik Developments Ltd [1988] AC 858 and Woolwich Equitable Building Society v IRC [1992] STC 657, [1993] AC 70 and reflected in Lord Mustill's reference in Matrix-Securities (see [1994] STC 272 at 294, [1994] 1 WLR 334 at 358) to 'the spirit of fair dealing which should inspire the whole of public life'."

Though in *Unilever* the Court of Appeal was primarily considering arguments about legitimate expectations, which arise under a different head of Mr Harris' arguments, it is of importance for the development of the principles of judicial review in Guernsey to observe that public law does not depend on analogy with private law principles, but on wider concepts of fairness in public life. The reasoning in the judgment of the Jersey Court of Appeal in *Trump Holdings Ltd v Planning and Environment Committee* 2004 JLR 232 at eg paragraph 59 (to which I was party) will need reconsideration in the light of these observations of Simon Brown LJ and the developing trend in English judicial review cases.

83. In my judgment the matters raised by Mr Harris and referred to in paragraph 78 above need to be considered as part of the case on legitimate expectations.

84. Mr Harris put his argument on irrationality also on the ground that the PSRC had decided against further enhancements for an improper purpose, that of reducing public expenditure so as to limit the burden of taxation. In my judgment this is an

erroneous argument. In the fields of public expenditure and of taxation to meet that expenditure, there is a wide element of policy in which it is not for the courts to second-guess those who have to make the essential democratic judgments between greater and lesser public expenditure and between greater and lesser taxation. It is only where public authorities have stepped outside the limits of fair dealing in the exercise of discretionary power that the courts can properly act to restrain any such abuse of power.

Legitimate Expectations of Members of the Pension Scheme

85. The way in which Mr Harris put his case under the heading of legitimate expectations developed during the hearing and led to amendment (which I allowed while giving Mr Ferbrache time to consider his response) of both the body of the Cause and the prayer for relief. It is convenient to follow the way in which Mr Harris put his submissions in closing, as summarised in his written closing submissions.

86. Mr Harris submitted that the case had to be considered from two linked but distinct perspectives, first, the impact of the PSRC's adoption of a new general policy, and second, the impact of that new general policy on Mr Bichard in particular.

Change of Policy in General

87. Mr Harris accepted that in principle it had been open to the PSRC to change its policies in response to changed circumstances, but only if

- (1) Circumstances had in fact changed in some relevant respect;
- (2) The PSRC had carried out sufficient consideration and analysis of the effect of the changed circumstances to enable it properly to consider the need for, and advisability of, a change of policy;

- (3) The PSRC had carried out adequate consultation of those whose interests in any change in policy meant that they must first be adequately consulted;
- (4) The PSRC did not by changing its policy frustrate a legitimate expectation of substantive benefit by an unfair abuse of power.

88. Mr Ferbrache in response argued that

- (1) A change of circumstances was not a pre-condition, but in any event the financial circumstances had clearly changed;
- (2) No further consideration or analysis was required of the PSRC who were entitled to change their policy or introduce a new policy as they thought fit in their discretion;
- (3) No consultation was required;
- (4) There was no abuse of power and no frustration of any legitimate expectation.

89. Before I look at the facts to see which of these rival submissions is borne out on the facts of this case, I consider the legal framework within which those facts need to be considered.

90. Though many cases were cited to the Court, starting with the venerable case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 CA, it seems to me that the greatest assistance to the Courts and practitioners in Guernsey on the subject of legitimate expectations is to be found in the judgment of the English Court of Appeal (Lord Woolf MR, Mummery and Sedley LJ) in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213. In that case the applicant, who had been devastatingly injured in a road accident, leaving her tetraplegic, doubly incontinent and partially paralysed in the respiratory tract, had received a clear promise from the health

authority that a particular building would be her home for life. It was held that no overriding public interest had been established which would justify the authority breaking that promise. Accordingly the Court of Appeal quashed the authority's decision to close the building. That case involved a legitimate expectation giving rise to a substantive benefit. But in most cases the expectation will be limited to the benefit of a particular procedural benefit. Both are in issue in the present case. Though it will result in this judgment being a long one, I believe that it will assist in Guernsey if I make a long quotation from *Coughlan* starting at page 241 at paragraph 55:

“Legitimate expectation – the court’s role

55. In considering the correctness of this part of the judge’s decision it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr Gordon accept.

*56. What is still the subject of some controversy is the court’s role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *In re Findlay [1985] AC 318, 338*, “But what was the legitimate expectation?” Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *In re Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*

*57. There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury grounds* (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay [1985] AC 318*; *R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906*. (b) On the other*

hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

58. *The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.*

59. *In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's words in In re Findlay [1985] AC 318) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation: see R v Grice (1977) 66 Cr App R 167; cf R v Reilly [1982] QB 1208, R v Dover Magistrates' Court, Ex p Pamment (1994) 15 Cr App R(S) 778, 782. No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts' role in relation to the third*

category is still controversial; but, as we hope to show, it is now clarified by authority.

60.

The authorities

61. *Whether to frustrate a legitimate expectation can amount to an abuse of power is the question which was posed by the House of Lords in R v Inland Revenue Comrs, Ex p Preston [1985] AFC 835 and addressed more recently by this court in R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681. In each case it was in relation to a decision by a public authority (the Crown) to resile from a representation about how it would treat a member of the public (the taxpayer). It cannot be suggested that special principles of public law apply to the Inland Revenue or to taxpayers. Yet this is an area of law which has been a site of recent controversy, because while Ex p Preston has been followed in tax cases, using the vocabulary of abuse of power, in other fields of public law analogous challenges, couched in the language of legitimate expectation, have not all been approached in the same way.*

62. *There has never been any question that the propriety of a breach by a public authority of a legitimate expectation of the second category, of a procedural benefit – typically a promise of being heard or consulted – is a matter for full review by the court. The court has, in other words, to examine the relevant circumstances and to decide for itself whether what happened was fair. This is of a piece with the historic jurisdiction of the courts over issues of procedural justice. But in relation to a legitimate expectation of a substantive benefit (such as a promise of a home for life) doubt has been cast upon whether the same standard of review applies. Instead it is suggested that the proper standard is the so-called Wednesbury standard which is applied to the generality of executive decisions. This touches the intrinsic quality of the decision, as opposed to the means by which it has been reached, only where the decision is irrational or (per Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410) immoral.*

63. *This is not a live issue in the common law of the European Union, where a uniform standard of full review for fairness is well established: see Schwarze, European Administrative Law (1992), pp 1134-1135 and the European Court of Justice cases reviewed in R v Ministry of Agriculture, Fisheries and Food, Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714, 726-728. It is, however, something on which the Human Rights Act 1998, when it comes into force, may have a bearing.*

64. *It is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those*

powers. This is the familiar ultra vires doctrine adopted by public law from company law (Colman v Eastern Counties Railway Co (1846) 10 Beav I). Since such powers will ordinarily include anything fairly incidental to the express remit, a statutory body may lawfully adopt and follow policies (British Oxygen Co Ltd v Board of Trade [1971] AC 610) and enter into formal undertakings. But since it cannot abdicate its general remit, not only must it remain free to change policy; its undertakings are correspondingly open to modification or abandonment. The recurrent question is when and where and how the courts are to intervene to protect the public from unwarranted harm in this process. The problem can readily be seen to go wider than the exercise of statutory powers. It may equally arise in relation to the exercise of the prerogative power, which at least since R v Criminal Injuries Compensation Board, Ex p Lain [1967] 2 QB 864, has been subject to judicial review, and in relation to private monopoly powers: R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815.

