Judicial review of the decision of the Industrial Disputes Officer to refer an industrial dispute to the Industrial Disputes Tribunal

[2022]GRC075

IN THE ROYAL COURT OF GUERNSEY
ORDINARY COURT

BETWEEN:

(1) THE STATES OF GUERNSEY
(in its capacity as EMPLOYER)

Plaintiff

-AND-

(2) STUART LE MAITRE
(in his capacity as THE INDUSTRIAL RELATIONS OFFICER)

Defendant

And:

(3) THE GUERNSEY POLICE ASSOCIATION

First Interested Party

(4) MATTHEW ROGER and others referred to as
THE ASSOCIATION OF GUERNSEY FIRE FIGHTERS

Second Interested Party

(5) JONATHAN TORODE and others referred to as
"THE GROUP OF 50"

Third Interested Party

Before Her Honour HAZEL MARSHALL KC Lieutenant Bailiff, sitting alone

Hearing Dates: 2nd – 4th November 2022
Judgment handed down 30th November 2022

Counsel for the Plaintiff: Advocate A Ozanne
Counsel for the Defendant: Advocate R Gist

Cases legislation and textbooks referred to:

Legislation

Guernsey

The Industrial Disputes and Conditions of Employment Law 1947
The Industrial Disputes and Conditions of Employment Law 1993, ss 3, 10, 11, 18
The Employment Protection Guernsey) Law 1998

The States of Guernsey (Public Servants) (Pensions and other Benefits) Rules 1972
The States of Guernsey (Public Servants) (New Pensions and other Benefits) Rules 2016

Cases:

Guernsey
Bichard v States of Guernsey (Royal Court Judgment 28/2006)

England and Wales
Amec Civil Engineering v Secretary of State for Transport [2005] 1 WLR 2339
McCloud and others v The Lord Chancellor of England & Wales and others [2018] EWCA Civ 2844

Textbooks
De Smith: *Judicial Review of Administrative Action 8th Ed para 7.115*

FINAL
J U D G M E N T

The Application

1. By the Cause in this matter, the States of Guernsey ("**the States**") seeks leave to bring, and thereafter for the Court to determine, an application for judicial review of the decision ("**the Decision**") of the Defendant, the Industrial Disputes Officer, ("**the IDO**"), made on or about 20th January 2022/3rd February 2022, and purportedly made pursuant to Section 3 (2) of the Industrial Disputes and Conditions of Employment Law 1993 ("**the 1993 Law"** or **"the Law**"), to refer to an Industrial Disputes Tribunal (the "**IDT**") three "notifications" to him, each of which he considers to be notifications of an "*industrial dispute*" within the meaning of the 1993 Law He considers such disputes to be between, respectively, the parties making those notifications as employees of the States on the one hand, and the States as employer on the other. Using deliberately non-legal language, I will refer to the subject of each of the notifications as a "complaint".

2. The three notifiers, are the First, Second and Third Interested Parties recorded in the title of this action. The First Interested Party is the Guernsey Police Association, ("**the GPA**"), a recognised employees' union. The Second Interested Party is Mr Matthew Roger on behalf of the Association of Guernsey Firefighters, ("**the AGF"**), an association which the States does not recognise as a union, firefighters in Guernsey being members of the trade union Unite, the Union ("**Unite")**. The Third Interested Party is Mr Jon Torode, (and formerly a Mrs Collette Falla, who appears subsequently to have withdrawn) as representative(s) of an otherwise unidentified cohort of senior civil servants who refer to themselves as "the Group of 50" ("**the G50**"), although in Mr Torode's case a particular issue arises because he is His Majesty's Greffier, and he holds this position by appointment rather than under a contract of employment. He is therefore, *prima facie*, not an employee. I will deal with this difference separately if and where necessary, but for simplicity I will ignore it otherwise.

3. The essence of each of the complaints is, broadly, that those making the notification are aggrieved at the implementation of changes to the pension scheme embodied in *The States of Guernsey (Public Servants) (Pension and other Benefits) Rules 1972 – 2007* of which they were members, which changes were effected in 2016, by the substitution (for convenience) of *The States of Guernsey (Public Servants) (New Pension and other Benefits) Rules 2016*, with a further amendment made to these in 2019. For brevity I will refer to this continuing scheme as the "**States Pension Scheme**" or "**the Scheme**". The complainants are all members of the Scheme, and are not merely entitled, but are obliged, to become members as part of their terms of employment. They are aggrieved at the way in which such changes affect or apply to them, either as compared with their position and pension expectations immediately prior to the coming into force of the changes made by the 2016 Rules, (I do not think that any grievance arising from the amendments made in 2019 has been disclosed), or as to some differential in the way in which those changes affected them as compared to others.

4. The States takes the view that the complaints being made are not amenable to the processes of the 1993 Law at all, because they are not "*industrial dispute(s)*" within the meaning or intendment of that Law. Through Advocate Ozanne, they point out that the States Pension Scheme takes effect through the quasi-legislative mechanism of a States Resolution to approve, adopt and put into effect the relevant Rules. They point out that the adoption of the 2016 Rules took place after several years' hard-fought negotiation between officials of the States and representatives of employees' organisations, set up for that very purpose, and that the new Rules were only implemented after balloting among the representative organisations had disclosed a sufficiently substantial representative majority acceptance that it appeared reasonable to the States to implement those new Rules, under its powers. They say, therefore, that any such grievances as are now being pursued should have been pursued many years ago, by the route of seeking (if possible) judicial review of the relevant States Resolution. Otherwise, the complaints must be viewed as allegations of breach of contract (ie, contracts of employment), or complaints about the operation of the Rules themselves, and either of those is a claim which can only be pursued through the courts. They are therefore simply not matters which either can be adjudicated on by an IDT, or are appropriate to go before an IDT. They say, therefore, that for the above reasons (on which they have greatly elaborated in argument) Mr Le Maitre, the IDO, was wrong to refer, or to purport to refer, these complaints to an IDT, and, hence, they have brought this Application for judicial review of his Decision to do so.

5. Apart from their criticisms based on the substance of the complaints, they take certain further procedural points. First, they say that as the essence of the complaints, even as articulated by the complainants, is breach of contract, such complaints are all, by now, time-barred by prescription, since it is more than six years since the changes to the Scheme Rules were put into effect. Next, they say that the Decision to refer the AGF complaint to an IDT is barred by a previous (and correct) decision of the former IDO, in 2018, that there was no "industrial dispute" because these very same grievances had already been raised and were compromised away under a binding agreement between the States and Unite of which the complainants were members and by which they were therefore bound. They also say that the Decision to refer the GPA complaints to an IDT is likewise barred by a similar decision of the former IDO in 2018 in respect of their grievances. However, the position there is more complex, as the GPA are not members of Unite, as explained later. As regards all three referrals, they take further

procedural points, including that the IDO's Decision is flawed and should be quashed on grounds such as the absence of identification of all the actual persons who are making the relevant complaints, and an absence of reasons having been given, quite apart from general allegations that it was irrational and unreasonable.

6. On behalf of the IDO, Advocate Gist simply rejects the complaint about absence of reasons, but contends, in effect, that the remaining arguments made by Advocate Ozanne are actually irrelevant to the question in issue on this Application - which is simply the validity of the IDO's Decision, that he has been faced with three "industrial disputes" within the meaning of the 1993 Law. That Decision, he submits, is both subjectively and objectively reasonable and unimpeachable, and the IDO's consequent action in referring these complaints to the IDT procedure – which is what is being challenged – is therefore equally unimpeachable, because it is his duty under the 1993 Law to do so. Insofar as the States' contentions on the merits of those disputes might have any substance, they are matters to be considered and investigated by the IDT as part of its own processes, and the States' present application should be dismissed for missing the mark, or being, at best, premature.

Judicial Review - procedural

7. The remedy of judicial review (more fully: 'judicial review of administrative action') is available in Guernsey under the procedure laid down by Practice Direction No 3 of 2004. This procedure was confirmed and applied in a case in which (ironically) a States employee was complaining about the effects of changes made to a previous iteration of the rules of the States Pension Scheme, whereby there was an amendment to the formula for calculating "reckonable service" under those Rules: see *Bichard v States of Guernsey* (Guernsey Royal Court Judgment 28/2006). The procedure requires an applicant for judicial review first to apply for leave to bring the particular matter before the Court. This requirement operates as a filter, to ensure that hopeless, misconceived or inappropriate applications can be dismissed at an early stage, before obliging the respondent to incur major costs in dealing with them.

8. Where, however, it is apparent at such early stage that there are substantial or complex issues being raised, not readily amenable to a summary evaluation and/or requiring serious questions of general application to be decided, it is convenient to take both the application for leave and the actual hearing of the application itself together. That has happened in this case, and a rolled-up hearing was ordered by the Bailiff in his order of 25th March 2022, when he gave directions for the further conduct of the proceedings.

9. The only other matter of procedural note is that the action before this Court is between the States of Guernsey and the IDO. The Interested Parties are not parties to this action, albeit they plainly have a particular interest (in the non-legal sense) in the outcome of the proceedings. That position is pursuant to the direction of the Bailiff in his order above. The Interested Parties therefor attend the hearing only (in effect) as members of the public, albeit Advocate Geall, instructed by the GPA on a watching brief, is entitled, as a Guernsey Advocate, to sit in counsel's row.

Evidence

10. As to the substantive evidence in the matter, the States have filed three affidavits. The main affidavit is the first affidavit, dated 3rd March 2022, of Mr Terence Harnden, a

Senior Negotiator employed by the States of Guernsey in that or a similar position since 1985, and involved with negotiations and consultations regarding, in particular, the States Pension Scheme, since the mid-1990s. It appends copious exhibits amounting to some 1,154 pages (although it is fair to say that this does include two versions of the Scheme Rules each in excess of 100 pages, and 70 pages of pleadings in the action *Pirouet and Batiste vs States of Guernsey*, referred to in [40] below).

11. Mr Harnden's evidence explained the background to, and evolution of, the Scheme, the particular considerations and actions which went into the review leading to the adoption of the 2016 Rules, subsequent developments, and the interaction of the States and other persons in respect of the current complaints and their origins. As an "aside" he also produced evidence regarding the background to the current wording of the 1993 Law. His evidence was that, in his personal experience, the 1993 Law had never been used to determine matters such as the present disputes, which were (he believed) matters of breach of contract, intended to be dealt with by the courts. He was of the firm view that the 1993 Law had always been understood not to cover, and that it therefore did not cover, the subject disputes. He filed a second affidavit in June 2022, replying in extensive and emphatic detail to the affidavit evidence of Mr Le Maitre mentioned below, but this did not really take the issues much further.

12. The second main affidavit on behalf of the States is that of Ms Toni Airley, dated 1st March 2022. Her position is currently Senior HR Manager - Pay, Reward and Employee Relations, with the States of Guernsey. She has been involved with the industrial disputes process in Guernsey since January 1999, the former "Industrial Disputes Service" having since been renamed, less confrontationally, the "Employment Relations Service" ("**The ERS**"). She gave evidence that her work and experience had involved her in all references of industrial disputes to the IDT since 1999, and that the majority of such disputes related to negotiations about pay awards, usually in the context of a collective bargaining process. She described seven such Tribunals between 2003 and 2011, as illustrating the kind of matters which were referred, and they were, indeed, mainly concerned with pay awards and, to a lesser degree, other employment matters such as working hours and holiday entitlement. She explained some of the practices of the IDT and that, in her experience, no IDT had dealt with any complex issues of law or damages, nor issues of breach of contract or pensions; in her opinion, based on her experience, the decision of the IDO to refer the present complaints to the IDT was wrong, and such matters were properly the subject of actions in the Royal Court.

13. Mr Le Maitre, the IDO, filed an affidavit in response to the above on his own account, in May 2022. He explained that his more recent background had been in the Civil Service in Guernsey until 2006, when he had moved into the private sector in commercial senior management roles (with Guernsey Airtel and the Medical Specialist Group, and also for a period as a self-employed consultant and NED) until his retirement earlier this year. He is not, he emphasised, legally qualified. He had been appointed as Deputy Industrial Disputes Officer in 2016 and succeeded Mr Carrington as Industrial Disputes Officer in February 2020, for a five-year term. The role is not full time, and whilst he and the DIDO draw administrative support from, and use accommodation at, the ERS, they work co-operatively with them but largely autonomously. He confirmed that Ms Airley's example cohort of decisions included a comprehensive record of IDT hearings between 2009 and 2011, and that he was not

aware, in fact, of any actual hearing since then. He also produced an example of an IDT award in 1999 which, he pointed out, had actually awarded that a whole new contract be provided to one employee group (college lecturers) and laid down specifically the terms which should apply.

14. He explained how he saw his own role, pointing out that it involved efforts at conciliation, as well as referring matters (or not) to an IDT. Not all matters which were notified to the IDO would proceed as a "dispute". As regards the subject complaints, he explained what he knew of Mr Carrington's actions, and also his own actions, regarding them, and he produced his correspondence files – which, unsurprisingly, disclosed certain documents which had not been seen by Mr Harnden or the States' own representatives at the time. He explained how he had come to the Decision itself, his interaction with the States and their Advocates as well as with the Interested Parties, why he had concluded that he properly could and should refer the complaints to an IDT under s. 3(2) of the 1993 Law, and why he believed that he had been correct to do so.

15. He also filed a second affidavit in June 2022 to clarify his position with regard to taking legal advice, but this did not really take the substance of the matter any further.

The Industrial Disputes and Conditions of Employment Law 1993

16. It appeared to me from the outset that the issue which is central to this Application is the correct interpretation of the 1993 Law, and in particular the definition of "*industrial dispute*" contained in it. For the better understanding of what follows, it is necessary to be acquainted with this definition, and also with some of the other, wider, terms of the Law for context. It is therefore convenient to give an account of the Law here.

17. By Sections 1 and 2, of the Law, the States is to appoint an Industrial Disputes Officer, and a Deputy Industrial Disputes Officer to deputise for him where necessary.

18. The functions of the IDO are set out in Section 3:-

> *"3 (1) Where an industrial dispute, actual or apprehended, is notified to the Industrial Disputes Officer, he shall use his best endeavours to prevent or settle the dispute –*
>
> *(a) by giving such advice and assistance as he thinks necessary or expedient'*
> *(b) by conciliation;*
> *(c) by arbitration, voluntarily submitted to by the parties; or*
> *(d) by referring the dispute to the Tribunal with the agreement of the parties.*
>
> *(2) The Industrial Disputes Officer shall refer an industrial dispute to the Tribunal –*
>
> *(a) if, in his opinion the dispute cannot be settled by the methods set out in subsection (2); or*
> *(b) if the dispute is not settled within six weeks of being notified to him, unless in his opinion negotiations conciliation or*

arbitration proceedings are in progress with a view to a settlement.

(3) The decision of the Industrial Disputes Officer –

(a) as to whether a dispute which has been notified to him is an industrial dispute;

(b) as to the date upon which an industrial dispute was notified to him; and

(c) as to the matters set out in subsection (2) (a) and (b);

shall be final.

(4) Where the Industrial Disputes Officer refers an industrial dispute to the Tribunal under this section, he shall forthwith deliver written terms of reference to the Tribunal identifying each issue in the dispute which is to be investigated and upon which the Tribunal is to make an award.

(5) ... ."

19. Section 4 provides for the convening of an "Industrial Disputes Tribunal"

> *"whenever occasion may require for the purpose of investigating any industrial dispute referred to it by the [IDO] under Section 3*".

The constitution, membership, powers and procedures of such an IDT are set out in the Schedule to the 1993 Law. Essentially an IDT is convened *ad hoc* for any dispute, as an individual exercise (Para 1). Its panel comprises a Chairman, and two ordinary members drawn, one each, from panels known as the Employers' Panel and the Employees' Panel (Paras 3 and 6). All Tribunal members are appointed by the Bailiff after consultation with the IDO (Para 5). Decisions are made on a simple majority (Para 14) but with the Chairman only having a casting vote (Para 16). Rules of procedure can be stipulated by the "Board" (ie the then Board of Employment, Industry and Commerce, which would now be the relevant States Committee), but otherwise the Tribunal can set its own procedures (Paras 17 and 19). It is granted the same powers as the Royal Court with regard to summoning and receiving oral or documentary evidence (Para 23), and it has powers to make orders as to the costs of or incidental to any hearing (Para 24), although if it does not do so, the costs are met by the States (Para 25).

20. The functions of the Tribunal are set out in Section 5 of the Law, and are principally that it shall

"(1) (a) investigate and make an award in respect of any industrial dispute referred to it by the Industrial Disputes Officer under Section 3

(b) [make written statement of award]

(c) [promulgate a notice of its award]

(d) declare that its award shall take effect from a specified date….".

By subsection 5(2) the IDT also has power to make an award effective from a specified earlier date, where the award holds that an employer has knowingly not been observing

the minimum "*recognised conditions of employment*" (see s.11) in a particular trade or industry.

