

**Judgment 7/2002**

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No. 289

Civil

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

**The** 5th day of July, 2002 before Sir John Grenfell Nutting, Bt, Q.C., presiding, Christopher Simon Courtenay Stephenson Clarke, Q.C., and Patrick Stewart Hodge, Q.C.

VINCENT SMITH

Plaintiff/Appellant

V

STATES OF GUERNSEY EDUCATION COUNCIL

Defendants/Respondents

In the Appeal of the above Plaintiff from the decision of the Royal Court made on 7th August, 2000;

THE COURT, having heard Advocates A.M. Merrien and R. J. McMahon for the respective parties thereon, this day GAVE JUDGMENT in the terms attached hereto and

- i) GRANTED leave for the Defences to be amended by the addition of an Exception de Fonds in the terms attached hereto;
- ii) UPHELD the Exception de Fonds and DISMISSED the Appeal and the Claim made by the Plaintiff; and
- iii) MADE NO ORDER as to costs in this Court or in the Royal Court.

Registrar of the Court of Appeal

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

**VINCENT SMITH v THE STATES OF GUERNSEY EDUCATION COUNCIL**

**Judgment in Civil Appeal 289 delivered on 5th July, 2002**

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CLARKE JA:

1. This is an Appeal from the judgment of the Lieutenant Bailiff delivered on 7<sup>th</sup> August 2000 at a preliminary hearing. In that Judgment he considered three issues, which he treated as questions of law. There is a dispute as to whether these were issues of law or fact. In order to explain the controversy, it is necessary to refer to the undisputed facts.

*The facts*

2. In 1992 the Plaintiff, Vincent Smith, was employed by the Education Council of the States (“*the Council*”) as a Lecturer Grade II in the Electrical Installation Department in the College of Further Education (“*the College*”). By his pleading he claims that his employment was governed by:

- (i) a document entitled “Conditions of Service for Full-Time

Teachers in Further Education in Guernsey:

Introduction” adopted by the Council on 1<sup>st</sup> March 1982 (“*the Conditions of Service*”);

- (ii) a document referred to in the former document, namely

the Scheme of Conditions of Service (First Edition 1981) produced by the National Joint Council for Teachers in Further Education in England and Wales (“*the 1981 Silver Book*”);

- (iii) the Council’s “Regulations governing the leave of absence for teachers, together with the procedures for dismissal and suspension (revised March 1976)” (“*the 1976 Regulations*”).

The averments to that effect in paragraphs 2 and 3 of the Cause are admitted in paragraphs 2(a) & (c) and 3 of the Defence and averred in paragraph 1 of the Pretensions.

3. The Conditions of Service provided as follows:

“(1) With effect from 1<sup>st</sup> May 1982 the States of Guernsey Education Council will adopt the Scheme of Conditions of Service (First Edition – 1981) produced by the National Joint Council for Teachers in Further Education in England and Wales

....

(5) Where such matters as sick leave and pay, maternity leave and pay, dismissal and suspension, and similar matters are concerned the Education Council’s “Regulations Governing the Leave of Absence of Teachers, Together with Procedures for Dismissal and Suspension (Revised March 1976)” or future revised versions of those Regulations will, in the event of any differences, take precedence over the Scheme of Conditions of Service (First Edition – 1981) produced by the National Joint Council for Teachers in Further Education in England and Wales or any future revised scheme ...” *i.e. the 1981 Silver Book*.

4. The 1981 Silver Book contained, in paragraph 5, provisions for Termination, Suspension and Dismissal. The provisions in relation to dismissal, insofar as relevant are:

“5.4 On it appearing to the appropriate body ... that consideration should be given to the dismissal of the teacher for misconduct or any other urgent cause, the matter shall be remitted to a meeting of the appropriate body to be held not less than 10 days after notice thereof has been given to the teacher in writing informing him that the question is to be considered, specifying in full any charge, complaint or adverse report affecting his conduct or capacity which is to be taken into account in that respect, and informing him that he has the right of a personal hearing (with the assistance of a friend if he so wishes) at that meeting. ... The “appropriate body” referred to in this paragraph will normally be the governing body but may sometimes be a committee of the LEA.