65. *The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise. The critical question is by what standard the court is to resolve such conflicts. It is when one examines the implications for a case like the present of the proposition that, so long as the decision-making process has been lawful, the court's only ground of intervention is the intrinsic rationality of the decision, that the problem becomes apparent. Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor). The present decision may well pass a rationality test; the health authority knew of the promise and its seriousness; it was aware of its new policies and the reasons for them; it knew that one had to yield, and it made a choice which, whatever else can be said of it, may not easily be challenged as irrational. As Lord Diplock said in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1064:*

“The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.”

But to limit the court's power of supervision to this is to exclude from consideration another aspect of the decision which is equally the concern of the law.

66. *In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations. The departmental decision in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 is a good example. If it does not, as in Ex p Unilever plc [1996] STC 681, the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations. In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair. It is in response to this dilemma that two distinct but related approaches have developed in the modern cases.*

67. *One approach is to ask not whether the decision is ultra vires in the restricted Wednesbury sense but whether, for example through unfairness or arbitrariness, it amounts to an abuse of power. The leading case on the existence of this principle is Ex p Preston [1985] AC 835. It concerned an allegation, not in the event made out, that the Inland Revenue Commissioners had gone back impermissibly on their promise not to reinvestigate certain aspects of an individual taxpayer's affairs. Lord Scarman, expressing his agreement with the single fully reasoned speech (that of Lord Templeman) advanced a number of important general propositions. First, he said, at p.851:*

[This passage appears in paragraph 81 of this judgment.]

Second, Lord Scarman reiterated, citing the decision of the House of Lords in R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or "have abused their powers or acted outside them". Third, that "unfairness in the purported exercise of a power can be such that it is an abuse or excess of power".

68. *It is evident from these passages and from Lord Scarman's further explanation of them that, in his view at least, it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view public law today reaches it. The same approach was taken by Lord Templeman, at p 862:*

"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law,

commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.”

69. *Abuses of power may take many forms. One, not considered in the Wednesbury case [1948] 1 KB 223 (even though it was arguably what the case was about), was the use of a power for a collateral purpose. Another, as cases like Ex p Preston [1985] AC 835 now make clear, is reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. There is no suggestion in Ex p Preston or elsewhere that the final arbiter of justification, rationality apart, is the decision-maker rather than the court. Lord Templeman, at pp. 864-866, reviewed the law in extenso, including the classic decisions in Laker Airways Ltd v Department of Trade [1977] QB 643; Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; Congreve v Home Office [1976] QB 629 and HTV Ltd v Price Commission [1976] ICR 170 (“It is a commonplace of modern law that such bodies must act fairly.... And that the courts have power to redress unfairness”: Scarman LJ at p.189.) He reached this conclusion, at pp.866-867:*

“In principle I see no reason why the [taxpayer] should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the [taxpayer] because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of [contract] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the [taxpayer] is entitled to relief by way of judicial review for ‘unfairness’ amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.”

The entire passage, too long to set out here, merits close attention. It may be observed that Lord Templeman’s final formulation, taken by itself, would allow no room for a test of overriding public interest. This, it is clear, is because of the facts then before the House. In a case such as the present the question posed in the HTV case [1976] ICR 170 remains live.

70. *This approach, in our view, embraces all the principles of public law which we have been considering. It recognizes the primacy of the public authority both in administration and in policy*

development but it insists, where these functions come into tension, upon the adjudicative role of the court to ensure fairness to the individual. It does not overlook the passage in the speech of Lord Browne-Wilkinson in R v Hull University Visitor, Ex p Page [1993] AC 682, 701, that the basis of the “fundamental principle.... that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully” is the Wednesbury limit on the exercise of powers; but it follows the authority not only of Ex p Preston [1985] AC 835 but of Lord Scarman’s speech in R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240, 249, in treating a power which is abused as a power which has not been lawfully exercised.

71. *Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits, representing a second approach to the same problem. If this is the position in the case of the third category, why is it not also the position in relation to the first category? May it be (though this was not considered in In re Findlay [1985] AC 318 or Ex p Hargreaves [1997] 1 WLR 906) that, when a promise is made to a category of individuals who have the same interest, it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict? Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts. Its application is still being developed on a case by case basis. Even where it reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest. It may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices. And without injury to the Wednesbury doctrine it may furnish a proper basis for the application of the now established concept of abuse of power.*

72. *A full century ago in the seminal case of Kruse v Johnson [1898] 2 QB 91 Lord Russell of Killowen CJ set the limits of the courts’ benevolence towards local government byelaws at those which were manifestly unjust, partial, made in bad faith or so gratuitous and oppressive that no reasonable person could think them justified. While it is the latter two classes which reappear in the decision of this court in the Wednesbury case [1948] 1 KB 223, the first two are equally part of the law. Thus in R v Inland Revenue Comrs, ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 a Divisional Court (Bingham LJ and Judge J) rejected on the facts a claim for the enforcement of a legitimate expectation in the face of a change of practice by the Inland Revenue. But having set out the need for certainty of representation, Bingham LJ went on, at pp.1569-1570:*

“In so stating these requirements I do not, I hope, diminish or emasculate the valuable, developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness.”

73. This approach, which makes no formal distinction between procedural and substantive unfairness, was expanded by reference to the extant body of authority by Simon Brown LJ in *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 88-89. He identified two categories of substantive legitimate expectation recognized by modern authority:

“(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337 and R v Secretary of State for the Home Department, Ex p Ruddock [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 and R v Jockey Club, Ex p RAM Racecourses Ltd [1993] 2 All ER 225. These various authorities show that the claimant’s right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body’s representation is communication by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: case in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is R v Torbay Borough Council, Ex p Cleasby [1991] COD 142, of the latter Ex p Asif Mahmood Khan. (2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant’s interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the

requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, O'Reilly v Mackman [1983] 2 AC 237 and the recent decision of Roch J in R v Rochdale Metropolitan Borough Council, Ex p Schemet [1993] 1 FCR 306 are clear examples of this head of legitimate expectation.”

Simon Brown LJ has not in that passage referred expressly to the situation where the individual can claim no higher expectation than to have his individual circumstances considered by the decision-maker in the light of the policy then in force. This is not surprising because this entitlement, which can also be said to be rooted in fairness, adds little to the standard requirements of any exercise of discretion: namely that the decision will take into account all relevant matters which here will include the promise or other conduct giving rise to the expectation and that if the decision-maker does so the courts will not interfere except on the basis that the decision is wholly unreasonable. It is the classic Wednesbury situation, not because the expectation is substantive but because it lacks legitimacy.

74. *Nowhere in this body of authority, nor in Ex p Preston [1985] AC 835, nor in In re Findlay [1985] AC 318, is there any suggestion that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision. But in Ex p Hargreaves [1997] 2 WLR 906, 921, 925 Hirst LJ (with whom Peter Gibson LJ agreed) was persuaded to reject the notion of scrutiny for fairness as heretical, and Pill LJ to reject it as “wrong in principle”.*

75. *Ex p Hargreaves concerned prisoners whose expectations of home leave and early release were not to be fulfilled by reason of a change of policy. Following In re Findlay [1985] AC 318 this court held that such prisoners’ only legitimate expectation was that their applications would be considered individually in the light of whatever policy was in force at the time: in other words the case came into the first category. This conclusion was dispositive of the case. What Hirst LJ went on to say, at p.919, under the head of “The proper approach for the court to the Secretary of State’s decision” was therefore obiter. However Hirst LJ accepted in terms the submission of leading counsel for the Home Secretary that, beyond review on Wednesbury grounds, the law recognised no enforceable legitimate expectation of a substantive benefit. In relation to the decision in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714, he said [1997] 1 WLR 906, 921:*

“Mr Beloff characterised Sedley J’s approach as heresy, and in my judgment he was right to do so. On matters of substance (as contrasted with procedure) Wednesbury provides the correct test.”