21. Sections 6 – 9 deal with confidentiality, interpretation of awards, costs of consensual arbitrations, and tribunal records, and are not relevant.

22. Under Part II of the Law headed "*Conditions of Employment*" Section 10 contains an important provision This is, omitting the irrelevant, that:

> *"10. …a decision or award of the Tribunal shall, from the date upon which it takes effect, be binding on the employer and employee to whom it relates and shall be an implied condition in the contract of employment between them until varied by a subsequent* [decision, award or agreement or permit]*."*

This section thus lays down how an IDT award takes effect. It is material to note that there are no provisions in the Law for any appeal from an award of the IDT.

23. Section 11 provides that:

> *"11. Where in any trade or industry conditions of employment are established by negotiation, arbitration or award to which the parties are organisations of employers and trade unions which are respectively representative of substantial proportions of the employers and employees engaged in that trade or industry in Guernsey, those conditions shall be known as "the recognised conditions of employment", and all employers in that trade or industry shall observe them or conditions of employment not less favourable than them."*

24. Sections 12 and 13 define and refine the meaning and effect of "*not less favourable"* and are not relevant. Section 14 provides that certain matters are deemed to be an "*industrial dispute*"; these are, by s.14(1), the employment of any person in contravention of ss 11 and 12, and by s. 14(2), any question as to the nature, scope or effect of any "*recognised conditions of employment",* or whether an employer is observing those conditions, or conditions not less favourable. Subs. 14(3) lays down matters to which the Tribunal is to have regard when considering such questions.

25. Part III of the Law contains general provisions, such as the obligation of the "Board" to provide information to the Tribunal (see s.15) and relevant offences (see s. 16). Section 17 relates to Orders of the "Board", and is not relevant.

26. Section 18 is central to the present Application, as it provides definitions. One material such definition is:

> *"**employee**" means a person who has entered into or who is gainfully occupied under a contract of employment (express or implied, written or oral) with an employer, whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour"*

There is no definition of employer. It is also to be observed that:

> *"**trade or industry"** includes the performance of its functions by a public authority".*

However, the crucial definition, for present purposes is:

> *"**industrial dispute"** means any dispute or difference between an employer and an employee or between an employee and employees, connected with the employment or non-employment, or the conditions of employment of any person".*

27. The further provisions of the Law are mechanistic and formal only, and are not relevant.

The broad issues

28. Thus, the obviously central issue in this Application is whether the IDO was correct, or was at least entitled, to regard the three complaints which are the subject of his Decision as "*industrial dispute[s]*". If he was not, then the matter ends there; they are outside his remit and his Decision to refer them to an IDT would have to be quashed. If he was, then the second issue, or set of issues, is whether there are other aspects of what has happened which still render his Decision liable to review by this Court for error or unreasonableness, either as a whole or possibly as regards one or two only of the three separate notifications to which the Decision relates.

29. The first issue is a simply a point of construction, even if its determination may not be simple. However, both this and the further issues require to be considered in the context of history and surrounding circumstance, both generally and specifically as regards the three complaints. I therefore now turn to give an account of this material history. It is, unfortunately, unavoidably lengthy.

The history of the States Pension Scheme

30. The States Pension Scheme is set up by the States, by States Resolution, as previously mentioned. The Scheme administrators are the Civil Service Board, which is a body set up by the States in 1963 to be responsible for personnel. In general principle, at least, all States employees are entitled, but also required, to join the Scheme as a term of their employment. However, as a result of the Scheme's history and development, membership is not entirely confined to persons employed by the States. Other employment sectors in Guernsey whose participants are not employees of the States itself, such as teachers, librarians and employees of States trading companies, are also eligible (and I assume, required) to join the Scheme. Crown Appointees, such as the Bailiff, the judiciary and holders of other States offices such as HM Procureur and HM Greffier, have also been admitted into the Scheme since (I think) 1975. In addition, I am told that persons may be members of the Scheme through being widows or dependents of States employees. The breadth of the Scheme membership thus extends outside the cohort of those with a direct contractual employment relationship with the States itself. I was told that the total number of employees within the Scheme is of the order of 5,000.

31. The instrument which constitutes the Pension Scheme (in fact there are two constituent schemes, but nothing turns on that) is a set of Scheme Rules, which have been formally

adopted by Resolution of the States of Deliberation. There has been such a Scheme since about 1919, but it has developed over the years. A wholesale revision of the Scheme Rules was made in 1972 by the *States of Guernsey (Public Servants) (Pensions and other Benefits) Rules, 1972*, at the time when the Scheme was altered from being non-contributory to being contributory. Those 1972 Rules were subsequently amended several times, but generally, I think, to increase the benefits conferred on members.

32. The States submits, (but in the light of his arguments, Advocate Gist did not really comment on this) that the Scheme Rules recognise and preserve, and always have done, that the right to make amendments to the Scheme Rules lies with the States alone, to do so by States Resolution save for express provision for this power to be delegated in minor respects. Whilst this was only implicit in the 1972 Rules (see Part I generally, and Rule 43 regarding delegation), it was the clearly understood position - see [34] below – and was made express in Rule 6 of the 2016 Rules.

33. Concerns about the future costs of the Scheme led to a review being commissioned in the early 1980s. A report by Peat Marwick Mitchell & Co was made to the Civil Service Board in 1987. Its recommendations set out four suggested appropriate general objectives for the Scheme to espouse. These included approximating its benefits and terms to those applicable to equivalent groups in the UK and elsewhere, but also keeping the Scheme costs (which are ultimately underwritten by the taxpayer) as low as possible. The report also included recommendations for an improved consultation process between the States and members of the Scheme with regard to any changes in the Scheme Rules.

34. This last recommendation resulted, in 1988, in the creation by the States of the Pensions Consultative Committee (the "**PCC**") having several members from both the employer side and the staff side, as a forum for discussion and negotiation of any changes to the Pension Scheme Rules and related matters. The PCC itself has no executive powers. It was set up on the basis that

> "*Final decision-making authority would remain with the States"*

(see Para 276 of the relevant Policy Letter of 16th June 1988, adopted in Resolution 8 of the States on 27th July 1988)). At the same time, the Association of States Employees Organisation ("**ASEO**") was also created, as an umbrella association to facilitate negotiations in (rather than "with" - a subtle but important difference) the PCC about any such rule changes, by co-ordinating and representing the views of the several trade unions which were its constituent members. ASEO is solely concerned with pensions and related matters. It elects the five members of the staff side of the PCC.

35. The GPR is a constituent member of ASEO. Unite was a constituent member of ASEO but withdrew from membership between December 2015 and the conclusion of the December 2017 Agreement mentioned in [42] below.

Origins of the 2016 Rules

36. In 2010, there were, once again, mounting concerns about the costs and potential future costs of the Pension Scheme as it then stood. This caused the PCC to set up a Joint Working Group, comprising representatives from both employer and staff side, to review the Pension Scheme once again, and make recommendations for reform.

Those recommendations, embodied in a report of February 2013, were intricate, but the central point was the recommended closure of the then current "final salary" based scheme, and its replacement with a "CARE" (Career Average Revalued Earnings) based scheme, together with other changes to pension age, speed of accrual, etc, but with protections for Scheme members close to retirement, who might have insufficient time to adjust to the new regime before relying on their pensions. The proposed changes, being aimed at reducing the predicted percentage of States' revenue required to be devoted to the States Pension Scheme, naturally tended to effect a reduction in the benefits being conferred, (although it is notable that it did not take the even more draconian step of moving from a "defined benefit" scheme to a "defined contribution" scheme). It is therefore unsurprising that the proposals were not favourably received by the employees and their representatives.

37. Cutting a long and tortuous story short, despite several years of negotiations, and some concessions resulting in amendments to the proposals, there was recurrent rejection of the proposed reforms across the Scheme membership. Eventually, however, with the States publicly proposing that it would approve the then current proposals for reform and seek the determination of the Royal Court as to its right to vary the Pension Scheme without members' consent in all the circumstances (ie, with the need to rein in the costs of the Pension Scheme, the reasonableness of the proposals, the extent of meaningful consultations and negotiations which had been undertaken before their formulation, and the States' reservation of the right to amend the Scheme Rules), there was a last attempt to reach an out-of-court solution by mediated negotiation.

38. In July 2015, ASEO confirmed that a majority of unions representing a substantial majority of Scheme members was prepared to recommend further revised proposals to their members. A subsequent ballot produced a sufficient level (over 56%) of majority support – or at least acceptance – of the latest proposals, for the States to consider it justifiable to proceed with the changes to the Scheme without going to the Court. Those reforms were therefore adopted by States Resolution in February 2016, and they came into force from 1st March 2016. For reasons of practicality, the changes were formulated as an entirely new Scheme, *The States of Guernsey (Public Servants) (New Pensions and other Benefits) Rules 2016* rather than by piecemeal amendments to the existing Scheme. They are conveniently referred to as "**the 2016 Rules**".

39. Apart from recording expressly the States' exclusive right as "Principal Employer" (a defined term under the 2016 Rules, for their operation) to make amendments to those Rules see (Rule 6), the 2016 Rules also provided expressly, at Rule 2, that

> *"2. These Rules and any dispute or claim arising out of or in connection with them or their subject matter or formation (including non-contractual disputes) shall be governed by and construed in accordance with the law of Guernsey"*

and at Rule 3 that

> *"3. The courts of Guernsey shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with these Rules or their subject matter or formation (including non-contractual disputes or claims)…"*

Subsequent challenge to the 2016 Rules, and the 2019 Amendments

40. Shortly afterwards, on 15th April 2016, two aggrieved individual employees, Messrs Pirouet and Batiste ("**P and B**"), supported by Unite, took proceedings in the Royal Court to challenge and complain at the introduction of the 2016 Rules.

41. The pleadings are in the evidence. P and B asserted that the change, which they characterised as a '*unilateral change in the terms and conditions of their employment'*, was unlawful and a breach of contract. They claimed declarations that they were entitled to continued membership of the "*1972 Scheme"*, as it had been in effect, either on the date on which they (respectively) commenced States employment or, alternatively on the 29th February 2016, (the date immediately before the coming into effect of the 2016 Rules) or on the terms of being accorded contractual benefits equivalent to either of these positions, together with damages for breach of contract. The States' Defences pleaded, in essence (and I summarise) that the changes had been made lawfully, because P and B's contracts of employment contained an express, or alternatively implied, term that the States was entitled to amend the Rules of the Pension Scheme, and further, that the change had been effected by a process (collective negotiation in the PCC) which was essentially reasonable and therefore compliant with any contractual implication in that regard.

42. Those proceedings were not pursued to trial, but led to a confidential mediation, in which Unite participated as a union. From this a compromise settlement ("**the December 2017 Agreement**") was reached and was executed on 8 December 2017. This would provide a choice to Pension Scheme members in the position of B and G, ie "*Transitional CARE members*" - those who were being migrated from the former final salary pension scheme to the new CARE pension scheme from 1st March 2016. The choice was either to take, from 1st March 2016, the pension benefits accruing under the new 2016 Rules or (broadly) to take an alternative under which they would have an adjusted applicable retirement age, receive a lower rate of annual pension (but with a lump sum), and make higher scheme contributions from 1st January 2020. This choice was put to all Unite members, and received approval. It thus became binding on all Unite members, but also (and this had been part of the December 2017 Agreement) it was then to be offered to all <u>other</u> "Transitional Care members", ie those who were not members of Unite. It became known as "**the Agreed Option**".

43. The required amendment to the 2016 Rules to enable the Agreed Option to be made available to relevant members was approved by a further States Resolution, which took effect on 22nd May 2019. The offer of the Agreed Option to all other eligible Scheme members was made in April 2019, with a time limit for acceptance of six months.

44. The AGF are members of Unite.

Origins of the present challenges

2018

45. However, in the interim there had been two further notifications to the IDO, who was then Mr Carrington, invoking the 1993 Law. On 26th February 2018 Mr Bob Lanning of Unite, wrote to the IDO to register a formal dispute with the States on behalf of the two firefighter unions led by a Mr Paul Ozanne, complaining at

> "*detrimental contract breaches by their employer, as an example but not limited to the recent enforced changes to their contractual retirement ages".*

This caused raised eyebrows on the States' part, since Unite had, within the December 2017 Agreement undertaken

> "*not to support any further claim in respect of the proceedings and the wider dispute.*"

46. On 6th March 2018 a representative of the GPA also wrote to the IDO stating that the GPA wished to register a dispute, for the same reason as the firefighters.

47. On 6th April 2018 Mr Ionannou-Droushiotis of the ERS wrote, on behalf of Mr Carrington as IDO, to each of the GPA and the AGF, in identical terms, rejecting the requested reference on the grounds that there had been no "*enforced changes to contractual retirement ages or other terms and conditions*", but citing the fact that

> " *…..an agreement was reached between all parties in advance of any Court hearing regarding the pension changes and this agreement was accepted by the parties, including Unite the Union on behalf of their members".*

This decision was notified to the States, through the Office for Policy and Resources.

48. However, unbeknown to the States, the GPA then wrote asking Mr Carrington to reconsider this decision in their case, on the grounds that the GPA members were not members of Unite, and had therefore not, they claimed, been a party to any settlement of the new Pension Rules in any way.

49. In mid-2018, Mr Harnden had correspondence with Mr Torode, explaining the effects of his own personal pension position to him. Mr Torode was unhappy, and the exchange ended in November 2018 with him stating that the next communication would be "*from our Advocates*", although nothing then materialised.

50. During August 2018, Mr Harnden also corresponded with the Chairman of the GPA, explaining that, whilst it was accepted that the GPA had not been parties to the "Unite" settlement, as they were not members of Unite, nonetheless, the resulting Agreed Option was being made available to them and the earlier decision by the IDO that there could be no recourse to the IDT was still correct, because any action would "*undoubtedly*" have to be taken through the Court – as B and G and Unite had obviously appreciated.

2019

51. As Mr Harnden was not aware that Mr Carrington was being urged to reconsider his decision of April 2018 in respect of the GPA, it was therefore with surprise that, almost one year later, he received a letter from Mr Carrington (through Mr David Higgs of the ERS), dated 23rd July 2019, stating that since

> *"…expressed consent was not given to the PCC to agree the changes on behalf of the GPA"*

an "industrial dispute" could (ie effectively "did") exist between the States and the GPA, and that, as to this, Mr Carrington considered that conciliation was not viable and so he suggested arbitration. The reawakening of the matter had, apparently, been prompted by the circulation, in April 2019, of the universal offer of the Agreed Option to all Transitional CARE Scheme Members.

52. The States thus became aware of the continued disaffection of the GPA from about this time, and it was at this point that they instructed Advocates (Walkers) to deal with the matter on their behalf. Walkers wrote on 28th August 2019, disputing the IDO's contention that an "industrial dispute" - as opposed to a dispute in the nature of a contractual dispute – did, or could, exist between the States and the members of the GPA, for various reasons. These included, that the earlier decision of the IDO of 6th April 2018 was not only correct (because its analysis that there had been "no" enforced changes to contractual terms or conditions was correct in law, regardless of whether the GPA had been party to any subsequent compromise agreement), but that it was in any event "final" under s. 3(3) of the 1993 Law; there was no jurisdiction to change his mind. It was therefore considered that the IDT jurisdiction could not be invoked. This response apparently (the States thought) concluded the correspondence.

53. On 9th September 2019, Mr Carrington received a letter from Mr Torode on behalf of the G50. Those were a group of senior civil servants who did not qualify as Final Salary Protected Members of the Scheme, and were, therefore Transitional CARE members. The basis for their asserted dispute with the States was that the failure to accord to them the "protection" option of remaining subject to the 1972 Rules (given to Final Salary Protected Members) constituted age discrimination, and/or failure to comply with an asserted objective to align the Guernsey States Pension Scheme with similar UK public sector Pension Schemes. This was based on the fact that it had recently been held in the UK, in *McCloud and others v The Lord Chancellor of England & Wales and others* [2018] EWCA Civ 2844, (leave to appeal to the Supreme Court having been refused) (the "**McCloud ruling**"), that failing to afford younger members of a pension scheme the protection afforded to older members, by "transitional provisions" related to date of birth, was age discriminatory (as well as indirectly gender discriminatory and race discriminatory in the circumstances) and was unlawful and/or contrary to policies on equal treatment.

54. It is to be noted that Guernsey did not in 2016, and does not yet, have any legislation outlawing discrimination on grounds of age. The McCloud ruling was decided under provisions of the UK's Equality Act 2010.

55. On 21st November 2019 Mr Carrington also, apparently (by inference from later correspondence), received another "Request for Assistance" from the firefighters.