5.5 In the event of the governing body of the college deciding to recommend the dismissal of the teacher to the LEA, the teacher shall have the right of appeal against the decision before it is ratified and in the course of that

appeal shall have the right to appear before the appropriate committee of the LEA accompanied by a friend if he so desires.

5.6 In the event of the initial hearing not taking place before the governing body, the LEA shall provide a procedure for an appeal at which the teacher may be accompanied by a friend if he so desires. This appeal shall be before a committee other than the one which conducts the initial hearing, and the committee shall contain no member who is involved in the initial hearing.”

5. The 1981 Silver Book was amended in 1991. Under the amended version (“*the 1991 Silver Book*”) there was a change in the procedures for discipline, suspension and dismissal. In particular, clause 6.5 provides, so far as relevant, as follows:

“(b) The sanctions available to the Governing Body, which are not mutually exclusive, are as follows:

(i) A reprimand

(ii) A written warning of the consequences for

the lecturer if there is subsequent need for recourse to the procedures;

(iii) Transfer to another post within the establishment (in appropriate circumstances and having regard in particular to the terms of the lecturer’s contract);

(iv) Withholding of a salary increment.

(v) Dismissal.”

6. The 1976 Regulations contained at paragraph 14 procedures relating to dismissal or suspension of teachers, but contained no provision relating to demotion or transfer to another post.

7. In December 1992 an allegation of misconduct was made against the Plaintiff by the Principal of the College. On 16<sup>th</sup> December 1992 an enquiry was held at the Education Department. By a letter of 17<sup>th</sup> December 1992 the Plaintiff was told that a decision had been made to refer the matter to the Council on 21<sup>st</sup> December 1992 and to suspend him

with immediate effect. The minutes of the Council Meeting of 21<sup>st</sup> December 1992 record:

“Although Council did have a procedure for dismissing its employees, it had no disciplinary procedures with an appropriate range of sanctions.”

On the footing that the 1981 Silver Book applied, this would appear to have been an apposite observation. The same minutes record that:

“The Acting Deputy Director, following consultation with Mr. Stephenson and Mr Diligent, had drawn up a proposed procedure which it was suggested should be followed as an iterim (sic) measure which took account of existing suspension/dismissal procedures and of good practice for disciplinary action. This had been discussed informally with the union representatives and had been endorsed by them.”

Mr. Smith’s suspension was confirmed and the Council resolved to set up a small disciplinary panel to meet during the week beginning 11<sup>th</sup> January 1993.

8. On 30<sup>th</sup> December 1992 the Council wrote to Mr Smith informing him that the disciplinary hearing would take place on 12<sup>th</sup> January 1993. The letter, amongst other things, enclosed the papers that were to be used, told him who would give evidence and what would be the constitution of the panel and told him that he would have a right of appeal. It, also, set out what the procedure would be and ended by saying:

“The penalties available to the panel are:

- i. verbal or written reprimand
- ii verbal or written warning as to future conduct
- iii withdrawal of a salary increment
- iv subject to agreement with you union, demotion from  
Lecturer II to Lecturer I
- v dismissal from your post.

9 On 12<sup>th</sup> January 1993 the hearing took place. At the beginning of the hearing the Chairman of the panel referred to the fact that the Council had available the range of penalties that had been specified in the letter of 30<sup>th</sup> December. A little later he asked Mr. Smith and his representatives if they were satisfied that this was a properly constituted panel. Mr. Henshelwood, who was Mr Smith’s Union representative, said the following:

“There are a couple of points which we wish to discuss but generally we recognise the constitution of the panel. I am basing the deposition on two documents – one the regulations of the States of Guernsey in relation to the absence of teachers, the final section of which refers to both the dismissal procedures and suspension procedures (*i.e. the 1976 Regulations*). That I gather is the primary document on which you will rely.