A number of learned commentators have questioned this conclusion (see eg P P Craig, “Substantive legitimate expectations and the principles of judicial review” in English Public Law and the Common Law of Europe, ed M Andenas (1998); T R S Allan, “Procedure and substance in judicial review” [1997] CLJ 246; Steve Foster, “Legitimate expectations and prisoners’ rights” (1997) 60 MLR 727).

76. *Ex p Hargreaves [1997] 1 WLR 906 can, in any event, be distinguished from the present case. Mr Gordon has sought to distinguish it on the ground that the present case involves an abuse of power. On one view all cases where proper effect is not given to a legitimate expectation involve an abuse of power. Abuse of power can be said to be but another name for acting contrary to law. But the real distinction between Ex p Hargreaves and this case is that in this case it is contended that fairness in the statutory context required more of the decision-maker than in Ex p Hargreaves where the sole legitimate expectation possessed by the prisoners had been met. It required the health authority, as a matter of fairness, not to resile from their promise unless there was an overriding justification for doing so. Another way of expressing the same thing is to talk of the unwarranted frustration of a legitimate expectation and thus an abuse of power or a failure of substantive fairness. Again the labels are not important except that they all distinguish the issue here from that in Ex p Hargreaves. They identify a different task for the court from that where what is in issue is a conventional application of policy or exercise of discretion. Here the decision can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court.*

77. *The cases decided in the European Court of Justice cited in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 all concern policies or practices conferring substantive benefits from which member states were not allowed to resile when the policy or practice was altered. In this country R v Secretary of State for the Home Department, Ex p Ruddock [1987] 1 WLR 1482 and R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337 were cited as instances of substantive legitimate expectations to which the courts were if appropriate prepared to give effect. Reliance was also placed, as we would place it, on Lord Diplock’s carefully worded summary in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 408-409 of the contemporary heads of judicial review. They included benefits or advantages which the applicant can legitimately expect to be permitted to continue to enjoy. Not only did Lord Diplock not limit these to procedural benefits or advantages; he referred expressly to In re*

Findlay [1985] AC 318 (a decision in which he had participated) as an example of a case concerning a claim to a legitimate expectation – plainly a substantive one, albeit that the claim failed. One can readily see why: Lord Scarman’s speech in In re Findlay is predicated on the assumption that the courts will protect a substantive legitimate expectation if one is established; and Taylor J so interpreted it in Ex p Ruddock [1987] 1 WLR 1482. None of these cases suggests that the standard of review is always limited to bare rationality, though none developed it as the revenue cases have done.

78. *It is from the revenue cases that, in relation to the third category, the proper test emerges. Thus in Ex p Unilever plc [1996] STC 681 this court concluded that for the Crown to enforce a time limit which for years it had not insisted upon would be so unfair as to amount to an abuse of power. As in other tax cases, there was no question of the court’s deferring to the Inland Revenue’s view of what was fair. The court also concluded that the Inland Revenue’s conduct passed the “notoriously high” threshold of irrationality; but the finding of abuse through unfairness was not dependent on this.*

79. *It is worth observing that this was how the leading textbook writers by the mid-1990s saw the law developing. In the (still current) seventh edition of Wade & Forsyth’s Administrative Law (1994) the authors reviewed a series of modern cases and commented, at p.419:*

“These are revealing decisions. They show that the courts now expect government departments to honour their statements of policy or intention or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness is clearly allied to unfairness by violation of natural justice. It was in the latter context that the doctrine of legitimate expectation was invented, but it is now proving to be a source of substantive as well as of procedural rights. Lord Scarman [in Ex p Preston [1985] AC 835] has stated emphatically that unfairness in the purported exercise of power can amount to an abuse or excess of power, and this may become an important general doctrine.”

To similar effect is de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed (1995), pp.575-576, para.13-035. Craig, Administrative Law, 3rd ed (1994), pp.672-675, links the issue, as Schwarze does (European Administrative Law (1992)), to the fundamental principle of legal certainty.

80. *In Ex p Unilever plc [1996] STC 681, 695 Simon Brown LJ proposed a valuable reconciliation of the existing strands of public law:*

[This passage appears in paragraph 82 above of this judgment.]

81. *For our part, in relation to this category of legitimate expectation, we do not consider it necessary to explain the modern doctrine in Wednesbury terms, helpful though this is in terms of received jurisprudence (cf Dunn LJ in R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337, 1352: “an unfair action can seldom be a reasonable one”). We would prefer to regard the Wednesbury categories themselves as the major instances (not necessarily the sole ones: see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 per Lord Diplock) of how public power may be misused. Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine.*

82. *The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive’s policy-making powers should not be trammelled by the courts;: see Hughes v Department of Health and Social Security [1985] AC 766, 788, per Lord Diplock. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data – in other words, as not ordinarily open to judicial review. The court’s task – and this is not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exception (as was envisaged in British Oxygen Co Ltd v Board of Trade [1971] AC 610 and as had happened in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714), or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual’s expectation is so unfair as to be a misuse of the authority’s power.”*

91. In my judgment this passage from *Coughlan* largely encapsulates the present state of English law on legitimate expectations in relation to public authorities, though as will appear below there have been some valuable further statements of the law in later cases. I bear in mind throughout that *Coughlan* was a case in which there was an express promise giving rise to a legitimate expectation falling in the Court of Appeal’s third category, and that care must be taken to ensure that anything which they said as to the third category (substantive benefit) must not be carried incorrectly into discussion of expectations falling within their first or second categories only.

92. I will next refer to the various other authorities cited to me in the context of the legitimate expectation heading:

- (1) **The *Wednesbury Case*** (cited above) This case should be approached, when legitimate expectations are in issue, in the way set out in paragraph 81 of the judgment in *Coughlan*, and not as Mr Ferbrache seemed to be submitting, as providing a conclusive statement of all respects in which administrative decisions may be reviewed. English law has moved on since 1947.
- (2) ***Bristol District Council v Clark* [1975] 3 All ER 976 CA.** This case was decided on standard *Wednesbury* grounds: see page 980. It raised no more than an application of those grounds to particular facts, and is of no assistance on the central questions of legal principle here in issue.
- (3) ***Preston*** (cited above) I have already dealt with the main points of principle decided in that case. I should emphasise that the Law Lords in that case stressed the importance of a clear analysis of the facts which would be likely in almost all cases to show whether there had been the alleged unfairness amounting to an abuse of power.
- (4) ***Council of Civil Service Unions et al v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 HL(E) (“the *GCHQ case*”).** For present purposes, in my view, it is sufficient to have regard to the citations from and the observations on the *GCHQ Case* in *Coughlan*.
- (5) ***R v Hertfordshire County Council ex p National Union of Public Employees and others* [1985] IRLR 258 CA.** In that case the respondent local authorities gave notice to their school “dinner ladies” to end their contracts of employment and offered re-employment on less favourable terms. It was held that this was not unreasonable on *Wednesbury* grounds. This was another application on particular facts of the *Wednesbury* principles and is therefore of little assistance in the

present case. Mr Ferbrache relied primarily on the holding of the Court of Appeal as summarized in the headnote:

“The decision by the respondent County Councils to give notice to their school meals service employees terminating their contracts of employment and offering them re-employment on less favourable terms and conditions could not be held to have been unreasonable within the meaning of the principle set out in Associated Provincial Picture Houses Ltd v Wednesbury Corporation – that, in all the circumstances, no reasonable authority could have adopted the course of action which was in fact adopted, if it had taken account of all relevant considerations and had left out of account all irrelevant collateral matters. The High Court Judge had not erred in refusing the appellants’ application for judicial review.