56. This request has not been produced in the evidence, and may perhaps have been informal but it is suggested to have been of even date with a letter from AFR Advocates, their Advocates, to Walkers on behalf of the States, complaining in general terms as to the "*imposition*" of changes to the Pension Rules from the Rules as they stood before the 2016 Amendments, describing this as a breach of contract and threatening legal proceedings. This was swiftly rejected by Walkers as being misconceived, in that no breach of contract had occurred (the States having the right to make amendments to the

Pension Scheme from time to time, as had, of course, been pleaded in the B and G case), and that the only appropriate course to deal with any grievance about the introduction of the new Rules would have been to take judicial review proceedings to challenge the States Resolution of 2016. This had not been done, and was by then well out of time This response appeared, so far as the States was concerned, to bring the matter to an end.

57. Taking stock therefore, at this time, the IDO (Mr Carrington) was apparently in receipt of three claimed active "notifications" of complaints, being those which have now been the subjects of the Decision which is the subject of the present Application. However, the States was only aware of the GPA complaint having been made to the IDO, and it had refuted this as inadmissible for having, already, been correctly rejected by the IDO.

2020

58. Mr Carrington retired as IDO in December 2019, and Mr Le Maitre, the present IDO and the Respondent to this application, succeeded him, in February 2020. Whilst Mr Le Maitre had been the DIDO since 2016, his evidence is that he and Mr Carrington had worked separately, and he had no knowledge of the matters now in issue, except for a general awareness that Mr Carrington had been working on a dispute involving police officers. There was no process of handover between Mr Carrington and himself, and Mr Carrington's record keeping had not been well-organised. Possibly as a result of this, but also no doubt contributed to by the Covid pandemic, which erupted in the spring of 2020 and caused a huge disruption of daily life in general, nothing further was done at the IDO's office for some months.

59. In about September 2020, matters revived again. Almost simultaneously with the IDO's office (Mr Le Maitre, Mr Higgs the Employment Relations Officer, and Mr Smillie the new DIDO) realising that the various complaining parties might well be awaiting action from them, Mr Le Maitre received a letter from Randell & Loveridge on behalf of the GPA, dated 28th September 2020, explaining why they considered that the IDO should (or even must) refer their complaint to the IDT. This was apparently an answer to a request for such an explanation made by Mr Carrington almost a year previously. This letter was followed by a riposte from Walkers, dated 8th October 2020, again explaining their case as to why this was simply not correct.

60. Reviewing the matter, Mr Le Maitre considered himself to be in difficulty, with two strong but conflicting lawyers' views being expressed on opposite sides of the issue whether or not there was a "referable" industrial dispute, and it was therefore decided to take legal advice. The GPA and the States were notified accordingly. Legal advice was then sought and obtained from Carey Olsen, some time before 12th January 2021. (Privilege is claimed for that advice).

61. At this time, it was noted by the IDO's office that the States had not yet been informed of the two other complaints, namely those from the AGF and the G50.

2021

62. In February 2021, Mr Higgs wrote on behalf of Mr Le Maitre to Randell & Loveridge, asking them to confirm or otherwise (in view of the delay) whether the GPA was still

wishing to proceed with their complaint. Randell & Loveridge replied on 15th March 2021, in a four-page letter, confirming that they did wish to proceed, and explaining why they considered that the IDO undoubtedly had jurisdiction to refer the dispute to the IDT, and why the detailed merits of the dispute itself were therefore not yet in issue.

63. Walkers, copied in on this letter, wished to respond in full, and they ultimately did so on 3rd June 2021 in a ten-page letter, with two appendices setting out the history of both the States Employees' Pension Scheme Rules and the Industrial Disputes (etc) legislation, and explaining why the States contended that there was, simply, no "*industrial dispute*" capable of being referred to the IDT and hence nothing to refer.

64. After two further short letters were exchanged, Mr Le Maitre reviewed these competing cases and decided that it <u>was</u> appropriate to refer the matter. In an internal email of 21st July 2021 he told Mr Mark Guilbert, the Senior Employment Relations Officer, that he had decided that it was appropriate to "trigger" the Industrial Tribunal process and asked Mr Guilbert to make arrangements to set up a Tribunal, writing further:

> "*It is acknowledged that this issue has been the subject of considerable dialogue between the parties and the Industrial Disputes Officer over a protracted period. Whilst both parties have presented highly complex and legalistic opinion on the merits of their case, it is not the function of the Industrial Disputes Officer, who is neither legally trained or qualified, to determine the substantive merits of the dispute and therefore I make no comment on the legal submissions made."*

65. The States therefore received a letter of 28th July 2021 stating that the IDO had determined that an industrial dispute existed between the States and the GPA and asking the States to provide *"your terms of reference"* within two weeks.

66. Walkers quickly responded on 30th July 2021, objecting that, procedurally, it was for the IDO to compose the Terms of Reference (see s. 3(4) of the Law) and not the parties, and also objecting that the IDO had not given <u>his</u> reasons for holding, contrary to the careful explanations from the States, that there was, indeed, an industrial dispute capable of being referred to an IDT at all.

67. The response from the IDO's office, on 5th August 2021, acknowledged that it was the IDO's obligation to draft terms of reference (whilst pointing out that it would seem sensible to allow the parties to make suggestions) and stated that the IDO regarded his reasons as already being clear to the parties, from being communicated in correspondence.

68. At the same time, although again unknown to the States, the IDO's office was seeking information from the AGF as to their account of the nature of their dispute. The IDO received a response by an email of 9th August from Mr Roger that

> "*In a nutshell, our members are aggrieved that the employer has changed the pension provisions without consent*"

which they regarded as unfair.

69. On 16th November 2021, Mr Higgs, on behalf of the IDO, notified Walkers that the Chair of the IDT, once appointed, might wish to conjoin all three of the "pension related cases" and hear them all at the same time, referring to the GPA the AGF and the G50. This was the first time Walkers had understood there to be the two further complaints of the AGF and the G50 on foot, although it would appear from an email sent by Mr Harnden to Mr Higgs of the IDO's office on 29th March 2021 that Mr Harnden was himself aware of the two other complaints; he, commented, there that whilst the overriding jurisdictional issue

> "*will probably be common to all 3 potential disputes there would be representational issues in respect of both the 'Association of Guernsey Fire Fighters' and the 'Group of 50'.*"

He was referring to the question of identifying who, exactly, was claiming to be comprised in the AGF and the G50.

2022 - The Decision and the reference

70. On 20th January 2022, the States received two identically worded letters from the IDO in relation, now, to the "*potential disputes*" between the States and the G50 and the States and the AGF, referring to "*requests for assistance*" of, respectively 9th September 2019 and 21st November 2019 from those persons, stating that

> "*the alleged dispute centred around the changes to the States pension scheme and potential detrimental breaches of contract as a result*"

and stating that the IDO believed that there could be an industrial dispute in this case.

71. Formal notification to the States of the IDO's decision to refer these three matters to the IDT was contained in a letter of 3rd February 2022 (the "**reference letter**") from the Secretary to the IDT, sent to Walkers as the States' Advocates. The reference letter embodies the Decision which the States now challenges.

72. The reference letter announced that Professor Roy Lewis, a UK qualified barrister and specialist in industrial relations, employment, discrimination and international administrative law, had been approached and had consented to act as Chairman of the Tribunal. It recorded some of the history, accepting that whilst the GPA dispute had initially been "*confirm[ed]*" as not qualifying as an industrial dispute owing to the then IDO's belief that agreements by Unite (and also the Prospect Union) to accept changes which became the 2019 amendments had bound all employee members of the Pension Scheme,

> "*[t]his was later accepted by the IDO to be a decision based on an erroneously held belief and was subsequently overturned.*"

73. The States reject this, pointing out that <u>they</u> have never accepted this, disputing any power of the IDO to withdraw, change or "overturn" any such "final" decision once made, and objecting that the source of the supposed power to do so, at least unilaterally, has never been explained. The States also dispute the accuracy of the IDO's statement in that letter that he had used his best endeavours to prevent or settle the supposed

dispute by "*meeting with the parties in an attempt to conciliate"* (there having been no such meetings) and *"engaging in and facilitating detailed correspondence with the parties and their representatives"*, which they regard as scarcely being a fair description of their engagement with the IDO, this having been characterised by inordinately long delays, failure to take their points and unjustifiable changes of mind.

74. The reference letter states that the IDO considers that the industrial disputes which he has identified arise from a common grievance disclosed in all three complaints by those whom he terms "the Employees", and he considers that they can conveniently be conjoined in a single IDT reference. He identifies the complaints as being:

    (1) that the changes to the Pension Scheme are changes to the terms and conditions of their employment made by their Employer (taken to be the States)

    (2) that the changes were made unlawfully by the Employer as they were imposed unilaterally and without the consent of the Employees; and

    (3) in the case of the G50 Employees, that they are discriminatory on the grounds of age.

75. It also contains "terms of reference" extending to seven paragraphs, designed to identify the issues which the IDO considers to be disclosed by the above disputes. It is not necessary to set them out here, and to recite the States' criticisms of both their substance, and the various underlying assumptions which the States contend are wrong, but are implicit in their wording. Since the States' position is, broadly, that these alleged "disputes" are founded on fundamental misconceptions of law, and are not, in any event, admissible for determination by the IDT, it can readily be appreciated that their objections are lengthy. I will deal with the points which they incorporate if and where they become relevant in the discussion which follows later.

76. Walkers responded, on behalf of the States, seeking the identity of, first, the persons comprising the G50, and, later, the individuals identifying themselves as the AGF and also explaining, once again, their view that the IDO had already (correctly) made the relevant decision in relation to both the AGF and the GPA, and could not change his mind.

77. On 4th March 2022, therefore, the States issued the present proceedings, comprising a Cause to judicially review the IDO's Decision in respect of all three matters, and the required Application for leave to proceed. I have already mentioned the Order of the Bailiff made on 25th March 2022 as to the subsequent conduct of the matter. The ultimate hearing has come before me on 2nd-4th November 2022. The IDT procedure has apparently been stayed by informal agreement in the meantime.

The essence of the claim in these proceedings

78. Before turning to evaluate the parties' respective cases, I remind myself, once again, of two fundamental points. The first is that the present proceedings are not between the States and the three groups of employees or pension scheme members, identified as the Interested Parties; they are between the States and the Industrial Disputes Officer.

79. The second which follows from the first, is that I am not directly concerned with deciding the merits of the competing arguments which are (or might be) deployed in deciding the matters of dispute between the States and those groups of employees or members. My only concern with those merits is the extent to which I find that they can, or should, affect the merits of the essential dispute in these proceedings, ie as to whether the Decision, and the consequent reference of these complaints by the IDO to an IDT, is properly amenable to interference by this Court upon an Application by the States for it to be judicially reviewed.

80. Although it will involve some repetition when it comes to discussion, it is convenient to set out the parties' respective cases at this juncture, because they come from very different and contrasting directions.

The States' case

81. The States' case is contained in a Cause running to 176 paragraphs, (with two annexures containing a chronology of the development of the States Pension Scheme and of the 1993 Law), of which paragraphs 21-131 recite material history and facts. It sets out four separate grounds on which judicial review is sought, although each is then broken down into three or four sub-grounds. Advocate Ozanne's lengthy (106 paragraph) Skeleton Argument follows the same format. The grounds do, though, overlap in several places. I set out the arguments which I derive from all this below.

Grounds 1 – nature of the complaints not within the jurisdiction of the IDT

82. This first ground is, in essence, that the IDO's Decision was *ultra vires* and/or in error of law because the alleged *"dispute or difference*" (which I am calling the "complaint") is, and can only be, a matter within the exclusive jurisdiction of the Royal Court. This argument runs as follows:-

83. If the complaint is taken to arise from amendments to the 1972 Scheme Rules, it ignores the fact that these amendments were effected by a States Resolution. This is a quasi-judicial act and therefore not one which is amenable to the jurisdiction of the IDT (and is only amenable to that of the Royal Court by the process of judicial review). The States did not make the amendments *qua* employer, but *qua* public body, and it was plainly never intended that the 1993 Law should confer power on an IDT to amend or override a States Resolution. Such a complaint therefore could not be an "i*ndustrial dispute*" within the meaning of Ss 3 and 18 of the 1993 Law: (**Grounds 1 (a)).**

84. If the complaint is taken to be *"arising out of or in connection with*" the 2016 Scheme Rules themselves, or "*their subject matter or formation*" then by Clause 3 of the Scheme Rules, such a complaint is reserved to the exclusive jurisdiction of the "*Courts of Guernsey*" and the IDT is not a court: (**Grounds 1 (b)).**

85. If the complaint is taken to be one of breach of contract or breach of fiduciary duty, then, once again, such subject matter (in particular breach of contract, which the States points out is what the complaints frequently assert) is – it is suggested on longstanding legal authority – within the exclusive jurisdiction of the Royal Court, and this is not displaced by the definition of "industrial dispute" in s.18 of the 1993 Law, which cannot be construed in a vacuum: (**Grounds 1 (c)).**

86. In support of this last point, Advocate Ozanne argued that it was clear, and it was accepted, that there had been later, specific, "carve outs" from this proposition as regards certain complaints in the employment field, such as unfair dismissal, sex discrimination and suchlike, which had indeed been confided to specialist tribunals outside the Courts themselves. She relied on this as supporting the proposition that breaches of employment contracts in general remained subject to the general jurisdiction of the Royal Court over contracts.

87. She submitted that this was supported as being the obvious general understanding, as evidenced in the Policy Letter of 31st March 1995 supporting the introduction of the *Employment Protection (Guernsey) Law 1998*, which introduced into Guernsey law the concept of "unfair dismissal" and set up an Employment Tribunal to deal with such cases. This Letter (at Section 2 page 501, third paragraph) emphasised that the Law Officers' opinion was that the 1993 Law could not deal with complaints about "unfair" dismissals, nor (see Section 5 page 511, third paragraph) could it deal with "individual dismissals"; this was recognised as being beyond its intended scope, and it had never been held to do so in its 48 years of operation. The Letter also recorded (at Section 3, page 504 final paragraph) that jurisdiction over claims for "wrongful dismissal", as contrasted with "unfair dismissal", remained subject to the jurisdiction of the Royal Court. All this, it was argued, showed that the recognised appropriate forum for claims regarding breach of an employment contract was the Royal Court, and not the IDT.

Grounds 2 – non-existence of an "industrial dispute" within the 1993 Law

88. Grounds 2 are, that the IDO's decision was *ultra vires* and/or made in error of law having regard to the terms of the 1993 Law itself. The points made are all foundations for a submission that no "*industrial dispute*" within the meaning of the 1993 Law can exist in the present situation, so that there is nothing capable of being referred by the IDO to an IDT and it is therefore *ultra vires* for the IDO to purport to do so. They are elaborated as follows:-

89. It is first submitted that the former IDO determined on 6th April 2018 (see [47] above) that no industrial dispute arising out of the matters of complaint existed in respect of the complaints of the AGF and the GPA. That decision was "final": see s 3(3) of the Law. There is no basis in law for the IDO to allege, or assume, any jurisdiction to reopen, reverse or overturn that decision, and his later attempts to get round this by suggesting that such decisions were only "*initial*" is colourable and misconceived. The IDO then became *functus officio* in respect of this situation, and any further steps could only be taken through the Courts; otherwise this would mean that employees who did not accept the rejection of a complaint could simply come back and raise it again, and again (as the firefighters were doing in this case), until they got the answer they wanted: (**Grounds 2 (a)).**

90. Advocate Ozanne further contended that this argument should apply to all three separate complaints, as the underlying situation was identical. The then IDO's basic reaction that any complaints about the introduction of the new 2016 Rules had effectively been "settled" by the December 2017 Agreement, and its extension to all affected members, had been correct. It would therefore be wrong and inconsistent to come to any different conclusion here, and even in relation also to the G50, who had not, by then, formally sought to raise any complaint.

91. She next submitted that, as a matter of the true construction of the 1993 Law itself, the IDO's powers of referral were not conferred for the purpose of matters such as the claimed dispute or difference in this case, and there is no "*industrial dispute*" within the meaning of the Law (ie the true construction of s. 18) for the IDT to "*investigate*", still less to make an award: (**Grounds 2 (b)).**

92. In support of this, she first submitted that a "*dispute or difference*" as defined in s. 18 had to be between an employer and an employee (or, but not materially, between an employee and employees) and the changes made to the Pension Scheme Rules were not made by the States as an employer, but by the States as a public body. The IDO's misapprehension on this point is illustrated by the fact that his proposed terms of reference depend on accepting that the proposition that the States has made "*changes to the terms and conditions of the Employees' contracts of employment"* is a possibility, when that is simply not the case. The Scheme is not contractual in nature, as witnessed by the fact that many members of it are not States employees at all.