There is a document drawn up in 1982 which was an agreement which sets out the terms of Conditions of Lecturers, copies of which had been circulated. Paras 1 and 5 clearly establish that the National Joint Council deal with the Conditions of Service of Lecturers in England and Wales as applicable, subject to the regulations in Guernsey so I take the second document on which you rely to be the “Silver” Book and on that basis the arrangements which were set out in the letter of the 30<sup>th</sup> December from the Director of Education to Mr. Smith I am broadly in agreement with.

Looking then at the provision of the regulations and the provisions of the NJC scheme that will be included in any local procedures, there is one issue to be clear about – paragraph 6.8(b) where it says –

“Disciplinary and Appeals bodies shall include either a lecturer  
member of the education committee of the LEA or a lecturer  
specifically selected for this purpose by the FE Lecturers  
service under the LEA, subject to the disqualification of any  
individual who has direct involvement in the case”.

I would suggest an interpretation that the LEA should read the Education Council, States of Guernsey, and for the Education Committee we should also read the Education Council, States of Guernsey.

The Panel is made up of two members of the Education Council and one other member, none of whom are lecturer members of the Education Council or people nominated by the teaching union and therefore in keeping with the documents on which they are relying we need to come to an agreement.”

The reference to paragraph 6.8(b) was an unstated reference to the provisions of the 1991 Silver Book, from which Mr Hinshelwood was quoting. Mr Taylor, who was presenting the case for the Council at the hearing, said he took the view that the 1976 regulations took precedence over any other conditions and that he would operate from those and not from the “Silver” Book. The Chairman of the Panel said that they realised the possibility of the issue as to which document applied, that resort had been had to the advice of HM Procureur, who had been satisfied that what the panel was doing was correct.

Mr. Henshelwood said he was happy to go along with the composition of the panel as long as his reservation was included in the minutes.

Mr Taylor stated that what he described as the interim procedure “was discussed by the local membership of the Union who were in agreement”.

10 On 14<sup>th</sup> January 1993 the Director of Education wrote to Mr. Smith informing him of the upshot of the disciplinary panel. The letter stated as follows:

“Following the disciplinary hearing held on 12<sup>th</sup> January 1993, the disciplinary panel concluded that the charge brought against you of serious misconduct, detailed in Mr. Taylor’s letter of 17<sup>th</sup> December 1992 has been substantiated.

The panel further resolved that appropriate action should be taken in relation to disciplinary penalties and that the nature of these penalties should reflect the severity of the charge.

It has been decided that:

- You will relinquish the duties and responsibilities associated with Lecturer Grade II with immediate effect and be appointed to the post of Lecturer Grade I
- Your salary will be reduced to £19,484 with effect from 1<sup>st</sup> February 1993. The normal arrangements for lecturers pay will apply following this date.
- You will be subject to a period of probation, following your return to the College, until 1<sup>st</sup> September 1994. During this period your performance and conduct will be monitored by the Principal of the College of Further Education in conjunction with your Head of Department. A formal assessment will be made on at least two occasions during this period by a Senior Officer of the Education Department in conjunction with the Principal and Head of Department.

The conclusion of the probationary period will be subject to a satisfactory final report and the subsequent recommendations of the Education Council.

I should be grateful if you would acknowledge, in writing, your acceptance of the above conditions.”

- 11 On 18<sup>th</sup> January 1993 the Plaintiff’s union wrote, in reference to the letter of 14<sup>th</sup> January 1993, as follows:

“The Branch wishes to inform you that, following the disciplinary hearing of Mr. Vince Smith and the subsequent penalties that the Panel imposed, the Branch accept those penalties as laid out in your letter.

However, we would wish to point out that the procedures adopted on this occasion and the penalties opposed as a consequence of the hearing should not be regarded as a precedent.

We will be seeking an early meeting with the relevant parties to discuss disciplinary procedures so that any future action of this nature may be conducted under a fully agreed formula.”

- 12 On 1<sup>st</sup> February 1993 the Plaintiff, himself, wrote to the Director of Education saying:

“Following the disciplinary hearing and the subsequent penalties imposed, I wish to inform you that I accept those penalties as laid out in your letter”.