The submission on behalf of the appellants that the respondents took no or insufficient account of the adverse effects of failing to adhere to nationally-agreed collective agreements in relation to wages and conditions could not be accepted. The basis of this submission was that it did not feature prominently in discussions and briefing papers. However, the members of the councils must have been fully familiar with this aspect of the problem and there were no grounds for inferring that they did not give the fullest consideration to it.

Nor could it be held that the councils’ decision was unreasonable because they failed to give consideration to achieving a reduction in expenditure by reducing the salaries of all Education Department employees. Such a course of action had not even been suggested by the trade union. The court could not infer that the employers did not take account of all relevant considerations by reason that there was no expressed reference to some unlikely solution. It is not to be expected that every choice or permutation of choice would be fully documented or discussed.

Per Mustill J:

It does not follow that an omission to consider one possible solution to a problem or to take into account one factor which might conceivably be regarded as relevant, fatally vitiates the decision. The Wednesbury line of authority is concerned with the overlooking of some consideration which, when weighed with other relevant factors, is at least potentially decisive; a consideration which is of such obvious materiality that to disregard could properly be regarded as unfair. The present case was in quite a different category. There were

innumerable ways in which the local authority could have chosen to make economies. To require the authority to consider every one of them, and also to demonstrate that they had been considered, in pain of having the decision declared to be wholly ineffectual, would paralyse local government and would carry the Wednesbury principle far beyond its proper limits.”

Mr Ferbrache drew attention particularly to the high threshold for the quashing of a decision on *Wednesbury* grounds, and to the Court’s assumption that the local authorities were fully familiar with the financial consequences of their decisions, though barely touched on in the discussions and briefing papers.

- (6) ***Hughes v Department of Health and Social Security*** [1985] 1 AC 776 HL(E). In that case three civil servants compulsorily retired before the age of 65 claimed for unfair dismissal on the footing that, though the normal retiring age was 60, there were administrative policies giving rise to a reasonable expectation of a higher normal retiring age of 65 subject to continued efficiency, and in fact all other civil servants in the same grades had been treated in the same way and encouraged to remain until 65. However, before they were compulsorily retired, there had been a formal and express adoption of a new policy for retirement ages earlier than 65. The House of Lords held that the claimants’ reasonable expectations could exist only as long as the previous policies were in force, and were ended by notice of new policies to contrary effect. At page 788 Lord Diplock said this:

“But this [the civil servants’ reasonable expectation] remains the case only so long as the departmental circular announcing that administrative policy to the employees affected by it remains in force. Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government. When a change in administrative policy takes place and is communicated in a departmental circular to, among others, those employees in the category whose age at which they would be compulsorily retired was stated in a previous circular to be a higher age than 60 years, any

reasonable expectations that may have been aroused in them by any previous circular are destroyed and are replaced by such other reasonable expectations as to the earliest date at which they can be compelled to retire if the administrative policy announced in the new circular is applied to them.”

Mr Ferbrache relied strongly on this case and on Lord Diplock’s speech for, first, the freedom of the PSRC to change its policies, and secondly, the effect of any change of policy in defeating previous legitimate expectations. As I will indicate below, however, the facts in *Hughes* were materially different from those in the present case. Though *Hughes* provides authority for the obvious point that government and local government authorities can change their policies, what matters in the present case is how the PSRC changed its policy and introduced a new policy.

(7) *Unilever* This has already been cited above and I need not add anything further under this head. The facts of *Unilever* were wholly exceptional, and its relevance on questions of principle is clearly set out in *Coughlan*.

(8) *R v Secretary of State for Home Department ex p Ahmed and Patel (and others)* (30 July 1998) CA (apparently reported, but the Court was not shown the report). This case concerned the standard application of standard *Wednesbury* principles to the particular facts, and adds nothing to the other cases cited. But reliance was placed by Mr Harris on one paragraph in the judgment of Hobhouse LJ:

“The principle of legitimate expectation in English law is a principle of fairness in the decision-making process. It differs from the doctrine of estoppel in private law. In the present context, it is a wholly objective concept and is not based upon any actual state of knowledge of individual immigrants or would be immigrants; indeed, if it had to be based upon a subjective understanding of the content of these Conventions and their legal effect in English law, there would be no basis for the application of the principle in cases such as these. However, the application of the principle must be based upon

some objectively identifiable legitimate expectation as to how decisions will be made and discretions exercised.”

Mr Harris relied on this for the proposition that the person seeking to take advantage of a legitimate expectation did not have themselves to have actual knowledge or understanding of all the relevant circumstances.

(9) ***R v Director General of the National Crime Squad ex p Tucker*** (17 January 2003, unreported) CA. The claimant was seconded to a Regional Crime Squad, but was summarily returned to his local force, without reasons being given and without an opportunity to make representations. He was not given reasons (and therefore denied any chance of dealing with such reasons) because of the need for confidentiality in the police service as to the sources of information received. This was held to be fair treatment, and in any event it was held that judicial review was not available as the decision was of a purely domestic nature relating solely to Tucker. Reliance as regards fairness was placed on six principles derived from Lord Mustill’s speech in *R v Secretary of State for Home Department ex p Doody* [1994] 1 AC 531, at 560D. *Doody* was not cited to this court. It is not appropriate to cite an unreported case (which is unreported because it raises no real question of principle) merely for a citation in that case of a summary of one speech in a well-known House of Lords decision. Nevertheless I set out here the summary by Scott Baker LJ of Lord Mustill’s principles (5) and (6):

“(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view of procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

It was in the light of principles such as these that Mr Ferbrache, subject to his caveats, found himself unable to support the November 2005 decision because Mr Bichard had not been permitted to make any representations.

(10) **Rowland v Environment Agency** [2005] Ch 1; [2004] 3 WLR 249 CA.

This case is far from the present. It concerned part of the Thames which for many years had been assumed no longer to be available for public navigation. The Agency in 2001 concluded that public navigation rights remained. The claimant sued on many grounds, including the ground that the Agency's representatives had created a legitimate expectation that the claimant would continue to enjoy the stretch of river as a private water. The Court of Appeal held that a legitimate expectation had been created; though the Agency had acted fairly in resiling from it, it must take into account in future the common assumption previously held by both parties that the stretch of river was private. It must be noted that this was an expectation of a substantive benefit, not a mere procedural one. Peter Gibson LJ dealt with the English law of legitimate expectation in this way (mainly by quotations from Lightman J):

“67. The public law concept on which Mrs Rowland relies is that of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. Lord Lester accepted as correct the judge’s summary of the general principles of English law on this subject [2003] Ch 581, 610-611:

“68. By a representation, a term which embraces a regular practice and a course of dealing, a public body does not give rise to an estoppel but may create an expectation in another, ‘the citizen’, from which it would be an abuse of power to resile: R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348. The principle of good administration prima facie requires adherence by public authorities to their promises. Whether it does so require must be determined in the light of all the circumstances. The public body can only be bound by acts and statements of its employees and agents if and to the extent that they had actual or ostensible authority to bind the public body by their acts and statements: South Bucks District Council v Flanagan [2002] 1 WLR 2601, 2607, para.18 per Keene LJ. The relevant representation must be unequivocal and lack any

relevant qualification: see R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545. The citizen must place all his cards on the table, making full disclosure and his expectation must be objectively reasonable: R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, per Peter Gibson LJ at p.1124, and Laws LJ, at p.1130. The expectation may be substantive or procedural and the categories of legitimate expectation are not closed: Begbie's case. Where the expectation relates to matters of substantive law as to which both parties are ignorant or in error, it is relevant both to reasonableness and fairness that the citizen had access to legal advice had he wished to take it: see Henry Boot Homes Ltd v Bassetlaw District Council [2002] EWCA Civ 983 at [58]. Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation. Lord Woolf MR in R v North and East Devon Health Authority, Ex p Coughlan [2002] QB 213, 241-242, paras.57-58 identified three kinds of unfairness, namely: (1) unfairness consisting in an irrational in a Wednesbury sense (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) failure by a public body to take its representations into account, together with the legitimate expectation to which it may have given rise before resiling from the representation; (2) unfairness consisting in a procedurally unfair failure by a public body to afford the citizen affected by its decision to resile from its expectation an opportunity for consultation; and (3) unfairness consisting in a failure by a public body to give effect to a substantive benefit which is the subject matter of a legitimate expectation in circumstances where there is no overriding interest which would justify the public body in resiling from its representation that such a benefit would be forthcoming. Where the court is satisfied that the public body made the representation by mistake, the court should be slow to fix the public body permanently with the consequences of that mistake: see Begbie's case [2000] 1 WLR 1115, per Peter Gibson LJ, at p.1127, and Sedley LJ, at p.1133. In such a situation the court must be alive to the possibility of such unfairness to the individual as to amount to an abuse of power. The court must also consider whether and how far, going beyond the immediate parties, the wider interests of the public may be affected by giving effect to the expectation, for the wider interests may require that the public body resiles in order properly to protect those wider interests. In such a case the issue of fairness requires the public body to act fairly in accordance with the first of the three categories in Coughlan's case [2001] QB 213 balancing in the public interest the irreconcilable interests and conflicting desiderata: see Begbie's case [2000] 1 WLR 1115, 1130-1131 and Laws LJ in R (Bibi) v Newham London Borough Council [2002] 1 WLR 237, 247-248, paras.34-39 and Henry Boot Homes Ltd v Bassetlaw District Council

[2000] EWHC (Admin) 546; [2002] EWCA Civ 983; The Times 16 December 2002. At the end of the day the court must decide whether, having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public and considerations of proportionality, for the public body to resile would in all the circumstances and applying the criteria referred to be so unfair as to constitute an abuse of power.

“69. *English domestic law imposes a constraint upon the applicability of the doctrine of legitimate expectation. For an expectation to be legitimate the party seeking to invoke it must show, amongst other things, ‘that it lay within the powers of the authority both to make the representation and to fulfil it’: per Schiemann LJ in R (Bibi) v Newham London Borough Council [2002] 1 WLR 237, 249, para.46. A legitimate expectation can only arise on the basis of a lawful promise or practice: per Gibson LJ in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1125. If the expectation relates to the exercise of a lawful discretion, eg to admit late claims, such an expectation may bind the public body to exercise its discretion in accordance with that expectation: see R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681. But under English domestic law there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so. This Rule of law has been the subject of sustained academic criticism as conducive to injustice: see eg Craig, Administrative Law, 4th ed (1999), p.642 and Morgan & Hogan, Administrative Law in Ireland, 2nd ed (1991), p.863. But it remains the law.”*

“68. *I add to that summary of the law in the following respects:*

(1) A legitimate expectation may arise from “the existence of a regular practice which the claimant can reasonably expect to continue”: see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 401 per Lord Fraser of Tullybelton, quoted by me in Begbie’s case [2000] 1 WLR 1115, 1125.

(2) It is not always a condition for a legitimate expectation to arise that there should be a clear, unambiguous and unqualified representation by the public authority (R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681, 693-695, per Simon Brown LJ): the test is whether the public authority has acted so unfairly that its conduct amounts to an abuse of power.

(3) Similarly, without in any way wishing to belittle the “cards on the table” requirement laid down in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 (a tax case), the answer to the question whether there has been such a failure of disclosure by a party as to disentitle him from having a legitimate expectation must depend on the particular circumstances of the case.”

See also the judgment of Mance LJ at paragraphs 129-135. Mance LJ stressed in paragraph 135 that the common law principle of legitimate expectation in English law is both “flexible and fact-responsive.”

- (11) ***R v Secretary of State for Home Department ex p Rashid*** (16 June 2005, unreported) CA. This was an asylum case in which the Secretary of State had departed from established policy in relation to Rashid. Mr Harris relied particularly on a passage in the judgment of Dyson LJ:

“45. *In his valuable discussion at p.641 of the 5th edition of Administrative Law, Professor Craig has identified four circumstances in which problems of legitimate expectation can arise: (i) where a general policy choice which an individual has relied on has been replaced by a different policy choice; (ii) where a general policy choice has been departed from in the circumstances of a particular case; (iii) where an individual representation has been relied on by a person, which the administration seeks to resile from in the light of a shift in general policy; and (iv) where an individualised representation has been relied on, and the administration then changes its mind and makes a decision that is inconsistent with the original representation. The present case seems to me to fall into the second of these categories.*

46. *A useful starting point for the discussion is the statement by the Court of Appeal in R (on the application of Bibi) v Newham LBC [2001] EWCA Civ 607, [2002] 1 WLR 237 at [24]:*

“*In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.*”

47. *The answer to the first of these questions is plainly that the Secretary of State committed himself to applying his policy during the period December 2001-March 2003. That must follow from the existence of the policy itself.*

For the purposes of the first question, it is immaterial that the claimant was unaware of the existence of the policy: see, for example, per Hobhouse LJ in R v Secretary of State for the Home Department ex parte Ahmed and Patel [1998] INLR 570, 591H.

48. *It is in the second question where the real difficulty lies. As was made clear in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at [57], where the court considers that a lawful promise or practice has given rise to a substantive legitimate expectation, the court will in a proper case decide whether “to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power”. It is for the court to decide whether the frustration of an individual’s expectation is so unfair as to be a misuse of the authority’s power. In performing this exercise, the court is not confined to a consideration of the rationality of the decision which is under challenge: see Coughlan at [74].*

49. *As Laws LJ said in R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115, 1130, the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases, a change of tack by a public authority, though unfair from the applicant’s stance, may involve questions of general policy affecting the public at large: in such cases the judges may not be in a position to adjudicate save at most on a bare Wednesbury basis “without themselves donning the garb of policy-maker, which they cannot wear.” In other cases, where, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found.*

50. *The nature of the decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power. The court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. The degree of unfairness is also material. That is why in R v Inland Revenue Commissioners, ex parte Unilever plc [1996] STC 681, Simon Brown LJ referred*

to “conspicuous unfairness” amounting to an abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power.....”
[Dyson LJ went on to deal with questions of bad faith which do not arise in the present case.]

93. One Jersey authority and two Guernsey authorities were cited. I have already referred to the Jersey case of *Trump Holdings*, and need not say more about it. The first Guernsey case was *Walters v States Housing Authority* (1997) 24 GLJ 39 Court of Appeal. The second was *Bradley v Chairman of Parole Review Committee* (30 January 2006, unreported) Collas D-B. I do not consider that either of these cases provides relevant guidance in the different circumstances of the present case.

Legitimate Expectations of Members of the Pension Scheme

94. At this point I am considering only the change to a new general policy, and not the particular circumstances of Mr Bichard. In considering the two decisions of November 2005 and January 2006, in my judgment the Court has to take them together and to look at the whole history. It is not appropriate, as Mr Ferbrache seemed to be arguing, to treat the November decision as a nullity because Mr Bichard was not able to make representations, and to look only at the January decision.