93. Although Advocate Ozanne never quite put it like this, I take this submission to be, in effect, a submission that the actual terms of an employee's contract of employment are that s/he shall be entitled and obliged to become and be a member of the "Public Servants Pension Scheme" in whatever form that may take from time to time. In other words, the term or condition of the employment contract is the fact of *membership* of the Scheme; the Rules of the Scheme which define any pension to be provided because of such membership are not, <u>themselves</u>, terms of any employment contract. The Scheme Rules are subject to operation, and possible amendment, in accordance with the constitution of the Scheme, and the operation of the contract of employment does not touch on this.

94. Next and further, she submitted that there was no lawful basis on which the IDO could make a reference to the IDT without identifying the individual "employees" on whose behalf the reference was being made, and this simply had not happened. This was despite the States' requesting that information, or that it be obtained. This was an obvious requirement because there could be <u>no</u> lawful basis on which the IDO could make a reference to an IDT in respect of an individual who was not a States employee, because such a person plainly fell outside the qualifications for an "*industrial dispute*" with the States, in s.18. This was a point of law, and the IDO's own opinion on this point was not material.

95. After referring next to two points relied on separately as Grounds 2(c) (below), Advocate Ozanne then submitted what seems to me to be a highly significant point in her argument, namely that the complaints cannot be properly characterised as "*industrial disputes*" when proper regard is had to the purpose of the 1993 Law and its terms.

96. She referred to the history of the 1993 Law, which I do not think is in dispute. The earliest enactment was in 1947 (*The Industrial Disputes and Conditions of Employment Law, 1947)* and was modeled on English legislation which had been enacted during World War II when the "right to strike" (that is, for workers to withdraw their labour as part of their bargaining power in relation to pay, and other workplace disputes) had been prohibited, because of the needs of the war effort. The process of attempted

conciliation, arbitration, or ultimate reference to a specialist industrial relations tribunal empowered to make binding awards, was introduced as a mechanism which would enable industrial disputes to be resolved without resort to the highly damaging and divisive effects of industrial action (strikes or lock outs). As the importance of this aim for a small economy such as Guernsey was recognised, the legislation was introduced into Guernsey even without the background considerations regarding any supposed "right to strike" which pertained in the United Kingdom. (The prohibition on striking was revoked in the United Kingdom later, but the useful legislation remained.)

97. The essence of the processes envisaged by the 1993 Law was thus, Advocate Ozanne submitted, the peaceful determination and fixing of general terms and conditions of employment across industry sectors, - as could be seen by (a) the terms of the Law itself and what they expressly dealt with (which I have recorded above) and (b) the nature of the disputes which, on the evidence of Mr Harnden and Ms Airley, had in fact been referred to an IDT over the years. Their general character was forward looking, in that they mostly resolved claims about pay and conditions, (though they might be backward looking as regards claims that a particular employer was not observing the minimum industry standard conditions), but they were essentially concerned with such "standard" terms going forward and not with matters of claimed breach of contract looking back. The 1993 Law had never been used to resolve the kind of complaint which was under discussion here, where individual employees were, in fact, alleging that their employer had broken their contracts of employment. The meaning and scope of the term "*industrial dispute*" in s. 18 had to be construed in context, and against that background, which showed that it was intended to have that particular scope, and would not include the present complaints.

98. This construction was actually inevitable, she further submitted, when one considered the jurisdiction of the IDT to make an award. Section 10 of the Law decreed that a

> *"…….decision or award of the Tribunal shall, from the date upon which it takes effect, be ……. an implied condition in the contract of employment between them* [sc. the relevant employer and employee(s)]*".*

Thus, the Law plainly envisaged that an "*industrial dispute*" must be capable of being resolved by an award which was itself capable of becoming a term (it mattered not that it was an implied term) of the relevant contract of employment, and a quick consideration showed that this was just not a possible outcome in this case. In support of this proposition she referred me to a finding of the Tribunal of Inquiry Report into Industrial Action by the Airport Fire Fighters at Guernsey Airport, completed in March 2009 and published by the then Bailiff as an Appendix to the Billet d'Etat No IX of 2010 for the States Meeting of Wednesday 28th April 2010 where, in Paragraph 4.6, the Tribunal recorded the opinion of HM Procureur and the then DIDO that this was the case, and that

> *"only matters that were capable of taking effect as implied conditions could be the subject of an 'industrial dispute."*

99. The IDT could not, she submitted, "award" that the employees should continue to be members of the "1972 Scheme", in whatever iteration, because that scheme no longer existed. Neither could it award that the relevant employees' contracts should contain

the terms of the 1972 Scheme, as that would be meaningless. Nor could it effect any amendment, or exception, to the Rules of the 2016 Scheme, because it could not amend a States Resolution. Therefore, in that the IDO's Decision to refer the complaints to the IDT must inevitably contemplate that the IDT would be able to make an award according to the provisions of the Law, when it simply could not do so, that Decision was made under an error of law and was invalid, accordingly.

100. Lastly, under this second Grounds (ie generally that there was no existing "*industrial dispute*" in law), Advocate Ozanne argued that the complaints which were the substance of the alleged "disputes" no longer existed, even if they once had done: (**Grounds 2 (c)).**

101. She first pointed out that the complaints, in their own terms, asserted breach of contract, but this must have taken place, at the latest, on 1st March 2016, when the 2016 Scheme Rules were put into effect. The time limit for prescription in the case of breach of contract was six years, and accordingly any such claim was extinguished on 1st March 2022. (If the complaints were formulated on the basis of claimed breach of fiduciary duty the limitation period was even shorter, at three years.) Only the issuance of proceedings in the Royal Court, which was effected by a plaintiff's handing the Cause to the Sheriff for service, stops time running. Neither the making of a complaint to the IDO nor a reference by him to an IDT, even if made within the relevant six-year period, could have the effect of stopping time running, because prescription and limitation operate as matters of the general or customary law, and the 1993 Law did not amend or affect this operation, nor purport to do so. It followed that such complaints can now have no existence, and there cannot, therefore, now, be an "*industrial dispute*" based upon them, because the complainants have no legal rights which could support this.

102. Alternatively or additionally, she relied on the effects of the December 2017 Agreement, as compromising (and thereby extinguishing) any such possible previously extant rights, certainly on behalf of all complainants who were then members of Unite. This would appear to be, at least, all of the AGF and possibly some of the G50 (adding, of course, that therefore the IDO's decision to refer the matter without knowing or ascertaining the extent of such membership was a further flaw in the Decision).

Grounds 3 - *Wednesbury* unreasonableness and/or flawed decision making

103. The third broad Grounds relied on are that the IDO's Decision was irrational, in the sense of being so unreasonable that no reasonable authority could have come to it, and/or that the IDO took into account irrelevant matters or failed to consider relevant matters. The first limb is, of course, the classic "*Wednesbury unreasonable"* test for upsetting an administrative decision by challenge to its substance. However in practice, much of the points made here repeat previous arguments.

104. Advocate Ozanne first submits (**Grounds 3 (a)),** that the Decision is unreasonable or irrational because it fails to take account of the points of law already elaborated under Grounds 1 and 2 above, namely, the quasi-legislative status of a States Resolution, the exclusive jurisdiction of the Royal Court in respect of the Scheme Rules and breaches of contract or fiduciary duty, the previous (correct) rejection of the complaints as not being "industrial disputes" by the then IDO in 2018, and the effects of prescription or compromise, in any event, on such alleged rights.

105. There is added here, though, the assertion that it was totally wrong and unreasonable for the IDO to conclude that an "*industrial dispute*" (or the States itself, as a party to it) could be fairly dealt with in circumstances where the identity of the complainants was not known, even by the IDO, let alone the States as the responding party, and where (it was asserted) the terms of the suggested dispute had not even been made clear. Advocate Ozanne's response to points made in the IDO's Summary Defences implies that this argument is not made as a matter of general principle but rather on the basis that such identification is required in this case (a) to verify all the complainants' *locus standi* as employees of the States and (b), because individual circumstances will vary, so as to the States to be able to consider the particular complaints, and for any hearing to have efficacy.

106. Lastly in support of the "unreasonableness" argument, it is complained that the IDO failed to give any reasons for his Decision, although this point is principally relied on later, under Grounds 4.

107. The second separate aspect of this procedural argument is stated to be that, on the current disclosure by the IDO, he failed to consider adequately, if at all, any of the various jurisdictional issues identified to him in the previous correspondence (including by failing to obtain adequate legal advice) and/or the practical difficulties of the IDT justly disposing of the alleged "industrial dispute" (**Grounds 3 (b)).**

108. In explanation of this, it is first asserted that the IDO was unreasonable in (as he stated in his affidavit) attempting to assess the law himself, and relying on what he believed to be a fair process without (apparently) obtaining fully comprehensive legal advice on such matters. Whilst he said he had taken legal advice, this had not been disclosed. It appeared only to be limited advice, and the IDO had not elicited the views of the States (in particular Mr Harnden). It was not clear how far the source of such advice was properly independent, since the Law Officers would have a personal interest in the matter through being members of the Pension Scheme. Proper legal advice was an obvious requirement, given the complex legal and jurisdictional issues, the public importance of the issues raised, the procedural problems of the lack of properly pleaded cases, especially with regard to damages, the wide range of outcomes which would depend on individual circumstances, with the potential need for complex actuarial calculations, and the potential difficulty of constituting an IDT which would be free from potential bias or conflict of interest. It was irrational to consider (as the IDO had said he did) that the matter was too complex for conciliation, but then to conclude that it was not too complex for an IDT to determine. Indeed, this wholly unreasonable failure to take into account such highly relevant matters was a symptom of the IDO's failure correctly to appreciate that the relevant complaints simply were not within the meaning of an "industrial dispute" as contemplated by the 1993 Law.

109. The third aspect of this general "unreasonableness" argument is that the IDO's Terms of Reference both take into account irrelevant matters and leave out of account relevant ones, and are, in part, simply wrong: (**Grounds 3(c)).**

110. Under this head, Advocate Ozanne lists, in her skeleton arguments, 15 criticisms of the Terms of Reference. It is not necessary to set these all out. Their flavour can be gathered from the account that they are either (i) alleged inaccuracies of fact, (ii) failure

to appreciate what the States regard as the correct legal position (such as the correct legal status of the PCC, and other points already mentioned under Grounds 1 and 2 above), (iii) attributing erroneous assertions of position to the States, or (iv) failing to refer at all to matters of importance, such as the extent and nature of consultations and negotiations which preceded the implementation of the change of the Pension Scheme to the 2016 Rules, and the impracticability of the States' negotiating separately with about 5000 individuals.

111. In particular, she submits that the Terms of Reference appear to contemplate that the IDT could determine, and award, that the 2016 Rules should be amended, which is simply not within its power. They also appear to contemplate that the IDT could award that the 2016 Rules should be amended for incorporating provisions which were age discriminatory, when age discrimination was not/is not unlawful in Guernsey.

112. All the above factors feed into the conclusion that the IDO's Decision can be seen to be irrational, "*Wednesbury"* unreasonable, or the result of a legally flawed decision-making process.

Grounds 4 – Procedural unfairness

113. Advocate Ozanne's fourth and last ground of argument in support of a judicial review of the IDO's Decision is that it was flawed by procedural unfairness, for some one or more of the following reasons:

(1) because of those matters as already relied on under Grounds 3,
(2) because no reasons have been given,
(3) because the identities of the Interested Parties are not known and
(4) for apparent bias.

114. Advocate Ozanne first submits that insofar as the matters relied on under Grounds 3 – indeed she extended it to Grounds 1-3 – are held not to render the Decision *ultra vires*, unlawful, irrational, unreasonable or reached by a legally flawed decision-making process in themselves, they nonetheless render the Decision flawed for procedural unfairness. Insofar as it might be said that any concerns about the complex matters of law and jurisdiction raised could be dealt with by the IDT reviewing its Terms of Reference, and that it was not necessary for the IDO to consider them himself, this was not good enough, because it did not mitigate the prejudice caused to the States by having to engage with the Tribunal process, or the risk to the States of having to deal with a lay Tribunal which might therefore be influenced by irrelevant or incorrect considerations (**Grounds 4 (a)).**

115. The second limb of such unfairness is that the IDO has not given his reasons for reaching his decision, despite requests and despite the normal presumption that reasons ought to be given for a decision. Suggesting that the true scope of the IDO's Decision meant that reasons did not need to be given was wrong, and failed to take into account the complex and important consequences and implications of the Decision, (**Grounds 4 (b**)).

116. As to the lack of identification of those claiming to be the Interested Parties in the matter, first, it is a principle of natural justice that a party to a case should know the

identity of its opponents. Second, and as an example, the arguments relating to membership of Unite and to the position of Mr Torode as having questionable *locus standi* could well apply to others, and the fact that the States do not know if this is the case unfairly prejudices their ability to respond to the claimed disputes. The argument that knowledge of individual identities is not required for the purpose of making a reference, and can be dealt with in the IDT itself, does not answer this point, not least because, where breaches of contract, sounding in damages, are alleged, it is fundamental that the identify of any individual claimant must be known from the outset so that the potential quantum of any claim can be assessed: (**Grounds 4 (c))**

117. As to the submission of bias, the States disavowed any allegation of actual bias, but was, rather relying on potential apparent bias. This was not, though, an allegation made in relation to the IDO's Decision directly, but was, rather, an assertion that the composition of an IDT itself would inevitably be tainted by apparent bias because the Chairman and Members of an IDT are appointed by the Bailiff (albeit on the advice of the IDO), and as all such persons – Bailiff, members of the Court staff and officers of the ERS - are affected by the 2016 Scheme Rules, the composition of such Tribunal would inevitably appear to the ordinary member of the public to be tainted with apparent bias. Thus, the Decision of the IDO to make such a reference to the IDT was improper, for inevitably having this result: (**Grounds (4) (d)).**

Summary case for the States

118. In conclusion, Advocate Ozanne summarised that the IDO's Decision of 3rd February 2022 was therefore flawed in itself, for any one of the four grounds elaborated previously, and that insofar as the Court then had a discretion, that discretion should be exercised to quash the Decision. This was because if the Court did not do so at this stage, the States would be required to participate in an expensive IDT process, which in law would not have the power to make the award or grant the remedy or the redress which the Interested Parties appeared to be seeking. The States would be unable to recover its costs of being thus embroiled, even if successful, in the IDT process and it would be exposed to the risk of an erroneous award being made which the States would then have to challenge by later judicial review, for being wrong in law (for reasons explained), because of its potential to cause great financial burdens on the public purse. Such an undesirable and costly process would be forestalled if the IDO's Decision were quashed, as it should be.

The IDO's Case

119. For the IDO, Advocate Gist presents a case which is disarmingly simple. In effect, it is that the IDO's function is very narrow; all he has to do is make a broad-brush decision that an "*industrial dispute*" as defined exists and he is then statutorily bound to refer it to an IDT. Moreover, the definition of '*industrial dispute*' in the 1993 Law is also, itself, very simple and perfectly clear. The definition needs to be capable of straightforward and common-sense interpretation by a layman (as the IDO is), and it is. The situation presented to the IDO is within such straightforward definition, and it reasonably appeared to him to be so, and he acted accordingly. None of the supposed criticisms of substance or procedure are valid or sufficient to undermine the reasonableness of his acting on his view, which was, in fact, correct anyway. The States' arguments seek to make a very simple test unnecessarily complex and

convoluted, and they import complexities into the function of the IDO which just do not exist. If and insofar as the States' arguments might have any merits with regard to the legal substance of the complaints, the proper place for these to be made is before the IDT and against the actual parties raising those complaints, not against the IDO. This Application is therefore, at best, premature and is actually bad.

120. Advocate Gist elaborates that the only question for the IDO, in performing his functions are:

(1) is there an "*industrial dispute*" within the meaning of s 18 of the 1993 Law?

(2) has he been "*notified*" of it (s (3) (1))?

(3) Does he think it can be settled by one of the methods set out in s.3(1) or s.3(2)(a)?

(4) If not, have six weeks passed since the relevant notification (s.3 (2)(b))?

If he decides questions 1 and 2 in the affirmative, question 3 in the negative and then question 4 in the affirmative, it is his duty to refer the matter to an IDT (s 3 (2)) and to compose terms of reference (s 3(4)).

121. The above are the only questions the IDO has purported to decide here. Contrary to the involved argument of the States, he has not "decided" that the complaints <u>were</u> challenges to the 2016 Scheme Rules. He has characterised the disputes as being whether the "*apparent*" incorporation of the 2016 Scheme Rules into the relevant parties' conditions of employment without their express consent was valid; that is a reasonable interpretation of the complaints. As to this the five issues, written into the Terms of Reference, are:

(1) Whether the Pension Scheme forms part of the Employees' terms and conditions of employment;

(2) Whether the terms of the Pension Scheme could be amended having regard to the Employees terms and conditions of employment;

(3) Whether changes to the Pension scheme constitute a change to terms and conditions;

(4) If there was a change in the terms and conditions was this lawful?