*The Pleadings*

- 13 Paragraphs 6, 9 and 10 of the Cause read as follows:

“6. With regard to the disciplinary options open to the Defendant, these were governed by the terms of the Silver Book.

...

9. The actions of the Defendant or its servants or agents in connection with the demotion of the Plaintiff from his Grade II Lecturer position to Grade I Lecturer and changes to the Plaintiff’s pay scale by way of withdrawal of salary increments were in breach of the express terms of the contract of employment and in particular those with regard to the penalties available to be imposed upon the Plaintiff by the Defendant.

PARTICULARS OF BREACH OF CONTRACT

10.(a) The Defendant wrongly withdrew salary increments already earned by the Plaintiff in breach of the provisions set out in the Silver Book.

(b) The Defendant had the ability to transfer the Plaintiff to another post within the establishment but not to alter the terms with regard to remuneration or otherwise of the employment of the

Plaintiff. The alteration of the terms of employment and demotion of the Plaintiff were in breach of the provisions of the Silver Book.”

Paragraph 10(b) appears to be a reference to the provisions in the 1991 Silver Book despite paragraph 2 of the Cause, which pleads the incorporation of the 1981 Silver Book. In the Niances, paragraphs 6, 9 and 10 were “denied as a matter of law” or “denied in law”.

14 No clear agreement was reached as to precisely what issues of law were to be addressed at the preliminary hearing but they included, and the Plaintiff’s skeleton argument in the Royal Court identified, one issue of law arising from the denial of paragraph 6 of the Cause and the consequential denials in paragraphs 9 and 10. The Defendant Council contended – as appears from paragraphs 1 and 2 of the Pretensions – that because the 1976 Regulations and the 1981 Silver Book “contained no restrictions” on what disciplinary measures might be considered, it was open to the Council to impose whatever penalty it chose. Such a contention, at any rate as pleaded, assumed the application of the 1981 Silver Book.

15 In the same skeleton argument the Plaintiff contended that the 1991 Silver Book applied. The argument put forward was that the 1991 Silver Book contemplated transfer to another post within the establishment but not an alteration of the agreed terms as to remuneration, so that the Plaintiffs demotion, together with a reduction in his salary was invalid.

In paragraph 12 of the skeleton the Plaintiff also contended:

“In paragraph 4 of the Pretensions it is claimed on behalf of the Defendant that the Panel’s determination was such that the Plaintiff was to be dismissed but was offered alternative employment at a different salary or that the Plaintiff was offered alternative employment instead of being dismissed. It is submitted that the decision of the panel, as communicated in the letter of 30<sup>th</sup> December 1993 to the Plaintiff, does not support this conclusion.”

16 The Defendant Council’s skeleton argument in the Royal Court claimed that the Plaintiff’s contract of employment was governed by, inter alia, the 1991 Silver Book (despite the fact that its defence admitted and averred that the 1981 Silver Book applied), but that the 1976 regulations took precedence over the Silver Book, so that there was “no

fetter on the disciplinary hearing in the type of sanction that they were capable of deciding upon”: see paragraph 3. It was said that, under the terms of the Plaintiff’s contract, it was therefore, as a matter of law open to the Defendant to impose whatever sanction upon the Plaintiff it wished. The skeleton also recorded the acceptance by both the Union and the Plaintiff of the penalties imposed by the panel and ended by contending that the Plaintiff was, by the actions of his Union and himself, “estopped in any event from pursuing further recourse in this matter”. This estoppel was not pleaded although a variation of the contract was just about pleaded in paragraph 6 of the Pretensions, which asserted that:

“To the extent that the proceedings before the disciplinary panel and the penalties determined by that panel were pursuant to arrangements additional to, or, which is not admitted, by way of variation from, the terms and conditions contained and referred to in the documents enumerated in pretension 1 above, such additions or variations were agreed between the Plaintiff’s union and the Defendant.”