95. The starting point, in my judgment, lies in what took place in 1988, and in particular

- (1) The decision of the States, in reliance on the Policy Letter, to retain the Rule 23(2) power of enhancement of reckonable service in respect of members of the Pension Scheme who joined before 1988 and those who would join after 1988: see paragraphs 10, 11 and 12 of this judgment. I infer from what was set out in the Policy Letter, and from the States’ decision to act as recommended in the Policy Letter, that the States considered that there were good reasons known to the States for taking this decision.

(2) The decision of the States, in reliance on the Policy Letter, to establish the PCC “so that employee representatives are regularly consulted on pension matters” through the forum which the PCC was to provide: see paragraph 13 of this judgment. The PCC through its formal constitution and mandate was to “act as a forum to discuss matters concerning the operation and design” of the Pension Scheme, with appropriate representatives of all the employers of members of the Pension Scheme, and of all the employees who were such members: see paragraphs 14 and 15 of this judgment.

96. I conclude, in respect of these decisions of the States in 1988, that it was clearly implicit in those decisions that consultation between employers’ and employees’ representatives in the PCC was to precede the making of any significant change in either the “operation” of the Pension Scheme or its “design”, ie in the wording of the Scheme Rules. Indeed this was acknowledged at the PCC Meeting on 22 September 2005: see paragraph 26 above.

97. Between 1988 and November 2005, in the operation of Rule 23(2) there was a consistent practice of granting maximum enhancements of reckonable service to members of the Pension Scheme who were made redundant: see paragraph 23 of this judgment. Whether by November 2005 this was merely a settled practice, or constituted a “policy” of the States through the PSRC, may not matter. But in my judgment by November 2005 the operation of Rule 23(2) in this way had become a firm “policy” of the PSRC (as it had been of its predecessor, the Board): see paragraph 25 of this judgment.

98. In my judgment by 2005 all members of the Scheme were entitled to have the minimum legitimate expectation that a change in the operation of Rule 23(2) which was material to any member of the Pension Scheme who might be made redundant would, before being put into effect, be the subject of full consultation between employers and employees through the forum of the PCC. It is clear that material changes in the operation of the Pension Scheme were intended to be put to consultation through the PCC before being implemented, because that was a prime reason (as the Policy Letter shows) for the PCC being established in 1988,

and kept in being thereafter: See also paragraph 26 of this judgment. It is accepted by Mr Ferbrache that there was no consultation, formal or informal, by the PSRC of the AGCS. But that would not be all that the members of the Pension Scheme were entitled to expect. They were entitled to expect a proper formal consultation in the forum of the PCC between all the employee representatives and those of the employers.

99. The manner in which the PSRC decided on a new policy on 17 November 2005 for the operation of Rule 23(2) is to be contrasted with the Resolution of the States on 30 November 2005 directing the PSRC and the Treasury and Resources Department to review the Pension Scheme and to report back jointly to the States by no later than September 2006; see paragraph 44 of this judgment. In making this Resolution the States is seeking fully considered proposals for change. Any such proposals, if they receive preliminary approval of the States, will be put out for consultation in the PCC before they are finally approved by the States and implemented (as was promised in the PCC on 22 September 2005).

100. That is in my judgment the minimum legitimate expectation which the members of the Pension Scheme were entitled to have. Anything less would be inconsistent with the States' decisions of 1988 which remain effective today, and what was said on 22 September 2005.

101. In paragraph 57 of the judgment in *Coughlan* (quoted in paragraph 90 of this judgment) the English Court of Appeal set out three alternative "possible outcomes" in the event of legitimate expectation relating to a public policy. In my judgment it is clear that the expectation of the members of the Pension Scheme in general was in the second category of "outcome". I will deal with the third category when considering the specific circumstances of Mr Bichard. The general expectation of members must be in the second and not the first category. I should, however, observe that even if it fell within the first category, the PSRC failed to comply with what it would then have been required to do. As the Court said about the first category in *Coughlan*:

“The Court may decide that the public authority is only required to bear in mind its previous policy, giving it the weight it thinks right, but no more, before deciding whether to change course.”

On the evidence before this Court, it is doubtful whether the PSRC paid any attention to the long-standing previous practice and policy or gave it any weight at all, before deciding whether to adopt the new policy.

102. In my judgment the previous practice and policy gave rise, in the circumstances, to a legitimate expectation of members of the Pension Scheme of being consulted through the PCC before any new policy as to the operation of Rule 23(2) was adopted. There was no such consultation, and on this ground alone the decisions of 17 November 2005 and 12 January 2006 cannot stand. But that is not the end of the matter.

103. Before any effective, and therefore lawful, consultation could take place, the PSRC needed to carry out a genuine consideration and analysis of the issues involved in a change of policy and practice, as Mr Harris argued. It would not suffice merely to go to the PCC, stating that the PSRC was thinking of a new policy not to grant any enhancements, and asking for the PCC’s views about that. If there was to be a genuine consultation, there had to be a sensible analysis for the PCC to consider; compare what was said in the PCC on 22 September 2005. Such an analysis would, in my judgment, include consideration of the following:

- (1) why the existing practice (and policy) had been adopted and adhered to for at least 17 years;
- (2) what would be the advantages and disadvantages of this change in policy and practice as it affected all the 4,500 to 5,000 members of the Pensions Scheme;
- (3) what the real state of Guernsey’s public finances was then, and was likely to be over the near future;

- (4) how many members of the Pension Scheme were likely to be made redundant and over what period;
- (5) what the likely cost to the States would be of (a) the mandatory entitlements of those likely to be made redundant, and (b) the enhancements of their reckonable service, whether the maximum or some shorter enhancements;
- (6) what the effect would be likely to be of the costs assessed under (5) above on the States' finances;
- (7) whether the States could afford to make enhancements of reckonable service, either the maximum or some shorter enhancements;
- (8) what the effect would be likely to be on the standards of service to the public and for the members of the Pension Scheme, if either enhancements were not to be granted, or reduced enhancements were to be granted.

It seems to me that without there having been any consideration of such issues as these (which may not be an exhaustive list), genuine consultation in the PCC would not be possible.

104. It will have been noted that in this judgment I have not embarked on any analysis of the various documents relating to the States' finances which have been placed before this Court. The reason for this is that the PSRC itself carried out no such analysis. The decision on 17 November 2005 seems to have been based merely on the Chairman's (Deputy Le Tocq's) statement that such finances were in disarray". The financial documents which I have seen do not seem to me to indicate that there was or is any such "disarray". But it is not for this Court to embark on any judgment as to the state of the States' finances or the States' ability to pay moneys to those made redundant. That is a matter for the PSRC, in collaboration with the Policy Council and the Treasury and Resources Department and any other appropriate body. What is for the determination of this Court is

whether any such analysis and judgment made by the PSRC has been reached by a process which will meet the requirements for a genuine consultation in the PCC.

105. Here there was no such analysis and no such consultation whatever. So the decisions on the new policy for the operation of Rule 23(2) cannot stand and will be quashed. The matter will be remitted to the PSRC for appropriate re-consideration, if the PSRC wishes to do this.