(5) Whether unlawful discrimination arises from the protection afforded to some employees.

That, again is a reasonable further elaboration. As IDO, he owes no further or other consideration to the matter, which then becomes the province of the IDT, as does the question of what award should be, or even can be, made.

122. He (the IDO) has <u>not</u> assumed that anything which is in the exclusive jurisdiction of the Royal Court is to be determined, as he has not purported to refer any dispute as to the operation of the Scheme Rules themselves. He has <u>not</u> purported to decide that the disputes are a challenge to the 2016 Rules, merely that an issue appears to arise as to whether they have been or could be validly incorporated into the complainants' contracts of employment. His opinion is that a dispute of that nature falls within the

definition of an "*industrial dispute*" in s 18 of the 1993 Law, which is all that it is his function to decide. The reasonableness or correctness of that opinion is therefore all that this Court can now review.

123. As to whether the previous decisions of his predecessor in April 2018 were "final", such that a decision in this regard has *already* been made that the relevant complaints are not "*industrial disputes*", the decision in relation to the GPA was based on the belief that the GPA had been members of Unite and were therefore bound by the terms of the December 2017 Agreement. That belief had been incorrect, and it was axiomatic that an administrative decision based on a false understanding of fact was void. Therefore, the argument that a previous decision had been made which was final and which precluded the present complaint being admitted as an "*industrial dispute*", he submitted in his Skeleton Argument, "*could only succeed in relation to the GPA*" (although I think this assertion must have been meant to read "could <u>not</u> succeed in relation to the GPA"). As regards the GPA, the former IDO's decision that this *could* be the subject of a referral was constituted by the letter of 23rd July 2019 - and as that had not been challenged at that time, it was now too late to do so.

124. However, on any basis, the simple fact was that by 2021, the (present) IDO had three separate complaints from different cohorts of complainants before him and this is what he based his Decision upon. In those circumstances, any remedy in respect of the argument as to "previous finality" would achieve no useful purpose, as the Terms of Reference could and would still proceed in respect of the other complaint or complaints.

125. As to the States' argument that the present situation does not fall within the true meaning of "*industrial dispute*" in s18 of the 1993 Law, he dismissed Advocate Ozanne's elaborate arguments on this point with the submission that the definition of "*industrial dispute*" is both perfectly clear and very wide. There is no attempt to limit the meaning of its words, and no need to look elsewhere. This is not least because the IDO's function is not just to refer such "disputes" to the IDT, but to attempt prior conciliation and resolution, which shows the utility of a very wide definition.

126. As to the suggestion that the complaints are in relation to breaches of contract over which the Royal Court has exclusive jurisdiction, he submits that there is no such exclusivity. The "dispute" which the IDO has identified is not as to the operation of the Rules (so that the exclusive jurisdiction clause contained in them is irrelevant) and there is no authority that breaches of contract are matters subject to any "exclusive" jurisdiction of the Royal Court. The argument that the complainants are seeking damages for breach of contract which only the Royal Court (not the IDT) can grant is not necessarily accepted, but is in any case a matter for the IDT and not the IDO. Points made with regard to jurisdiction over "wrongful dismissal" or "unfair dismissal" claims prove nothing with regard to the meaning or scope of an "*industrial dispute*" under s18 of the 1993 Law, not least because, by definition, they arise after a termination of the employment by dismissal, such that there is no longer a dispute between "*an employer and an employee*", on any basis.

127. The definition of an "*industrial dispute*" is intentional. Repeating its terms as

> *"<u>any dispute or difference</u> <u>between an employer and an employee</u> or between an employee and employees, <u>connected with the employment</u> or non-*

> *employment, or the conditions of employment of any person"* (relevant emphasis added),

the characteristics of the subject complaints are, quite clearly, within the natural meaning of the words in this wide definition.

128. In support of his submission that the definition was to be read according to the natural meaning of the words, and was not subject to any implied restriction supposedly derived from its subject matter or from established practice, such as suggested by Mr Harnden and Ms Airley, Advocate Gist referred me to another passage in the 2010 Tribunal of Report already (referred to at [98] above) into damaging industrial action taken by Guernsey Airport Firefighters in 2009, and which report contained recommendations for the future to try to avoid any similar recurrence. He pointed to a passage in Paragraph 4.5 of the Chapter on "Relevant Legislation and its Application" where, after setting out the definition of "*industrial dispute*" noted in [127] above, the Tribunal commented:

> "*Both the current IDO and the DIDO interpret 'dispute' as requiring a claim and a rejection of that claim in accordance with the UK case law summarised in an article exhibited to us They also take the view that they should look at all the circumstances in deciding whether or not to 'accept' a dispute, not merely whether the statutory definition of 'dispute' was satisfied."*

He then referred me on to a passage in Chapter 7, on "Actions and Omissions" where, at 7.17, the Tribunal commented:

> *"…we formed the view that the IDOs would benefit from greater professional training and support in relation to the exercise of their statutory powers. Their evidence to us showed, in our view, a misunderstanding of a number of aspects of their jurisdiction. … Their view that a 'dispute or difference' required a clam and rejection of that claim ….. failed to take account of subsequent case law, in particular Amec Civil Engineering v Secretary of State for Transport [2005] 1 WLR 2339. We also consider that their approach of considering a range of factors before 'accepting' a dispute or difference', even where the statutory definition of an 'industrial dispute' is satisfied, carries the risk of failing to act in circumstances envisaged by the Law… The DIDO's letter of 10 February 2009 to the Chairman of the PSRC specifying the matters which she considered should properly form the subject matter of negotiations before she would find that a 'dispute' existed exemplifies that risk. Moreover she did not seem, in that letter, to have considered whether there might have been a 'difference' for the purposes of the Law…."*

129. Advocate Gist submitted that this passage illustrates, first, the intentional width of the IDO's jurisdiction, and, second, that it was not intended to be limited by some form of supposed discretion as to what did or did not amount to an "*industrial dispute*" or whether any situation could or should be "accepted" as such by an IDO, as a further test, once the statutory definition was met. Albeit the States had not chosen, despite recommendations by the Tribunal, to modify or clarify the operation of the IDO's functions (see Paragraph 9.8 of the report), the Tribunal's view as to how the IDO must

operate correctly under the terms of the 1993 Law, as derived from the passages above, accorded with the approach the IDO had taken in this case.

130. In support of the proposition that it could not be intended that the IDO should have to carry out an elaborate assessment of the legal effects of particular circumstances, Advocate Gist pointed to the fact that the IDO was not legally qualified, and was simply the statutory administrator of a conciliation and employment dispute resolution scheme. He submitted that the arguments and objections raised by Advocate Ozanne on the part of the States were therefore not matters for the IDO, but were properly matters for the IDT itself. The IDT had procedural rules, and had powers to extract evidence of material matters which the IDO did not have, and the IDT was therefore placed to make the kinds of judgment which Advocate Ozanne submitted should be made. The States' Application for judicial review of the IDO's Decision insofar as it rested on arguments based on the subject matter of the complaints themselves, was simply misplaced and premature.

131. As regards the objection founded on the assertion that the Employees' rights had by now been extinguished by prescription, he submitted that this was also an argument of law which it was not the province of the IDO to determine. If it were held to be a correct analysis of the complaints, then such a point could and should be taken as a point before the IDT. No prescription period applied to an 'industrial dispute' as such, and insofar as the argument therefore rested on an analysis of the legal position underlying the '*dispute or difference'* which had been notified to the IDO, the fact that this was not a decision for the IDO was further underlined. The same point, ie that an IDO could not be intended to have to make judgements on disputes of law, also applied to the question whether any of the complainants were, in law, bound by the December 2017 Agreement. That too would be a matter for the IDT.

132. Advocate Gist further challenged the suggestion that a decision to refer a dispute must be invalid if the identities of all the individual complainants were not known, for several reasons. First, it was not necessary to identify each and every claimant in order to see that an '*industrial dispute*' within the meaning of s.18 of the 1993 Law existed between the employer and 'an' employee. Second, it was frequently the case that disputes would be formulated between a group of persons identified only by some common characteristic (such as membership of a particular trade union) without all their individual identities being known at the time. This caused no problem. In any event, the IDO did not have any power to obtain such information whereas the IDT did, insofar as it was deemed necessary in any case.

133. This point, therefore, applied also to the criticism in relation to Mr Torode's involvement and status. This was so even if the argument that he was not an employee at all was accepted (and it was not admitted), this being, yet again, a point of law which the IDO could not be expected to decide. Mr Torode's position as a representative was sufficient to identify some employees who would, in the end, become identified as the actual parties to the relevant industrial dispute.

134. With regard to the further alleged grounds for judicial review relating to "*Wednesbury* unreasonableness", alleged procedural unfairness, and absence of reasons, Advocate Gist submitted that none of these provided a justification for granting relief on judicial review in this case, even if they might be theoretically capable of doing so. This was

because of the point that the IDO is not a tribunal and is simply not a decision-maker in respect of the merits of an industrial dispute; his function here is simply procedural. The States' general assertion that the IDO's Decision to refer was irrational, or *Wednesbury* unreasonable, because he had "failed to understand" the merits of the situation (as propounded by the State) simply ignored this point.

135. The "*Wednesbury unreasonable"* test of irrationality, when properly analysed would require the court to be satisfied that no reasonable IDO in the position of Mr Le Maitre could have come to the conclusion that an "industrial dispute" (in fact, three such) existed in the present circumstances. Such a test only had to be stated for it to be seen that it could not be surmounted.

136. The objections that the IDO's Decision was somehow flawed because he had not sought to exercise his powers of conciliation was unreasonable - and somewhat hollow in the light of the States' entrenched and intransigent position. The IDO's actions, faced with the parties' respective positions, could be seen to have been reasonable from the correspondence. Similarly, objections that the Decision had not been taken on the expiration of the statutory six-week time limit from notification were likewise unmeritorious in the circumstances. In any event the question whether delay vitiated an administrative act was a matter for the Court's discretion, and it ought not, in the circumstances of this case, to be exercised so as to stifle the complaints here.

137. As to absence of reasons, first, the IDO was dealing with a simple decision, namely whether or not in his opinion an "*industrial dispute*" within the appropriate definition existed, and that was not a discretionary judgment. His reasons for making the reference were, obviously, that he had concluded that it did exist. That in itself provides an adequate, and the obvious, reason for his deciding to make the reference to the IDT, but his underlying further reasons were in fact also obvious anyway.

138. No greater or more elaborate account of reasons would reasonably be required of a lay person charged with the IDO's function. A lay person is not required in law to provide the kind of sophisticated or detailed reasons which could be expected from a judge, or lawyer, or professional tribunal. The alleged high value, complexity or public importance of the case were entirely irrelevant as regards this point, because it is only the Decision itself which is under scrutiny.

139. In any event, the Terms of Reference, even though criticised by the States, provided plainly discernible reasons insofar as it might be necessary for the IDO to explain what he regarded the relevant '*industrial dispute*' to consist in. Any deficiencies were not so serious as to call into question the validity or soundness of the IDO's Decision. They would not limit the scope of the IDT's conduct of the matter, or the scope of arguments which could be put before it by the States. Once again, therefore, any criticisms of the Terms of Reference did not provide any good reason for granting relief on judicial review, and certainly not for quashing the Decision to refer.

140. As regards the allegations of "procedural unfairness" these should all be rejected, mainly for reasons already canvassed in relation to the earlier Grounds, and in particular as regards the specific matters of reasons, and the absence of identity of individual complainants. The final point with regard to bias was entirely unsustainable, since the

only question to which bias was relevant on the present Application would be bias on the part of the IDO himself, and this was not alleged.

Summary case for the IDO

141. In summary Advocate Gist submitted that the States' Application for judicial review of the IDO's Decision on the grounds of *ultra vires* or error of law was unsustainable; the disputes clearly fell, *prima facie*, within the relevant definition of an "*industrial dispute*" as contained in the 1993 Law. The grounds based on additional or peripheral matters such as prescription, alleged previous binding compromise, or the absence of identification of individual parties or their individual qualifying status, were either matters which the IDO could not reasonably have been intended to have to decide, or they were not of universal application (such that even if one complaint were affected, the reference would still continue and so granting relief in that respect was pointless), or they were matters not requiring to be clarified for the purpose of the Decision. Their effect, together with any other arguments of substance which the States might wish to raise against the Interested Parties themselves, could, would and should properly be dealt with by the IDT, and they provided no sufficient foundation for disturbing the IDO's Decision upon judicial review. The further grounds based on process, such as alleged *Wednesbury* unreasonableness, taking into account wrong matters, claimed absence of legal advice and of the giving of detailed reasons, were all misconceived; there had been no "procedural unfairness" in all the circumstances.

Discussion

General

142. As a matter of initial impression, taking into account the history and origins of both the 1993 Law and the 2016 Scheme Rules, Advocate Ozanne's position appears to have a good deal of force. The 1993 Law itself carries the strong flavour of being focused on support for the system of collective bargaining in employment matters, seeking, in the public interest, to facilitate the smooth negotiation across employment sectors of such matters as pay rounds, and similar concerns, and obviating damaging and divisive industrial action. The history of the 2016 Scheme Rules suggests that relevant collective bargaining has taken place already, with hard-fought negotiations, during the five or six years prior to February 2016 and with a further convulsion thereafter. It is therefore unattractive that, after all that effort and toil, the States should be exposed to the prospect of having such a hard-won outcome challenged, and possibly undermined, by small groups of aggrieved individuals seeking to take them before an Industrial Disputes Tribunal.

143. However, that is simply a matter of initial impression, and is not a process of principled application of the law. As to that I have come to the conclusion that, with regard to the central issue (namely whether the three complaints notified to the IDO were "*industrial disputes*" within the meaning of the 1993 Law, and were therefore capable of being lawfully treated as such by him), Advocate Gist's arguments are correct. That conclusion does not necessarily govern the final result, but it is the essential starting point.

144. I remind myself yet again that the question for decision in these proceedings does not start from a consideration of the underlying merits of the States' case(s) against the Interested Parties - who are not parties to these proceedings at all. These proceedings are only concerned with whether the States has any complaint which justifies the Court's interfering, at the States' instance, with the particular Decision of the IDO, which was made or formalised on 3rd February 2022, namely the Decision to send these complaints to an IDT.

145. I accept as the simple position (which I think is effectively common ground, although Advocate Ozanne's arguments divide this up in an extremely elaborate way) that administrative decisions are amenable to judicial review on one of three basic grounds, namely:

(1) illegality/*ultra vires*,

(2) *"Wednesbury"* unreasonableness, or a flawed decision-making process, and

(3) matters of procedural unfairness.

I therefore consider each of these in turn.

(1) Illegality/*ultra vires* - Are the complaints "*industrial disputes*"?

146. It follows, as it has appeared to me throughout this hearing, that the first and foremost matter for determination is whether the complaints themselves fell/fall within the definition of an "*industrial dispute*" for the purposes of the 1993 Law, as defined in s. 18 of that Law. If they did not, then that is an end of the matter, as the IDO had no power to refer such complaints to the IDT, and his Decision to do so was therefore *ultra vires*, or (which amounts to the same thing) based on an error of law. If they did, then *prima facie* he did have such power, although there may be other matters which affect that conclusion or otherwise affect the validity of such Decision.

147. The meaning of the definition in s.18 is a question of construction. Any question of construction starts from the natural meaning of the words used, albeit construed in the context of the relevant instrument, or Law, as a whole. The words of the definition are:

> *"….any dispute or difference between an employer and an employee or between an employee and employees, connected with the employment or non-employment, or the conditions of employment of any person".*

148. These words are notably wide. They encompass not merely a "*dispute*" but also a "*difference*". This clearly tends to extend their ambit to matters of disagreement which might not be perceived, yet, to have hardened into a "dispute" but which have the potential to do so. This serves to emphasise, to my mind, the intended great breadth of their operation, and this accords with the purpose of the Law being to catch, and hopefully head off, industrial action.

149. Next, the words envisage such a "*dispute or difference*" as being capable of being between an employer and "**an**" employee. They are thus apt, in their natural meaning, to cover a dispute between an employer and even a single employee. Plainly a dispute

between an employer and a group of several employees is intended to be covered, but this remains within the definition even literally, for being the aggregate of several individual disputes.

150. I noted that, in argument, Advocate Gist was at first inclined to accept and submit, no doubt influenced by the flavour of "collective bargaining" about the 1993 Law, that an "*industrial dispute*" would really be intended to be directed at group disputes and would not be intended to extend to claims, effectively, of breach of contract by a single employee. However, on reflection, (when it was pointed out that any such concession tended to undermine his basic proposition that the words of the definition were clear and should be construed in their natural and literal meaning and effect) he revised that concession, and submitted that even a claim by a single employee would fall within the definition.