17 However, at the hearing, Her Majesty’s Comptroller, contrary to his skeleton argument, but in accordance with his pleadings, stoutly asserted that the 1991 Silver Book was not incorporated into the Plaintiff’s contract of employment in the following words:

“I hope to satisfy you, I am quite convinced in my own mind, otherwise I would not have pleaded the point, that it is clear from the papers, that as a matter of law, and the construction of a contract has to be a matter of law, the 1991 Silver Book options have not been incorporated in the contract.

Advocate Merrien for the Plaintiff, understandably, complained that this was a departure from the Defendants skeleton argument. He contended that the 1991 Silver Book applied, notwithstanding, that that, too, was a departure from his pleading, or at any rate part of it.

18 The function of a pleading is to state concisely and clearly the case which is made so as, where relevant, to delineate, or make it possible to delineate, any issues of law that may arise. The function of a skeleton argument is to summarise the parties’ arguments on the law and the facts and the application of the one to the other. The function of both pleading and skeleton is to secure the just and economical disposal of the cause and to assist the judge to that end. The function of a preliminary hearing on legal issues is to decide, where this can conveniently be done, discrete issues of law whose resolution may resolve the whole or a distinct part of the case. In the present case the pleadings and arguments fall far short of the ideal. Each party has ended up putting forward a case

which departed from either his pleading or his skeleton and the identification of what issues of law arose, or were said to arise, has been far from clear. If a preliminary issue of law is to be decided the skeleton arguments should ordinarily identify (1) the precise issue of law that each party desires to have decided; (2) the passages in the pleading which show that the relevant issue arises (and, if necessary, any application to amend that requires to be made); (3) the material upon which it is suggested that such issues should be decided; (4) why, in the light of that material, the identified issues are issues of law and not of fact and (5) what conclusion the judge is invited to reach on each of the identified issues.

*The decision of the Lieutenant Bailiff*

19 The Lieutenant Bailiff identified the issues of law as being the following:

(i) Whether the Education Council's Regulations governing the Leave of Absence of Teachers revised in March 1976 take precedence over (or according to Paragraph 3 of the Cause, apply over and above) the Conditions of Service produced by the National Joint Council for Teachers in Further Education in England & Wales, known universally as the Silver Book, and

(ii) Which, and which edition, of these documents governed the Plaintiff's employment by the Defendant Council at the material time.

(iii) Whether, in any event, the sanction of demotion was legally available to the panel appointed by the Defendant to try the Plaintiff for the disciplinary defence of serious misconduct in the event of the charge being substantiated.

20 By his judgment the Lieutenant Bailiff decided:

(i) That what took place was a demotion and not a dismissal with an offer of re-employment;

(ii) That the 1991 Silver Book applied;

- (iii) That the Defendant’s argument that there was no fetter on the disciplinary sanctions which it could impose was ill founded; but
- (iv) That, by no later than 5<sup>th</sup> January 1993 “demotion became incorporated into the contract as a sanction, in the event of a complaint of a disciplinary offence being established after due hearing”. 5<sup>th</sup> January 1993 was the date upon which, following the letter of 30<sup>th</sup> December 1992, the Plaintiffs Union wrote to the education office enclosing the documents that the Plaintiff intended to use as part of his defence of the hearing, without any comment on the letter of 30<sup>th</sup> December.

21 By his Notice of Appeal the Appellant Plaintiff contends that it was not open to the Lieutenant Bailiff to make the findings that he did in relation to a variation in the contract of employment by no later than 5<sup>th</sup> January 1993 and that, whilst purporting to decide an issue of law, he had, in this respect, decided what was an issue of fact which fell to be determined by the Jurats. He also contends that the Lieutenant Bailiff failed to take into consideration whether an issue of duress, economic or otherwise, fell to be considered.

22 In those circumstances we have first to determine what issues of law truly arose and whether in respect of those that were issue of law the Lieutenant Bailiff came to a correct conclusion.