106. Because the matter will have to be reconsidered by the PSRC, it seems to me that I should deal reasonably fully with the process adopted by the PSRC, so as to make clear in what respects the PSRC, in my judgment, failed to act fairly:

- (1) Before the meeting on 17 November 2005 there had been no analysis of the issues, no consideration of these within the States' committees, and no consideration within the PSRC itself;
- (2) There had been no consultation within the PCC or otherwise.
- (3) The question whether the States' finances were in a state which necessitated the new policy was merely raised by the Chairman, apparently on the spur of the moment and without prior discussion or consideration.
- (4) The question whether any enhancements of less than the maximum might be granted was not considered.
- (5) There appears to have been no discussion of the new policy proposed by the Chairman or of the Chairman's suggestion that the States' finances were "in disarray".
- (6) Though the particular decision being taken related to Mr Bichard, he was given no opportunity to make written or oral submissions to the PSRC.

- (7) Following the meeting on 17 November 2005 Mr Bichard was not told that the decision in his case had been in pursuance of the new policy decided on at that meeting.
- (8) Neither the AGCS nor the other employees' organisations were told squarely about the decision to adopt the new policy.
- (9) Between November 2005 and January 2006 no steps were taken to carry out the analysis to which I have referred, or to engage in consultation within the PCC, and the matter was simply left to be reconsidered at the meeting on 12 January 2006.
- (10) Both the AGCS and Mr Bichard should have been told of the new policy before the meeting on 12 January 2006, so that they could make representations to the PSRC before or at that meeting about the new policy.
- (11) If the PSRC were prepared to consider making exceptions to the new policy, the PSRC needed to decide on the criteria which would govern the making of such exceptions, and to tell the AGCS and Mr Bichard what those criteria were, so that representations could be made directed specifically to such criteria.
- (12) The first part of the meeting on 12 January 2006 consisted (in part) of a reconsideration of the new policy and a decision to maintain it. The AGCS and Mr Bichard were not about the decision in November 2005 to make a new policy, and in January 2006 to reconsider the new policy and to make a decision to maintain it. The AGCS and Mr Bichard should have been told about this so that representations could be directed to this, because with the new policy standing and with no criteria for the making of exceptions, the decision on Mr Bichard's particular case had effectively already been made.

(13) The allegation about Mr Bichard having been offered and refused two alternative posts (see paragraph 58(1) above) should have been put specifically to him.

(14) The PSRC again made no attempt to analyse what the real financial position of the States was, what other redundancies were likely, what would be the likely cost of the mandatory redundancy payments, and whether the States could afford to pay for any enhancements, whether the maximum, or enhancements of less than the maximum.

(15) The PSRC failed to ascertain whether the R&R Fund could be used to pay for at least the mandatory part of the redundancy payments (as was in fact decided in February 2006) and, it appears, wrongly assumed that the Fund could not be so used.

107. In my judgment the failure to give effect to the legitimate expectations of all the members of the Pension Scheme and the degree of unfairness resulting from that failure amounted clearly to an abuse of power by the PSCR.

108. I have set out in summary Mr Ferbrache's arguments in relation to legitimate expectations in paragraph 88 above, and I should deal briefly with those arguments. It was not and is not necessary for the PSRC to show that there has been a material change of circumstances making a change of policy necessary: to this extent I accept Mr Ferbrache's argument. But the rest of his arguments depended on the propositions that no consultation of any kind was required (so that the PCC could be ignored), that no prior analysis or consideration was needed, and that it was entirely acceptable for a change in policy as to the operation of Rule 23(2) to be made on the spur of the moment at the discretion of the PSRC. Given the prior history which I have set out, especially the establishment of the PCC and the long-standing practice in the operation of Rule 23(2) and what was said in the PCC on 22 September 2005, such propositions seem to me to be without merit. I distinguish *Hughes* (see paragraph 92 (6) in this

judgment) because in that case no requirements as to the making of a new policy were necessary to be met except the need for notice of the change of policy.

Legitimate Expectations of Mr Bichard

109. In the original cause Mr Bichard's case was put in paragraph 20 in this way:

*“20. **Legitimate expectation** The Defendant's conduct in always (save in exceptional circumstances) enhancing reckonable service by the maximum period permitted by Rule 23(2) of the Scheme in the event of a member's redundancy (which conduct was widely known) created a legitimate expectation amongst members of the Scheme, and in particular on the part of the Plaintiff, that reckonable service would be enhanced to the maximum extent permitted pursuant to Rule 23(2). To fail to enhance the Plaintiff's reckonable service to the maximum extent permitted would frustrate that expectation and amount to an abuse of power by the Defendant.”*

This seems to me to be putting forward a case based on deprivation of a substantive benefit, rather than mere procedural unfairness. But in the prayer for relief, after seeking the quashing of the two decisions, paragraph (2) read;

“(2) An ORDER directing the Defendant to reconsider enhancement of the Plaintiff's reckonable service pursuant to Rule 23(2) of the Scheme Rules and to reach a decision in accordance with the judgment of the Court.”

It seemed to me unclear from this whether in fact Mr Bichard was seeking to establish entitlement to a substantive benefit. When it became clear from Mr Harris' closing written submissions that Mr Bichard was seeking to rely on a substantive benefit, Mr Harris, in order to make this clear, sought leave to re-amend the Cause in this way. In paragraph 20, after the words “created a legitimate expectation” he inserted “of a substantive benefit”, and he added to the prayer for relief as follows:

“(2A) An ORDER directing the Defendant to apply its pre 17 November 2005 policy to the question of enhancement of the Plaintiff’s reckonable service pursuant to Rule 23(2) of the Scheme.

(2B) Such further Order as the Court may consider appropriate.”

I gave leave for these re-amendments to be made, and offered Mr Ferbrache the opportunity for an adjournment if he required one.

110. Mr Harris made clear in his written closing submissions that he was seeking, in Mr Bichard’s particular case, an order requiring the PSRC to grant Mr Bichard the maximum enhancement, ie he was relying on a legitimate expectation in the third category in *Coughlin*: see paragraph 57 of the judgment quoted in paragraph 90 above. Mr Harris summarised his case in this regard in paragraph 13 of his written closing submissions:

“13. In the particular case of the Plaintiff it is submitted that the Court can and should go further. Because of the inconsistency and unfairness inherent in applying the new policy to the circumstances of his case, it is submitted that it is appropriate to find not only that his procedural legitimate expectation has been frustrated, but that there has been frustration of a substantive legitimate expectation, namely that he would receive full enhancement of his reckonable service.”

111. Mr Harris submitted that the chronology of events which I have set out above showed the manifest inconsistency and unfairness of the PSRC’s decision to apply to Mr Bichard:

- (1) a new policy adopted only after he had been given notice of redundancy and during his notice period;
- (2) a different policy from the one always applied since 1988;
- (3) a different policy from that which it had or would have applied to others made redundant by reason of the 2004 Machinery of

Government changes (ie the officer made redundant on 30 September 2005, and Mr Orton if he had been made redundant);

- (4) a new policy of which he was wholly unaware at the times of the November 2005 and January 2006 meetings.

Mr Harris submitted that there was no overriding public interest which could have justified the PSRC in not granting to Mr Bichard the maximum enhancement. Mr Ferbrache's submission was that, since the Rule 23(2) power was a discretionary power vested in the PSRC, the PSRC was fully entitled to decide not to apply its previous policy in the case of Mr Bichard so that he had no legitimate expectation of receiving, in any event, a maximum or any enhancement. Mr Ferbrache also submitted that in any event the needs of the States in its current financial situation amounted to an overriding public interest which justified the PSRC's decision in Mr Bichard's case.

112. The difficulty which Mr Ferbrache faces, in seeking to rely on financial considerations as an overriding public interest, is that the PSRC has not analysed the financial position at all, and has not even attempted to assess whether the States can afford to pay for an enhancement of reckonable service in Mr Bichard's particular case, whether the maximum or some lesser enhancement. The members of the PSRC and those advising the PSRC, despite having met twice to consider Mr Bichard's case, have not applied their minds rationally to this question. In my judgment, in the absence of any attempt by the PSRC to make a rational assessment of the financial position, the States cannot rely on any such overriding public interest in this regard.