151. In my judgment he was right to do so. The 1993 Law contains no measure by which an "*industrial dispute*" is to be identified by reference to any number of employee disputants exceeding one. Moreover, the Law also contains terms which envisage its being concerned with "*industrial disputes*" about whether an employer is employing staff on the basis of the industry's "*recognised conditions of employment*" or terms "*no less favourable*" than these (see ss 11-13) and it is perfectly feasible that that kind of industrial dispute could involve a single employee - although it is also fair to say that these disputes are expressly "*deemed*" to be "*industrial disputes*", under s 14.

152. The further requirement is that such an "*industrial dispute*" must be

> "*connected with the employment* [of any person] *or the non-employment* [of any person] *or the conditions of employment of any person*."

The nature of the required "connection" is not specified and the general term "*connected with*" is naturally capable of a very wide application. The reference to connection with either the "*employment or non-employment or the conditions of employment…"* emphasises the breadth of the intended application and this is further reinforced by the final reference to "*<u>any</u> person*" rather than a more confining reference simply to the employee or employees already in question.

153. Thus, the whole flavour of the definition, taken in its natural meaning, is that it is intended to be very wide ranging, and in principle to cover any kind of employment related dispute or difference between a current employer and any ("an") employee. Later legislation may have carved out particular employment related disputes, such as unfair dismissal or sex discrimination complaints, to be resolved under their own procedures, but that is a different point and it does not affect the breadth of the underlying definition of "*industrial dispute*" contained in the 1993 Law, and operating for its purposes.

154. Advocate Gist therefore satisfies me that, *prima facie,* the complaints in question do qualify as being within the natural meaning of the definition of an "*industrial dispute*" in the 1993 Law. The next question is therefore whether there are any other matters which displace this, and show that the meaning of the words was intended to be somehow restricted, and restricted in a manner which excludes the subject complaints. This means turning to Advocate Ozanne's arguments.

155. Most of these arguments involve suggesting a legal analysis of the nature of the complaints and then submitting that a complaint of that nature is not intended to be (and therefore is not) within the ambit of being an "*industrial dispute*" for the purposes of the Law. She submits, for example, that the complaints are "really" complaints about the operation of the 2016 Scheme Rules, and are therefore, under the Scheme Rules, confined to the exclusive jurisdiction of the Royal Court. Or, she submits that the complaints are, in essence, complaints of (supposed) breach of contract by the States as employer (although in fact misconceived as such), and that these are, again, the proper province of the Royal Court.

156. However, none of these points addresses the relevant test for present purposes, which is simply whether they are reasonably viewed as being "*connected with .... the conditions of employment*" of the persons in question. They do not address the pertinent question, therefore, and the assertions of character which are made are not necessarily mutually exclusive. In my judgment Advocate Gist is correct when he submits that matters such as those relied on by Advocate Ozanne, unless they are so obvious as to admit of no contest as a matter of ordinary common sense, are properly not the concern of the IDO at this stage even if they may well become the concern of the IDT, and seeking to invoke such matters at this stage is premature. This is not least because, at the present stage of the proceedings, the States' complaint is against the IDO, and the Interested Parties are not parties to this contest.

157. In support of her submission that the definition of "*industrial dispute*" must be intended to have a restricted scope which is not meant to extend to the subject complaints, Advocate Ozanne relies heavily on the evidence of both Mr Harnden and Ms Airley. This is to the effect that the Law has never, to their extensive knowledge and experience, been invoked in relation to such a "dispute" as the present, and they do not believe that it was intended to do so. Mr Harnden expresses this opinion very strongly.

158. However, I can place no weight on that opinion. The true construction of the 1993 Law is a matter of law, and that is for a competent court to determine. It may well be that those who operate the Law have been doing so under a particular view as to its meaning or scope, but if this has never been authoritatively examined or tested, it may turn out to have been a misapprehension. Any practice which has previously operated cannot affect, or change, the true meaning of the Law itself.

159. I also see a further problem with this argument. The submission that the term "*industrial dispute*" was not intended to include disputes "such as the present" does not define the scope of the claimed definition of "*industrial dispute*" which <u>was</u> intended, and it cannot do so without doing far more violence to the actual wording of the Law than can be justified as being a process merely of interpretation. By "disputes such as the present" I infer that Mr Harnden and Ms Airly would mean: individuals' dissatisfactions with a matter which has been established through a collective bargaining process. I do not see how any such limitation can simply be implied into the actual wording of the definition of "*industrial dispute*" in the Law, and this submission therefore boils down, simply, to an assertion that the Law "can't have been" intended to apply in the present situation. That is not, in my judgment, an adequate or proper basis for holding that the IDO's view of the definition was wrong in law. This is especially so when it further seems that the opportunity for such arguments to

be made will still be available, and can be taken into account later, within the processes actually provided by the Law itself.

160. Advocate Ozanne's strongest point of principle in support of her case lies, in my judgment, in her submission that the Law cannot have been intended to apply to disputes of the present kind, or in the present circumstances, because an award of the IDT is directed, by the Law itself, to take effect as an "*implied condition of the contract of employment between* [the relevant employer and employee[s]" and no award taking effect in such a way could be made in respect of these complaints. If this were correct then, on the basis that words must be construed in the context of the Law as a whole, that would, in my judgment, be a powerful factor suggesting that some modification of the natural meaning of the definition of "*industrial dispute*" must be inferred, and it would also provide an actual yardstick by which to measure and properly define a more constrained meaning of "industrial dispute".

161. However, I do not accept that the necessary underlying proposition is actually correct. Advocate Ozanne argues that the IDT could not make an "award" that "the 1972 Scheme" or its "Rules" should continue to have effect in relation to the complainants' contracts of employment, because that Scheme no longer exists. This may be true, but that is not the only form which an award could take. As a matter simply of a possible legal process (I express no view about merits, only mechanics) it seems to me that it would be perfectly possible to draft a form of award which could operate as an implied term of the relevant complainants' contracts of employment. This could be along the lines that if and insofar as the pension benefits accruing to the relevant employee at his retirement under the then operative States Pension Scheme fell short of the net (this is important as contributions levels might be material) benefits which would have accrued to him at such retirement if the 1972 Pension Scheme had not been replaced, then the employer would make up the difference, no doubt according to some formula. I do not, therefore, accept that this point is of the decisive weight which Advocate Ozanne has contended for, in practice.

162. There is one further matter which has confirmed me in my view that the wording of the 1993 Law not only has, but was intended to have, the very wide general meaning for which Advocate Gist contends. Although neither Advocate took me to them in the course of the hearing, certain materials casting light on the origins of the s 18 definition of "*industrial dispute*" in its present form were contained within the exhibits to Mr Harnden's first affidavit. From these, I derived the following:

163. The terms of the 1993 Law were laid down in a *Projet de Loi* which was ultimately enacted pursuant to a States Resolution made on 31st October 1991. This followed the States' consideration of a Policy Letter report from the then States Board for Employment, Industry and Commerce, dated 5th June 1991, which had reviewed the operation of the *Industrial Disputes and Conditions of Employment Law 1947* (as amended) ("**the 1947 Law"**) and made certain recommendations for further amendment.

164. Section 5 of the Policy Letter dealt with "*Areas which cannot be dealt with under the Industrial Disputes Law*". Paragraph 5.1 reads

> *"5.1 The definition of an industrial dispute within the context of the law is wide and there is no provision dealing with those matters which are deemed not to constitute a dispute and which cannot therefore be pursued under this law. This can lead to problems for the Industrial Disputes Officer when determining whether a dispute exists or not.*" (emphasis in original).

165. The then definition of 'industrial dispute' in the 1947 Law (Article 21) read:

> *"' Industrial dispute' means any dispute or difference between an employer or employers and a workman or workmen or between workman and workmen connected with the employment or non-employment or the terms or conditions of employment of any person*"

The Board wished, therefore (see Paragraph 5.2 of the Letter) to "*clarify*" the position by

> "*....exclud[ing] from the definition of an Industrial Dispute:-*
>
> *(a) questions of the payment of non-payment of wages and other questions relating to the interpretation and enforcement of or any contravention of contracts of employment. These are essentially matters for the Courts although of course, the good offices of the Industrial Relations Advisory Officer would continue to be available for advice;*
>
> *(b) whether a person should or should not be a member of an organisation;*
>
> *(c) disputes between an employee and employees;*
>
> *(d) disputes over the continued employment of a person."*

166. The recommendations for amendments were all set out in Section 10 of the Policy Letter, headed "*Conclusions*", in particular in Paragraph 10.4. At point 10.4.5 of that paragraph, the essence of paragraphs (a) to (d) above were recommended to be written into the Law, to amend the definition of "*industrial dispute*" by making them an express exclusion therefrom,

> *"so as to ensure there is a general awareness that such matters cannot be pursued through the law*" (emphasis original).

167. However, the States Resolution of 31st October 1991 (Billet Nos XX, XXIII and XXIV 1991 p 153) ultimately resolved to amend further the 1947 law

> "*along the lines set out in Paragraph 10.4 of [the report of 5th June 1991 with the exception of those items referred to in sub-paragraph 5 of that paragraph."* (emphasis added).

168. The result of this was the current definition of "*industrial dispute*" in s. 18 of the 1993 Law, in which it can be seen that the previous definition was effectively unchanged. All that was amended was the cosmetic alteration recommended at paragraph 10.4.7 of

the 5th June 1991 Letter, to bring terminology up to date by (for example) substituting the more modern "*employee*" for "*workman*".

169. There is no official record of the States Debate on this measure, as such was only introduced into States procedure in 2012. The Guernsey Evening Star report for Friday 1st November 1991 at page 7 records that the debate on the matter was opened by the Industry Board president, Deputy Evans, on the Wednesday afternoon, but then adjourned before Deputy Carol Fletcher could place an amendment. The following morning, on 31st October,

> *"…Deputy Fletcher, without opposition from either Deputy Evans or the House, successfully proposed that certain items that were to have been excluded from the definition of 'industrial dispute' were kept in the new proposals.*
>
> *These were: any question as to the payment or non-payment of wages and other questions relating to the contravention of contracts of employment; membership of an 'organisation'; disputes between an employee and employees and disputes over the continued employment of a person.*
>
> *Deputy Fletcher said that, for example, if someone was dismissed and everyone else downed tools because they felt that the person was unfairly dismissed, there had to be a mechanism which would enable both sides to agree*".

There is no more press report of the debate on this topic (if there was any) because the report immediately turned at this point to record complaints by the president of the Civil Service Board that the proposed amendments to the Law failed to go far enough towards encouraging sensible negotiations. Ultimately it was simply recorded in the press report, (though possibly without perfect accuracy in view of Deputy Fletcher's amendment obviously being passed) that "*the proposals*" were carried unanimously. The 31st October1991 Resolution, recorded above, was the result.

170. It is thus apparent that at the inception of the 1993 Law, the potential breadth of the then existing definition of "*industrial dispute*" in the 1947 Law was considered by those conducting the relevant review, and its apparent potential breadth was noted and was thought to require expressly limiting. It was proposed to make it clear and express that there were exceptions not intended to be covered by it, but in the end, the States rejected (apparently without demur) the very alteration which had been proposed to be inserted, to have that effect, and which would (see (a)) have excluded the kind of disputes which are now being put forward in this case. In my judgment this is powerful support for Advocate Gist's submission.

171. I did invite comments on these materials from the Advocates, after the original hearing, and Advocate Ozanne, apparently relayeing Mr Harnden's view, submitted that the fact that the policy letter suggested that this amendment would be "*clarifying*" the position meant that the existing law was, indeed, intended and understood <u>not</u> to enable the matters proposed to be expressly excluded to be taken to an IDT, so that, in rejecting this amendment, the States was actually endorsing that view, (ie that the definition contained such implied limitations) so that such an express amendment was unnecessary.

172. I simply do not and cannot read the materials in that way and I regard it as an entirely unnatural interpretation of what happened. It seems to me to be perfectly plain that in accepting Deputy Fletcher's proposed excision of the proposed express limitations, the States (who would not have been construing the terms of the Policy Letter as if they were Advocates) was both accepting the underlying view of the Policy Letter, that the definition did bear the very wide meaning suggested, and which it was also suggested was undesirable, but that the States rejected the view that this was undesirable. For what it is worth, that was plainly the understanding of the Guernsey Press reporter, who reported that such items were to be "kept" in the new proposals, rather than excluded.

173. The essence of Advocate Ozanne's argument is that she urges that the definition of "*industrial dispute*" should be given a "purposive" construction, and when that is done, it is clear, from the history and context of the 1993 Law, that it cannot have been intended to cover a dispute such as the present. However, whilst the tool of purposive construction can be used to resolve an ambiguity in wording, it cannot, in my judgment, be used to override the natural meaning of words where there really is no ambiguity. I find that to be the position here.

174. For all the above reasons, therefore I reject Advocate Ozanne's arguments that the IDO's opinion that the complaints before him fell within the definition of an "*industrial dispute*" in s 18 of the 1993 Law was wrong, such that his Decision to refer them to the IDT was, as a matter of underlying principle, *ultra vires* and made in error of law, and should be quashed for that reason. The question is then, therefore, whether there are any further or other matters which vitiate the Decision.

175. Before leaving this point, though, I would say that I have come to this conclusion rather reluctantly. Many of Advocate Ozannes's submissions in this regard seem to me to have force, as a matter of practicality, and of getting down to resolving the real issues which this case reveals. There is also attractiveness in what is effectively her submission, namely that the industrial dispute procedure under the 1993 Law ought to respect and support the outcome of a serious collective bargaining process. However, my decision has to be founded in the applicable principles of law as regards the actual case, and therefore on what I find to be the meaning of the 1993 Law itself.

176. Had I been of the view that arguments of law could not have been properly and adequately dealt with by the IDT itself, that might have affected my conclusion, but I do not think that that is the case.

177. First, if the complaints go to an IDT, then the relevant points will be argued between the parties who are the real opponents, ie the States and the Interested Parties, and that alone is an important factor of both convenience and natural justice.

178. Second, I might have been swayed if I had had concerns with regard to the apparent ability of an IDT to deal satisfactorily with arguments of law which might be made before it and which might be regarded as key, and I appreciate that it is the States' view that such arguments are key. Such concerns could arise from the composition and the powers of an IDT. They would then, indeed, reflect points relied on by Advocate Ozanne in support of her general submission that disputes such as the present cannot have been intended to go to an IDT, and/or that it was unreasonable of the IDO to refer

them. Whilst I do not accept either argument in those precise contexts, I also, in fact, do not consider that there is reason to have any such concerns, for the following reasons.

179. As to the composition of the IDT, whilst it is indeed a "lay" tribunal, it is plainly possible to appoint a legally qualified, or experienced, Chairman. This is what was actually proposed in this case, with the proposed appointee being Professor Roy Lewis, a qualified English Barrister. This suggests, as I would expect, that the ERS and the IDO give consideration to the suitability of any Chairman (at least), who is suggested for such appointment, according to what is likely to be required in the case. Any such legally aware Chairman will have the ability to recognise points of law and the experience to work out how they should be correctly handled or determined.

180. As to the IDT's powers, there would appear to be a range of possible responses from an IDT which is confronted with arguments that points of law require decision. Common sense would suggest that it should be possible for an IDT to obtain legal advice on points of law, if required, although it might be argued that its express powers (see the Schedule to the 1993 Law, especially paragraph 17) do not expressly extend to this. However, it also seems to me that ultimately the IDT has power to require parties to obtain any necessary binding decision on a point of law, if not through express direction (though I do not really see why not), then indirectly through the exercise of its power to award. I note, for example, that in one award exhibited by Ms Airley (a 2009 Award in respect of Prison Officers' terms and conditions) she records that the IDT declined to make a decision in respect of certain matters, but directed the parties to set up a working group. This would seem no different, in principle, to directing the parties to obtain a binding legal decision from the Court.

181. Alternatively, and in any event, it also seems to me that an IDT must have a power to make "No Award" if it considers it correct to do so upon "investigating" the industrial dispute. It seems to me that this power would also provide protection for the States, in this instance, if appropriate. I have of course noted that the function of the IDT is stated, in s. 5 of the Law, to be that it

> *"shall.....investigate and make an award in respect of any industrial dispute referred to it…" (emphasis added)*

but it does not seem to me that this could be construed as requiring the IDT to make some actual positive award in all cases, without encompassing any power to make, expressly if necessary, "no award" if appropriate.

182. Advocate Gist also pointed out that it was not the case (as Advocate Ozanne appeared to have submitted) that any IDT hearing would necessarily involve the States in paying all the costs; this was only a fall-back provision in Paragraph 25 of the Schedule to the Law, and, in fact, the IDT could make any order it thought right with regard to the costs of an IDT hearing: see Paragraph 24. Therefore, I am not persuaded that the possible exposure of the States to unavoidable and unreasonable expenditure from the public purse, if a matter is referred to an IDT rather than being refused admission by the IDO as "gatekeeper", thus has any weight, in terms of whether making such a referral is unreasonable for lack of suitable safeguards.