*Dismissal or demotion*

23 In my judgment the Lieutenant Bailiff was entitled to find, and found correctly, that what the Council did was to demote the Plaintiff, that is to say to reduce both his rank and salary. That is what the letter of 14<sup>th</sup> January 1993 says and it can, in my judgment, have no other meaning. The letter did not purport to dismiss the Plaintiff. It conveyed a decision that he would be demoted. The fact that it invited his acceptance of the conditions contained in the letter does not alter its essential character. This issue, which relates to the true construction of the letter of 14<sup>th</sup> January, whose despatch and receipt is not in dispute, is a matter of law, which the Lieutenant Bailiff was entitled to resolve, even though it was not identified by him in his statement of the three issues that arose.

*Which Silver Book was incorporated?*

24 Whether the 1981 or the 1991 Silver Book applied is a question of fact upon which the parties themselves have expressed different opinions, contradictory both of themselves and of each other. As to this the Lieutenant Bailiff said:

“... although the correspondence at that time does not expressly say so, the Court is entitled to assume that all the relevant Conclusions of Service and Regulations were either brought to (Mr Smith’s) attention or available to Mr. Smith on taking up the post. He would thus have been aware that the United Kingdom conditions were applicable in conjunction with the Guernsey Regulations. He would also have been aware of the references in the introduction to future Revised Schemes and versions of each. In September 1991 the Amended Edition of the Silver Book was brought in. It would have been applicable in Guernsey as from that month, that is, well before the disciplinary hearing.”

Whilst it may be the case that the 1991 Silver Book was incorporated, it is far from clear to me that that was so. The reference in paragraph 5 of the Conditions of Service to “any future revised scheme” is consistent with the Plaintiff’s contract of employment incorporating the Silver Book as from time to time amended. But the passage in which those words appear is directed to providing that the 1976 Regulations or any future revision of them will, in the event of any difference, take precedence over the 1981 Silver Book or any future revised scheme. The paragraph does not in terms provide that the Plaintiff’s contract of employment shall incorporate any future revision of the English national scheme. Nor do the papers before us reveal any agreement to that effect when the Plaintiff began employment or when he changed grade. Nor have we seen any document, such as came into existence in 1982, whereby the Council adopted the 1991 amendments or whereby the Union on behalf of lecturers did so. It may be that, either by custom and practice, or by some express adoption of the 1991 Silver Book by the Council and the Union, or by reason of the parties otherwise making clear that the 1991 Silver Book was to be in force, its terms became incorporated into the Plaintiff’s contract of employment. But upon the material before us that is a question of fact, which, if it were necessary to do so, would have to be decided hereafter.

*Was demotion an available sanction?*

25 Whichever of the Silver Books applied, the Council was not, in my view, entitled (in the absence of some agreement such as was found by the Lieutenant Bailiff) unilaterally to

demote the Plaintiff as a result of a disciplinary hearing. In the absence of some contractual provision the remedy of an employer in the event of misconduct (apart, of course, from a written or oral warning) is to dismiss an employee either, if the conduct is sufficiently serious, summarily or by giving the notice provided for in the contract. Such a dismissal can, of course, be accompanied by an offer to re-employ the employee in a different and lower capacity and at a lower rate of pay. But an employee is not entitled unilaterally to demote an employee both in status and pay if the contract does not give him such an entitlement.

26 If the 1981 Silver Book was applicable, then the position, as at the end of 1992, was that that Book lay down a procedure for dismissal as did the 1976 regulations. But neither of those documents provided for demotion. The absence of any such provision cannot and does not mean that the Council could apply any sanction short of dismissal that it chose. The reverse is true. The Council was bound by contract to employ the Plaintiff as a lecturer Grade II at his current salary unless and until they dismissed him.

27 If, on the other hand, the 1991 Silver Book applied, then the Council possessed a power to transfer the Plaintiff to another post, but not, in my judgment, to down grade him both in salary and position.

28 Thus, whichever version of the Silver Book was incorporated, the Defendants were not entitled to demote the Plaintiff as they did.