113. I return, accordingly, to the question whether Mr Bichard can be held to have had a legitimate expectation that he would necessarily receive the maximum enhancement. As was recognised in paragraph 59 of the judgment in *Coughlan*, it is often very difficult to decide into which category a legitimate expectation falls. When the question lies between the second and third categories, it can be especially difficult to segregate the procedural from the substantive. The last seven lines of paragraph 59 in *Coughlan* are helpful in recognising that an

enforceable expectation of a substantive benefit is likely to be confined to one person or at the most a few people.

114. In the cases cited and passages quoted in eg paragraphs 72 and 73 of *Coughlan*, the analogy with contract or estoppel in private law was relied on. The later citations in *Coughlan* and the references in the later cases cited by me in paragraph 92 of this judgment (see especially sub-paragraphs (8), (10) and (11)) show that the English Courts have moved away from analogies with private law concepts, and rather towards assessment of the unfairness of the departure from settled practice viewed in the light of the public interests involved.

115. In my judgment, the unfairness to Mr Bichard is stark. The established policy of operation of Rule 23(2) had subsisted since 1988. It was applied as recently as 30 September 2005. At the time when he was given notice of redundancy, that policy continued to prevail. It was a policy applied to the other two persons affected or potentially affected by the 2004 Machinery of Government changes, who with Mr Bichard represented the whole class of persons so affected. The new policy was applied to him on the basis of what can be described as a sudden impulse on the part of the Chairman of the PSRC, without prior consideration or consultation, ignoring and by-passing the PCC (the long established forum for consultation), and without even discussion by the members of the PSRC. The new policy was created in those circumstances specifically to catch Mr Bichard's case. Though the new policy has to be viewed in the context of the States' financial circumstances, no assessment of the impact on those circumstances of granting Mr Bichard any enhancement up to the maximum was carried out, and the Court is left entirely without guidance in this respect. Mr Bichard was not told that a new policy had been established so as to exclude the grant of enhancement to him in November 2005, or that the new policy had been reconsidered and maintained on 12 January 2006 before he was allowed to meet the PSRC, or that he should in his representations address the new policy of which he was ignorant. No criteria for exemptions from the new policy were established, so that he was making his representations to the PSRC without knowing in what way they might be relevant, and without the PSRC having any established framework for considering his representations. Without established criteria Mr Bichard could not

have known whether he was making relevant points, and the PSRC could not know what weight to give to the points he raised.

116. Viewing the expectations of Mr Bichard at 17 November 2005, it seems to me that his expectations fell within the third category, as expectations of a substantive benefit, and there is no established and overriding public interest on the basis of which this Court could decide that his expectations could lawfully be denied. In his particular case the unfairness in dealing with his legitimate expectation of a substantive benefit was so serious as to amount to an abuse of power by the PSRC.

117. Though I so decide, it is right that I should consider the alternative – that Mr Bichard’s expectations fell within the second category and were only procedural, as expectations of a proper process including consultation within the PCC. In such circumstances this Court would have to remit the matter to the PSRC to consider in accordance with the law as expounded by this Court. In theory this would mean that reconsideration of Mr Bichard’s case would have to await the taking by the PSRC of all the preparatory steps, including analysis of matters such as those set out in paragraph 103 of this judgment, discussion with the employers of the members of the Pension Scheme, and consultation in the PCC, a process likely to take a considerable time. But Mr Bichard became redundant on 8 February 2006, and that was the time when he was entitled to receive or to know whatever payments were to be made in respect of his redundancy. The real relevance of that date is that Mr Bichard would be entitled to have his case reconsidered **as at 8 February 2006**, and not as at any later date. At that date, as I have held in this judgment, the established practice and policy of the States was that redundant members of the Pension Scheme were to receive the maximum enhancement. The decisions made in November 2005 and January 2006, having been quashed, would have to be entirely left out of account by the PSRC. It follows, in my judgment, that even if I were to hold that Mr Bichard’s legitimate expectation was only of a due process leading to consultation, nevertheless when the PSRC came to re-consider his case some time from today, the PSRC would have to apply the policy which I have held was still in force on 8 February 2006.

Accordingly, in my judgment, I would reach the same conclusion even if I were to hold that Mr Bichard's legitimate expectations were only of the second category.

118. At the end of this rather too long judgment, it may assist those who are not lawyers if I summarise the position (as I have decided it is) affecting generally the 4,500-5,000 members of the Pension Scheme:

- (1) The Pension Scheme is of vital importance to its members in the Guernsey public service. It can be said that for many it stands between them and a penurious retirement and old age.
- (2) The operation of Rule 23(2) is equally of importance to any members who might be made redundant, for similar reasons.
- (3) The policy and practice to grant maximum enhancement of reckonable service to those made redundant was in force from 1988 until November 2005.
- (4) The PCC was established in 1988 as (and has continued ever since to be) the forum for the discussion of the operation and design of the Pension Scheme, and of any changes desired to be made to its operation or design, including any change in the long-standing policy for the operation of Rule 23(2).
- (5) The members of the Pension Scheme had the legitimate expectation, recognised and upheld in law, that before any change was made in that long-standing policy there would be full consultation in the forum of the PCC, as was recognised in the PCC as recently as 22 September 2005.
- (6) For the purposes of any such consultation there had to be a careful assessment of the reasons why any such change was appropriate, taking into account factors such as those set out in this judgment.

- (7) The change in policy was made on 17 November 2005 without any such assessment or consultation beforehand, and indeed without any prior consideration or discussion, and merely on the basis of the chairman's statement that the States' finances were "in disarray".
- (8) No steps were taken between November 2005 and January 2006 to carry out the necessary assessment or consultation.
- (9) The new policy was re-affirmed on 12 January 2006, again without any such assessment or consultation beforehand.
- (10) No overriding public interest has been shown which could have justified the PSRC in ignoring the legitimate expectations of members of the Pension Scheme.
- (11) Accordingly the two decisions of November 2005 and January 2006 which established the new policy cannot stand and are set aside by this Court, and the policy in force since 1988 remains the current policy for the operation of Rule 23(2).
- (12) If the PSRC still wishes to change the way in which Rule 23(2) has long been operated, the PSRC must now embark carefully on the processes of assessment and consultation referred to in (5) and (6) above.

119. In the light of the above judgment, the orders which I propose to make are these:

“(1) An order that the decisions as to the new policy for the operation of Rule 23(2) of the Pension Scheme made by the Public Sector Remuneration Committee on 17 November 2005 and 12 January 2006 are declared to be unlawful and are quashed.

(2) An order that, if the Public Sector Remuneration Committee wishes to consider a change in the long-established policy for the operation of Rule 23(2) of the Pension Scheme, that Committee shall act in accordance with the principles laid down in the judgment.

(3) *An order that the Public Sector Remuneration Committee shall within [14] days meet and make a determination that Mr Bichard is entitled to the maximum enhancement of his reckonable service pursuant to Rule 23(2) for the purposes of his pension under the Rules of the Pension Scheme.*

(4) *An order that the States of Guernsey shall ensure that Mr Bichard is paid at the due dates such further sums as will become due and payable to him by reason of such determination by the Public Sector Remuneration Committee.”*

120. I will hear applications for costs at the time when this judgment is delivered, and will expect to receive submissions as to the legal principles applicable in relation to such costs orders as the parties may apply for.