183. Lastly, the final protection for the States' position in this case lies in the fact, which is accepted by Advocate Gist, that if the IDT itself made a decision or award which the States considered was wrong in law, that decision or award could be challenged by judicial review, even if not by appeal.

184. For all the above reasons, therefore, I do not find that Advocate Ozanne's arguments that the determination of the matters in issue between the States and the Interested Parties are points of law which (*therefore)* cannot be an "*industrial dispute*" at all because they are "*unsuitable*" for a decision by an IDT, override the force of the natural and ordinary meaning of the words used in the 1993 Law in the definition of "*industrial dispute*".

(2) Illegality/ultra vires. Have any such "industrial disputes" clearly been extinguished?

185. That disposes of the arguments based on the nature and substance of the underlying disputes, but that is not the end of the matter, because there are three further, extraneous, points which are argued to bear on the question whether the IDO was within his powers of referral. They go to the question whether the relevant "*industrial dispute(s)*" can now, still, be said to exist.

186. The first is Advocate Ozanne's "prescription" argument and the second is her "previously compromised" argument. On the basis that the effect of these has been to extinguish the relevant claims, these points can be said to found an argument as to *ultra vires* or error of law, because they would mean that the IDO had purported to refer to the IDT a "*dispute or difference*" which did not or could not now exist in law. Alternatively, they can be viewed as part of an argument of *"Wednesbury"* unreasonableness.

187. Advocate Ozanne also advances a third point of a similar effect to the above, which is that the IDO erred in law in referring the two present complaints of the GPA and the AGF to an IDT because they had both, in fact, been previously rejected as such by the (former) IDO, in April 2018, and those decisions were "final" in law. The only available route for challenging those decisions at the time would have been judicial review; this did not happen and it would now be way too late to do so. The question of the existence (or not) of these "*industrial disputes*" has, therefore already been conclusively determined and it is *ultra vires* for the IDO to purport now to make one.

General considerations

188. As to these three points in general, first, I accept Advocate Gist's proposition that the court's attitude towards the IDO's operation of his powers must have regard to his lay status, and therefore ought to lean in favour of his being able to function validly on the basis of an intelligent layman's reasonable and common-sense approach. In saying this I have noted that the IDO's standard form decision letter includes the statement that the IDO is "guided by the law", but I do not think that affects the matter, as it is really only stating the obvious. He would, of course, expect to observe the law in general terms, but that does not seem to me to mean that he is undertaking to make a decision in the same depth of detail as if he were a lawyer.

189. The IDO is not a legal tribunal. He carries out what is meant to be a relatively straightforward administrative function, including operating as a conciliator and facilitator, and with the power of referral of a dispute to an IDT being conferred as a final fall-back. He does not make a discretionary decision "whether" to refer an "*industrial dispute*" to an IDT. Once he has determined that he has been presented with such a dispute, his actions are mandated by the 1993 Law. In my judgment, therefore, the IDO's duties are not to be interpreted as requiring him to grapple with refined or specialist legal propositions, in order to make the intended common-sense decisions he is authorised and intended to make in performing his functions.

190. I also find, however, that there must be some limits to that proposition. If the situation which is presented to the IDO reveals, as a matter of plain common sense, that a supposed "*industrial dispute*" in fact cannot exist, or cannot still exist, for simple and obvious reasons, even though one party may be urging that it does so just because that party is aggrieved, then the IDO's judgment as to whether there is a qualifying "*dispute or difference*" before him at all must, in common sense, be in the negative. Thus, if his decision flies in the face of an obvious answer in layman's terms, then that would, in my judgment, justify judicial review of his decision, and its being quashed.

191. This perfectly proper and correct approach is illustrated even in this case by the reaction of the former IDO, Mr Carrington, in rejecting the two early complaints by the AGF and the GPA made in February 2018, in his letters of 3rd April 2018, on the grounds that the evidence showed that those complaints had previously been extinguished by a compromise agreement which bound the relevant complainants. (I use this only as an example of principle, and make no comment at this point on the correctness of either such decision.)

192. The question under this head, therefore, is whether, given his function and the reasonable decision-making which could be expected of him, the IDO has erred in law in purporting to refer to the IDT supposed "*industrial disputes*" which, Advocate Ozanne submits, can clearly be seen no longer to exist or be capable of subsisting.

(a) The prescription argument

193. The States' first argument, as to all three complaints, is that even if they were correctly regarded as "*industrial disputes*" in the first place, they have since become extinguished by the operation of prescription (see [101] above: I do not repeat the argument here).

194. That, however, is a proposition of law, which itself involves several propositions. It first involves analysing the relevant "dispute or difference" as a complaint of breach of employment contracts or as a breach of trust; it then involves the proposition that time has run, and has run out, against the substance of those underlying complaints, notwithstanding their having been laid before the IDO some time ago. It then involves applying the relevant time factor, and it is notable that if that period was six years from 1st March 2016, then in the case of a breach of contract claim, the prescription period, had seemingly not expired at the time of the Decision itself - 3rd February 2022 at the latest - at all.

195. Those are the basic factors which the IDO would have had to find to be plain as matter of common sense before it could be said that the relevant "*industrial disputes*" could

no longer exist, and it is not immediately apparent that any of them is entirely incontestable, or that the consequences must be taken to be perfectly clear.

196. I did not find Advocate Gist's submissions on this point very useful. His argument that there is "no prescription on an industrial dispute" to my mind misses the point. The 1993 Law does not purport to alter the law in relation to prescription or limitation and this would therefore seem to take effect *dehors* the 1993 Law, with whatever legal consequence might follow. That, though, will depend on the nature of the dispute itself.

197. The principle which I find to be applicable here is that where there is a plain and obvious ground for holding that a supposed "*industrial dispute*" no longer exists or could exist, the IDO would, indeed, be wrong not to take account of this, and not to hold that there was no "*industrial dispute*" for that reason. However, that is not the case where such a ground cannot be said to be plain and obvious, but may itself be subject to dispute. Indeed, in such a case, the possible differences of view over such underlying ground would arguably even feed into the definition of "*industrial dispute*", because it would itself be, at least, a "*difference*" between the parties which could not be said to be without any substance.

198. Applying this test to this case I do not consider that the obviousness of Advocate Ozanne's "prescription" argument is sufficient to justify finding that the IDO acted *ultra vires* or in error of law in making the Decision to refer these three complaints to the IDT, on 3rd February 2022. There are too many potentially arguable (certainly to a lay person) factors feeding into any such conclusion. It could not be said that, at that time, this prescription argument meant that the only reasonable view was that there was no difference capable of constituting an "*industrial dispute*" in existence between the States and relevant employees.

(b) Previous binding compromise

199. The argument here, although the same in principle, applies differently, not least because the question whether a binding compromise of particular complaints has been executed is *prima facie* an easier matter to identify as fact, than are the component parts of a claim of prescription in law. However, this argument must be considered in relation to each of the three individual complaints separately, and even, ultimately, to the constituent individual complainants.

200. The complainants are seeking to contest that they are/were bound, in all the circumstances, to accept the application of the changes to the States Pension Scheme implemented on 1st March 2016. I take this to be the correct underlying description of the relevant industrial disputes, as it appears, quite clearly, to be the basic complaint of all three complainant groups. What one is therefore looking for, on the present argument - which is quite a narrow point - is a subsequent binding agreement by which the employee parties to such agreement compromised away any rights they might have had to raise such a complaint as described. The obvious and only contender for this is the December 2017 Agreement, ie the agreement which originated in attempts to settle the P and B case, but became a compromise mediated between the States and Unite and subsequently incorporated, through Unite's own processes, into an Agreement which became directly binding on all members of Unite, and which later

still, also as part of the December 2017 Agreement itself, was offered by the States to all relevantly affected Scheme members who were not Unite members, as well.

201. With regard to the participants in the complaints here, therefore:

(1) The G50 has never, as such, been involved in any bargaining or agreement with regard to acceptance of the Scheme Rules, or part of them, or their application, and so this argument would *prima facie* seem not to apply to it/them. However the identities of the constituent individuals are not known (apart from Mr Torode and possibly Mrs Falla), and it may well be, as Advocate Ozanne points out, that some of their number were members of Unite at the relevant time.

(2) The AGF complainants were members of Unite. (This has been asserted throughout the evidence and never contested or questioned.) It would therefore seem that, *prima facie*, all this group of complainants are bound by an agreement which has compromised any right they might have had to pursue any grievances arising out of the implementation of the changes made by the 2016 Scheme Rules.

(3) The GPA membership were not members of Unite. It does not seem, therefore, that they have compromised away any rights they might otherwise have to raise any such grievances. The GPA was a member of ASEO, the umbrella body of employee organisations which was set up to enable negotiation and collective bargaining with regard to such changes (see [34] above). However, the extent to which such participation would mean that GPA members were, in effect, bound, by the original changes made in 2016 is part of the very "*industrial dispute*" which the GPA has been seeking to raise. This fact does not therefore give rise to any issue of <u>subsequent</u> binding compromise.

202. Looking at these respective positions, and applying the test which I consider to be correct (see [197] above) namely that, for the IDO to commit an error of law or act *ultra vires*, it would need to be plain and obvious to an ordinary person that the complainants had compromised away all relevant rights, I take the view that this proposition has been fulfilled in the case of the AGF, but not in the cases of the GPA and the G50.

203. In general argument on this topic, resisting the proposition that the IDO had erred in law in purporting to refer these industrial disputes to the IDT when they had already been compromised out of existence, Advocate Gist rather glossed over the position of the AGF, although of course, he is not actually representing them. I therefore examine their position carefully.

204. On the evidence, the order of events was that the Scheme Rules were amended by States Resolution with effect from 1st March 2016, the P and B case was commenced in April 2016, and the compromise arising from this case, which became binding on all Unite members, was concluded on 8th December 2017.

205. The AGF gave notification of their claimed industrial dispute with the States, relating to

> *"detrimental contract breaches by their employer, as an example but not limited to the recent enforced changes to their contractual retirement ages"*

on 16th February 2018. It was rejected by Mr Carrington on 3rd April 2018 on the basis that there was no "industrial dispute" because this supposed dispute had been compromised by the December 2017 Agreement. This was never challenged as a decision, and it would seem to have been perfectly correct.

206. The present complaint originated in a second notification to the IDO around 21st November 2019, apparently to the effect that the "industrial dispute" was that

> *"….our members are aggrieved that the employer has changed the pension provisions without consent."*

(see explanatory email of 5th August 2021 from Mr Roger.) The wording of this later notification is not the same as the 2018 one. I have therefore asked myself whether it could reasonably be argued that it was a different "*dispute or difference*" from that which underlay the 16th February 2018 notification. However, this has never been suggested, and I cannot see how it could be a different complaint from the earlier one. There is also no suggestion that the IDO allowed it because he considered, on any reasonably cogent grounds, that it was or could be a different "*dispute or difference*", in substance, from the earlier one.

207. On that basis, it is difficult to see what justification the IDO had for entertaining this second (started in 2019) purported notification of an "industrial dispute" from the AGF, as this notification appears to be (a) in breach of the December 2017 Agreement, and in any event (b) an abusive repetition of the very same complaint as that which was previously dismissed, on 3rd April 2018, for that very reason, - and which dismissal was not challenged at the time.

208. I therefore hold that the IDO's Decision of 3rd February 2022 to refer the AGF's purported notification of an "*industrial dispute*" to an IDT was, indeed, made in error of law, and/or was *ultra vires*, because it seems to me that he simply did not take the "previously compromised" point properly into account. Had he done so, he must necessarily have rejected the AGF complaint for not being capable of being an existing "*dispute or difference*" - in fact in the same way as Mr Carrington had previously rejected the 2018 AGF complaint. I reach this conclusion, however, only because, in my judgment, the facts and circumstances constituting the binding compromise were sufficiently clearly demonstrated from the obvious facts before Mr Le Maitre, without the need to apply any refined assessment of law or fact. It could not have been cogently asserted that a "*dispute or difference*" in this regard could still exist as at 3rd February 2022, and the IDO ought to have come to that conclusion.

(c) Previous "final" decision

209. Under this head, Advocate Ozanne argues, alternatively, that, in respect of both the AGF and the GPA, the IDO's Decision was either *Wednesbury* unreasonable or was made in error of law, because he failed to take account of the fact that the very same complaints were previously referred to the (former) IDO in February 2018 and March

2018 (respectively) and were each rejected by him and held not to be an "industrial dispute", and that this decision was "final" by force of law (s 3(3) of the 1993 Law).

210. Mr Carrington's given reason in each case was the fact that the December 2017 Agreement had compromised any such complaints and was binding on each of the AGF and the GPA. As regards the AGF, this is therefore part of the "previous binding compromise" ground discussed above, providing also the common-sense reason why the IDO should have come to the conclusion that there could be no "dispute or difference" between the AGF members and the States, capable of being referred to an IDT. I accept Advocate Ozanne's submission that the definition of "*industrial dispute*" cannot be so wide as to enable disaffected employees to make continued repeated notifications to the IDO, of (in effect) the same grievances once it has been decided that those grievances cannot stand as an "*industrial dispute*"; to hold otherwise would be to ignore the fact that the Law declares such a decision by the IDO to be "final" (see s.3(3)), which means that it can only be upset by the remedy of judicial review.

211. The position with regard to the GPA, however, is not so simple, because the former IDO was persuaded, on the basis of evidence later produced to him by the GPA (although the States were, perhaps unfortunately, not aware of this at the time), that he had made his rejection decision under a misunderstanding, namely that the GPA had also been members of Unite and thus effectively had been parties to the December 2017 Agreement, when in fact they were not.

212. If this is right then it simply left the situation with regard to the GPA members as set out in [201(3)] above, and I have already held that that situation was sufficiently unclear, in law, that the IDO could reasonably take the view that an "*industrial dispute*" was capable of existing in their case. Indeed, this is precisely what Mr Carrington eventually did conclude, judging from his letter of 23rd July 2019.

213. This leads therefore, to Advocate Ozanne's further point that, notwithstanding the IDO's view that he could and should issue a revised decision admitting the GPA claim as being an "*industrial dispute*", it simply was not open to him to do so, and the IDO's present Decision purporting to refer that dispute to an IDT was therefore simply a nullity.

214. I find this argument singularly unattractive insofar as it contends that, even if a "decision" with regard to the existence of an "*industrial dispute*" had been made on an acknowledged false basis, nonetheless, the fact that it was made at all makes it "final" under s 3(3) of the Law, and incapable of being revisited.

215. I then do not find either of the matters which Advocate Ozanne then prays in aid as making the decision somewhat less unattractive at all convincing. The first is that a rejection of the dispute as an "industrial dispute" did not really prevent the GPA membership from pursuing any remedy for their grievances, because the route of going to the Court to claim a breach of contract remained open to them. I take rather a jaundiced view of the worth of this, having regard to the arguments (eg as to there having been no breach of contract, and that in any event the only legitimate way to bring such grievances into court would have been to take judicial review proceedings in respect of the 2016 States Resolution) which I think I can safely infer that the States

would then, obviously, advance in opposition to that route. In any event, looking simply at the processes and costs involved, I can well see that such an alternative course would not be an attractive one, and consequently less immediately obvious, and that invoking the industrial disputes procedure would have been a preferable course if possible.

216. Advocate Ozanne's second argument is that the original decision that there was "no industrial dispute" was actually correct, even if justified on the basis of wrong reasons, because it was stated to be made on the grounds that there had in fact been no "*enforced changes to contractual retirement ages or other terms and conditions*" (see the terms of the relevant letter of 3rd April 2018), and this was actually quite right, because the "contractual terms and conditions" did not include the terms of the States Pension Scheme itself. This, however, simply asserts, that one of the States' answers to the GPA complaint is correct, and it takes Mr Carrington's sentiments selectively, and in a way which is not what he was meaning. It is not a good and fair reason to decide this point in the States' favour.

217. It is also submitted that there was an available route which the GPA could have taken as regards contesting Mr Carrington's 3rd April 2018 rejection of their notification, and that was judicial review, and that this is the route they should have taken because he had then become *functus officio* in the matter, having made a decision which was "final", for better or worse. I consider that, in this context where the focus is on the conciliation and resolution of potentially damaging industrial disputes outside court, it would be unduly rigid to insist on that.

218. In my judgment, therefore, Advocate Gist's argument is to be preferred. If an IDO makes a decision that there is "no industrial dispute" on the basis of a misapprehension of fact, that decision is simply a nullity, and the IDO, upon being properly satisfied of this, has the power to make a (now) valid and effective decision on a true appreciation of the facts. Obviously the IDO should not make such a decision lightly, because he should not simply give in to pestering from a dissatisfied complainant which is all that it may, in some cases, be, but I am satisfied that this is not the position here with respect to the GPA.