#### *Variation*

29 The Lieutenant Bailiff has found that the Plaintiff and the Council mutually agreed by no later than 5<sup>th</sup> January 1993 that the Plaintiff's contract with the Council was varied by mutual consent so as to provide that demotion should be a possible sanction in the event of a disciplinary offence. In my judgment that is not so. The letter of 30<sup>th</sup> December 1992 asserted to Mr. Smith that the penalties available to the panel included, subject to agreement with his Union, demotion from Lecturer Grade II to Lecturer Grade I. That statement did not represent the contractual position whichever version of the Silver Book was incorporated. The letter of 30<sup>th</sup> December 1992 did not, in my view, purport to be an offer to vary Mr. Smith's contract of employment. It was a statement of the position as seen by the Council. The letter of 5<sup>th</sup> January 1993 from the branch secretary of the Plaintiff's Union to Mr. Taylor of the Education Office enclosed the documents that the

Plaintiff intended to use as part of his defence at the disciplinary hearing and notified the Education Office of three things (a) the Plaintiff's intention to call up to three witnesses (b) the fact that the Union intended to retain the services of Mr. John Hinshelwood, their full time regional official, in an advisory capacity to attend the hearing and (c) that Mr. Farish would be putting the case for Mr. Smith. It did not purport to accept any offer of a change in the Plaintiff's contract of employment. In those circumstances I find it impossible to spell out of these documents an agreement that the Plaintiff's contract should be so varied. If that had been the proper construction of the documents, the curious consequence would appear to follow that it would not have been open to the Plaintiff or his Union to point out at the beginning of the hearing on 12<sup>th</sup> January 1993 that the Council was simply wrong in asserting that the sanction of demotion was available.

30 In my judgment the Lieutenant Bailiff's decision in this respect cannot stand. Advocate McMahon has, however, submitted to us that, even if the variation in question was not agreed by 5<sup>th</sup> January 1993 it must be regarded as having been agreed at the beginning or, at any rate, by the end of the disciplinary hearings. I do not accept this submission. As I have already said I cannot read the letter of 30<sup>th</sup> December as constituting an offer on the part of the Council to vary Mr Smith's contract if employment; nor do I regard what was said at the beginning of the disciplinary hearing as constituting an acceptance of any such offer. I do not, of course, suggest that the parties must speak explicitly in the language of offer and acceptance. But they must manifest an intention to vary their existing contract. It is not apparent from the letter of 30<sup>th</sup> December or from what was said at the hearing that they intended any such thing.

31 That conclusion makes it unnecessary to decide whether it is necessary that any apparent variation was supported by consideration moving from the Council. We were told that the majority view amongst Guernsey lawyers is that, in contractual matters, Guernsey law is the same as English law, such that any variation would require consideration, and that the minority view was that Guernsey law should follow the civil law and require, not consideration, but a cause, that is to say an intent to enter into legal relations, whether supported by consideration or not. If consideration was required, neither Advocate McMahon nor Advocate Merrien was able to suggest to us that there was any consideration for Mr Smith's acceptance that the Council should have a right to demote him. If consideration was not needed, there was, in my view and as I have already said,

no intent manifested to alter the existing contractual arrangements between Mr Smith and the Council.

- 32 I do not doubt that in proposing to proceed in the manner stated in their letter of 30<sup>th</sup> December the Council acted in good faith in promulgating a disciplinary policy which they regarded as in accordance with good practice and as an improvement on the very limited provisions of the 1976 Regulations and the Silver Book. But the relevant question is whether what they promulgated was agreed as a variation of the Plaintiff's contract of employment. In my judgement it was not.

### *Estoppel*

- 33 The Lieutenant Bailiff declined to address the question of whether an estoppel arose upon the basis that that involved a factual inquiry. No form of estoppel is pleaded but a reference to estoppel was made in the Skeleton Argument of the Respondents in the Royal Court. It appeared to us, however, that on the undisputed facts, there was a powerful argument in favour of an estoppel and that much of the reasoning of the Lieutenant Bailiff in support of his conclusion that there was a variation of the contract in truth supported a different proposition, namely that there was an estoppel by convention. In the light of our indication to that effect Advocate McMahon on the part of the Council asked for leave to introduce an Exception de Fonds to plead such an estoppel.
- 34 I am satisfied that we have jurisdiction to allow such an amendment if we think fit. An Exception de Fonds should normally be entered before the inscription of the Cause on the Role des Causes a Plaidier. But there is jurisdiction, in a proper case, to allow such an Exception to be entered at any time before final judgement if the justice of the case so requires: Cherub Investments Ltd v Channel Islands Aero Club (1982) January 13 per Hoffmann, J.A. The Royal Court could, thus, have allowed such an Exception to be brought forward. By section 14 of the Court of Appeal (Guernsey) Law 1961 this Court has the jurisdiction vested in the Royal Court sitting as a "Cour des Jugements et Records", which, in my view, would entitle us to make such an amendment. Further by rule 12 (1) of the Rules of the Civil Division of this Court we have power to order the amendment of any document. By rule 12 (4) that power is not dependent on the existence of a respondent's notice in respect of the relevant part of the decision and the Court is

empowered to make any order, on such terms as it thinks just, “to ensure the determination on the merits of the real question in controversy”.

35 I am sure that we should not, in present circumstances, make such an amendment if there is evidence available which might be adduced by the Plaintiff and which could rebut the contention that such an estoppel was established.

36. I accept the following as an accurate statement of the law:

“Estoppel by convention may arise where both parties to a transaction “act on an assumed state of facts or law, the assumption being either shared by both or acquiesced in by the other”. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it, Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any “clear and unequivocal” representation or promise: it can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party”: Chitty on Contract Volume I paragraph 3-101.

37 I have reached the clear conclusion that on the indisputable facts the Plaintiff is now estopped from contending that demotion was not a sanction available to the Council in 1993. I reach that conclusion for the following reasons:

(a) it is apparent from the letter of 30<sup>th</sup> December that the Council was assuming and asserting that demotion with the Union’s consent was a sanction available to the Council;

(b) at the disciplinary hearing the Plaintiff and his representatives showed either that they shared that assumption or, at the least, that they acquiesced in it. The fact that demotion was one of the penalties available had been restated by the Chairman of the Panel without demur at the beginning of the meeting. Although objection, or, at least, a reservation, was tabled to the composition of the panel, Mr Hinshelwood described himself as broadly in agreement with the arrangements set out in the letter of the 30<sup>th</sup> December. Mr Taylor stated that the Union were in agreement with the interim procedure. No suggestion was made by or on behalf of the Plaintiff that the penalties available to the Council did not include demotion (with the Union’s consent).

(c) after the disciplinary hearing the Council sought and obtained the agreement of both the Union and the Plaintiff that they accepted the penalty. Neither of them suggested that the penalty was not available at all.

(d) thereafter the Plaintiff continued in the employment of the Council as a Lecturer Grade I and at a reduced salary i.e. in a demoted position. No approach was made to the Council by or on behalf of the Plaintiff to challenge the validity of the demotion until his solicitors' letter of 11<sup>th</sup> January 1996. We inquired whether there was anything else of relevance that occurred in the intervening three years Advocate Merrien told us, on instructions, that, whilst before then the Plaintiff expressed his dissatisfaction with his position to people he knew in a private capacity, no approach was made to complain to those responsible at the Council until 1996.

(e) assuming, as I do in Mr Smith's favour, that on 13<sup>th</sup> January 1993 he was given a message from the Council that, if he did not accept demotion, he would be dismissed, I am quite unable to accept that that meant that his will was so vitiated that there was no true, albeit reluctant, acceptance of his demotion. Nor can that circumstance alter the fact that Mr Smith and the Union made clear to the Council at and after the hearing and for several years thereafter that they acquiesced in the assumption that demotion was an available penalty.

(f) it would now be unconscionable for Mr Smith to resile from that assumption, on the faith of which the Council has acted for several years.

38 Accordingly I would allow the amendment to plead the Exception de Fonds and hold that the Exception is well founded and that the Plaintiff's claim fails. I would wish to hear argument on the terms as to costs upon which such amendment should be allowed and as to the costs here and below.