219. I should record here that, at the beginning of the hearing Advocate Gist did advance the point that Mr Carrington's letter of 23rd July 2019, by which he notified his change of mind, had not only been a valid decision under s, 3 of the 1993 Law, but that, as the States had not sought its judicial review at the time, it was now the operative Decision as regards the present referral to the IDT, and it was too late for judicial review, now. This caused Advocate Ozanne to argue that the lack of detail in the 23rd July 2019 letter, combined with absence of any attempt at formulating terms of reference, meant that it could not be regarded as a proper "decision" within the requirements of the 1993 Law. However, Advocate Gist presented this point without great conviction, and in the end he did not persist in it, because he recognised that the question of "promptitude" in judicial review proceedings was a matter for the court's discretion and was not an absolute. This was a sensible concession. I would not have been attracted to dismissing the States' Application on this rather technical and opportunistic ground in any event, and I need say no more about this point.

(3) "*Wednesbury*" unreasonableness/flawed decision-making process

220. This still leaves Advocate Ozanne's more "procedural" challenges to the Decision.

(a) Great legal complexity

221. Her first submission is that the Decision was irrational and unreasonable because of the failure of the IDO (she argued) to take into account the various legal points with regard to the substance of the complaints, previously explained by the States and argued here, either at all, or simply as regards the fact that they were extremely complex - and arguably "too" complex for an IDT.

222. I reject this argument. On one view it is simply another way of putting the arguments of illegality and *ultra vires* which I have already held do not go to the real, and relatively narrow, issue on this Application. I reiterate that that is only whether it was (or was not) open to the IDO to conclude that there was an "*industrial dispute*" within the meaning of the 1993 Law in existence. That question has a "yes or no" answer. He has no discretion, under the Law, as to how he then then deals with any such dispute which he has recognised, and the degree of its underlying legal complexity is just not relevant. Put another way, the 1993 Law contains no limitation on what is an "*industrial dispute*" according to its legal difficulty.

223. At some points, Advocate Ozanne seemed to put this point on the basis that the IDO needed, in order to decide fairly if he was faced with a true "*industrial dispute*", to know what the dispute was about, and that the IDO's actions, and his evidence in this case, could be said to show that he just did not understand these legal points, leading to a conclusion that his eventual decision must therefore be irrational or unreasonable. However, I reject the argument put in that way as well. Having considered all the evidence, this seems to me to be more a matter of semantics and rhetoric than a real point of substance.

(b) Individual complainants not (yet) identified

224. Next, there is Advocate Ozanne's additional point, that it is unreasonable and irrational to find or to entertain an "*industrial dispute*" when all the complainants supposedly making it have not been individually identified, then adds anything to the above argument.

225. I do not think it does. I accept Advocate Gist's point that the mere existence of an "*industrial dispute*" between an employer and at least one employee is all that is required to be identified in order trigger the IDO's function of either attempting conciliation or referring the matter to an IDT. So long, therefore, as at least one person as an employee can be identified as falling within a "group" description, that is sufficient for this initial stage.

226. I am fortified in this view by the fact that it would appear to be the case in most of the IDT awards which I have been shown, that the employee participants have not been identified individually, but by reference to a description from which they can later be identified. This would clearly apply, I think, to the GPA and the AGF in this case, as the complainants are at least some of their identifiable membership. It applies less clearly to the G50, who are not a recognised established organisation but a disparate

group. However, in my judgment that, again, makes no difference at this stage. In my judgment, it is reasonably a matter for the IDT itself to call for information as to individual identities in the context of any particular reference to it, if it has not got this at the outset, if and insofar it considers that that is either only fair as a matter of natural justice, or is necessary for the investigation and determination of the issues which arise in the reference.

227. This does lead, however, to Advocate Ozanne's further argument that it may be necessary to know the identity of particular individual complainants, in order to ascertain that they do have *locus standi* to bring a complaint before the IDT at all. This has two aspects in the present case, illustrated clearly from the anonymity of the members of the G50, and the actual identity of Mr Torode as their representative.

228. I have already held that members of Unite are clearly disentitled from joining in as complainants in any reference to an IDT, because they cannot allege that there is any longer a potential "*dispute or difference*" between them and the States arising from the change in the Pension Scheme to the 2016 Rules. However, in my judgment this simply means that the question whether any members of Unite are amongst the complainants under the banner of either the GPA, or the G50, is one of the matters on which it would be right and convenient for the IDT to require information in dealing with the reference. I imagine that, on any basis, the IDT would normally think it appropriate to identify the individuals who were claiming under "group" descriptions, such as in the present case, if only to ensure that the composition of any such "group" did not change opportunistically as matters progressed. That, however, would, in my judgment, be a matter for the IDT, and on any basis not the IDO, whose function is only to identify, correctly and reasonably, that there is an apparently qualifying "*industrial dispute*". It is not irrational or unreasonable for him so to conclude, even without knowing the identity of all underlying individual complainants.

(c) Status of Mr Torode

229. The position with regard to Mr Torode is different. Advocate Gist did not seem to me to address, directly, the point that Mr Torode is not an "employee" but a Crown appointee, and is therefore not qualified to bring an "*industrial dispute*" before an IDT, but, in my judgment, there is clear force in this point.

230. Mr Torode's *locus standi* has to be established according to the terms of the 1993 Law. It is, in my judgment, quite clear, from the tenor, subject matter and purpose of the 1993 Law that this was aimed at dealing with employment relationships, and not the position of Crown Appointees. Mr Torode's status does not fall within the clear words of the definition of "industrial dispute" and there is no basis, even on a "purposive" construction, for construing those words to include it. There is nothing extraordinary or unfair about this. Appointees hold their office on terms which, generally, provide them with security of tenure for the term of their office (no doubt with some basis enabling removal for "bad behaviour"), but the corollary of that protected status is that they do not need, nor are they given, special protections which attach to the position of employees. It is not legitimate simply to treat them as being "employees" by analogy. (How they would be affected by any possible awards of an IDT is a matter upon which I was not addressed, and is not relevant for present purposes.)

231. Advocate Gist argues that none of this affects Mr Torode's ability to stand as the named representative on behalf of a group of which others, who are undoubtedly qualified, are constituents. This is not quite the same point.

232. It appears to be correct that Mr Torode does not, personally, have the status to be the named representative of the G50, and it would clearly behove this group to nominate another of its members to take this representative position if Mrs Falla has withdrawn (as I believe may be the case). If I could direct this, I would certainly do so, but it is not open to me to do so because the G50 are not parties to these proceedings. This is, therefore, once again, a matter of procedure which, in my judgment, is appropriate to be sorted out by the IDT.

233. The narrow question, at present is whether Mr Torode's apparent lack of status vitiates the IDO's Decision to refer the G50's dispute to an IDT. That depends on whether it was right and reasonable for him to conclude, that the situation presented to him, with the involvement of Mr Torode, Mrs Falla and others not actually named, disclosed an "*industrial dispute …between an employer and an employee*" (emphasis added). In my judgment, it did, as I have already indicated.

234. I should add that in practice there are probably only two or three people in the position of Mr Torode, - although I accept that there may be other persons within the G50 who are not actually employees of the States, and to whom, therefore, similar arguments as to status could also apply. In my judgment, however, this uncertainty is likewise not, in itself, sufficient to vitiate the IDO's Decision, and is a matter of procedure which can and should be dealt with by the IDT.

(d) Failure to take comprehensive legal advice

235. I reject this criticism as any potential grounds for judicial review of the IDO's Decision.

236. First, there is no obligation imposed on the IDO, either expressly or impliedly, to take legal advice at all. As I have already held, he is intended to operate, as a layman, on a practical common-sense basis. Whilst he might choose to take legal advice, if that is practical, he is not obliged to do so. Moreover, in my judgment, it would be for him to judge the extent of any legal advice he might feel he should take, and unless what he did were totally contrary to common sense as to whether or not some particular matter were left out of consideration, the extent of the legal advice he might take would have no effect to render a consequent decision of his vulnerable to judicial review. In this case, it would appear that the IDO did take legal advice, although he claims, as he is entitled to do, that the substance of that advice is subject to legal professional privilege.

237. However, the fundamental analytical reason why I consider that this complaint really cannot support grounds for judicial review is that, to be brought within the recognised principles, this criticism would, in my judgment, have to fall under the heading of a "failure to take into account some relevant matter". But the argument here is not that the IDO failed to take into account some relevant matter which was known to him, but that he did not bring into being some assertedly relevant matter, at all - which I have already held he was not obliged to do, in any event. I therefore consider this criticism to be without merit.

(e) Flaws in Terms of Reference

238. I can dismiss this criticism equally quickly. In my judgment, the details of the suggested Terms of Reference composed by the IDO as part of his statutory function, are not part of the "Decision" which is the object of this judicial review application; that is the decision that there IS an "*industrial dispute*" and its consequent reference to an IDT.

239. Errors contained in the Terms of Reference might, in an appropriate case, show that the IDO's view that there actually was a "dispute or difference" within the meaning of the 1993 Law was demonstrably wrong. Those would generally, though, it seems to me, have to be errors of objective fact. Where the alleged error lies simply in the fact that the complaining party disagrees with the IDO's judgment of what are actual or possible (in law) issues in dispute, any such "error" is simply part of the dispute which is being referred, rather than part of the IDO's reasons for referring it.

240. In my judgment, the alleged "errors" in the drafted Terms of Reference are either of this second type, or are immaterial (for present purposes) matters of detail, or incompleteness, or oversimplification, which properly can, and will if necessary, be considered and dealt with by the IDT, as part of its own processes.

(4) Procedural unfairnesses

241. Lastly, I turn to the final four grounds argued by Advocate Ozanne which are raised as matters of "procedural unfairness".

242. As to these, I have already considered above, on their merits, the States' complaints about (i) the IDO's not having sought to determine, himself, the merits of the various legal issues which the States have raised, and (ii) the lack of identification of individual complainants, and I have rejected these. For the avoidance of doubt I therefore also reject the contention that these points have given rise to any procedural unfairness in and about the IDO's making the Decision. This leaves two outstanding points.

(a) Absence of reasons

243. Advocate Ozanne argues that the Decision is, itself, devoid of any reasons being given for it, and it is axiomatic that a party adversely affected by an administrative decision is entitled to have the reasons for it given, even if only so that it should know, clearly, why its rights have been adversely (in its own eyes) affected. Furthermore, she pointed to textbook authority (de Smith *Judicial Review* 8th Ed at para 7.115) that the correct course was to quash an unreasoned decision, rather than to refer it back to the decision-maker for reasons to be given, because that would tend to produce *ex post facto* justification, rather than a genuine expression of the actual previous reasons.

244. Advocate Gist relies on his earlier submission that the reasons which are to be expected from a lay person are not matters of great detail, such as a lawyer might give, and it is sufficient if they show the relevant reasons on a broad common-sense basis. This is especially so when the decision in question has been a simple "black or white" judgment, rather than the exercise of a discretion.

245. When I put to Advocate Ozanne that the IDO's reasons were really pretty apparent from his Decision itself, ie, that he thought that there was an "*industrial dispute*" within the meaning of s 18 of the 1993 Law, she argued that that was just not good enough, the IDO must set out why he thought that.

246. I disagree; I accept Advocate Gist's argument. In my judgment, the requirement for reasons to be given has to be construed in a sensible way. The point of the requirement for reasons is simply that the parties should know why the relevant conclusion has been reached by the particular decision-maker. In the present case, it seems to me that the IDO's reasons have been sufficiently clearly made known in the Decision itself, supplemented, if that were necessary, by the Terms of Reference which he had now composed. These latter might, in the States' eyes, reveal misconceptions as to the correct legal position, but, if so, that would only go to explaining the reasons themselves. It would not provide grounds for upsetting the actual Decision in question for lack of reasons.

(b) Bias

247. The last of the many points raised by Advocate Ozanne is an argument that the Decision should be set aside for being tainted by "apparent bias" – or rather, for inevitably leading to an IDT being constituted which would be immediately vulnerable to an accusation of apparent bias: see [117] above.

248. This is a quite extraordinary argument to make, and I reject it. Not only does it not go to any question in of "apparent bias" affecting the actual Decision in question, but the argument itself is constructed on such a flimsy edifice of assumption and supposition as to the way in which future events would unfold, or be interpreted, that I consider it to be entirely fanciful. It certainly imports no procedural unfairness at this stage, and neither does it disclose any inevitable consequence which could begin to make it arguable that the actual Decision of Mr Le Maitre was unreasonably or irrationally taken in the first place.

Final point – delay

249. Lastly, Advocate Ozanne has frequently criticised the conduct of the IDO, both present and former, for the lengthy delays which she points to in their dealing with this matter, not all of which can be fairly attributed to the well-rehearsed Covid pandemic. They do, of course, indicate that the IDOs have exceeded the general six-week timescale for referring industrial disputes to an IDT, and apparently in circumstances where the exception (that it appeared that negotiations or suchlike were under way) could not be said to have applied (see s 3 (2)). Advocate Ozanne did not, however, suggest that this gave rise to any grounds for quashing the Decision which the IDO did ultimately make, or convey, on 3rd February 2022,

250. In my judgment this was correct in the circumstances of this case, as such delay is really properly characterised only as delay in deciding whether the IDO had, indeed, been notified of an "*industrial dispute*" within the meaning of s.3(1) of the Law, rather than delay in making a consequent reference to the IDT.

251. Similarly, Advocate Ozanne did not appear to me to argue seriously that the IDO had failed in his primary statutory duty to seek to prevent or settle the dispute, because he had not sufficiently engaged with the parties (the States in particular) in such a function, and that such failure therefore vitiated his Decision to refer the matter to an IDT. This was notwithstanding that she roundly criticised his assertion that he had done this, in the Terms of Reference.

252. Again, I consider that this was a correct and pragmatic approach, as the IDO, as a layman, was reasonably entitled to take the view that, with the entrenched position of the parties (including the likely position of the G50), any such attempts would just be fruitless. I do not see that either of the above points, therefore, could or should have any effect on whether the Decision itself should be quashed.

Consequential conclusions

253. Taking stock, therefore, I have concluded that the Decision of the IDO cannot be upset on grounds which justify judicial review in respect of either of the complaints notified to him on behalf of the GPA or the Group of 50, but that it can be so upset in respect of the complaint notified by the GFA.

254. Advocate Gist, at one point, suggested that even if there were grounds for judicially reviewing and quashing part of the Decision in this way, the Court should not, as a matter of discretion, do that, because the reference would still continue in respect of the remaining complaint or complaints, such that there was no point in quashing the Decision in relation to only one or two of its three constituent complaints.

255. I disagree. In my judgment it would be wrong to permit a reference which I have ruled is clearly inadmissible to go forward to an IDT on the back of references which I am unable to say were wrongly admitted. Firstly, this seems to me to give an unwarranted advantage to the AGF complainants, which they do not merit. Second, the very fact that I have ruled one of these complaints to be inadmissible may be a factor which an IDT would find of some relevance to its investigative process and award.

Decision

256. My decision upon this Application and Cause is, therefore, that

(1) I grant the States' Application dated 4th March 2022 for leave to seek judicial review of the Decision (as identified) of the IDO of 3rd February 2022,

(2) I dismiss the substantive Application for judicial review in respect of that part of the Decision relating to the industrial disputes notified by or on behalf of

(a) the GPA and
(b) the Group of 50.

(3) I allow the substantive Application for judicial review in respect that part of the Decision relating to the industrial dispute notified by the AGF.

Costs

257. Since the result of these proceedings has been what I might call a "score draw" and I also anticipate that, in the end, any legal costs will be met by the States through one route or another, I would propose to make no order as to costs. If either party wishes to make a case that that is not appropriate, then they have leave to make an application within 14 days of receipt of the final approved judgment.

Postscript

258. I wish to add a postscript. I have already indicated (see [175] above) that I have reached my conclusion with regard to the (non-)impact of many of the legal issues which have been adverted to in this this case without enthusiasm.

259. I am also well aware, and I am concerned, that the decision which I have actually made is likely to have unsatisfactory practical consequences, because I have concluded that there are two complaints which must be allowed to proceed to an IDT where any resultant award could have wide and uncertain implications for matters even outside the relations of the particular parties involved. It is also right to say that the scope of the investigation which an IDT would have to undertake in order to make its ultimate decision certainly seems to me to involve determinations on points of law, as canvassed in this case by Advocate Ozanne on the part of the States.

260. However, for the reasons which I have no doubt laboured above, and however, desirable it might appear as a matter of common sense that those matters are authoritatively decided by a court of competent jurisdiction, I have concluded that that this simply not possible within the proper scope of the judicial review Application which the States has brought before this Court. This is, first, because those issues are not directly material to the actual question for decision upon such Application and, second, because the necessary parties to any such binding determination, are not before the Court. However much, therefore, I may regret the "untidiness" of the consequences of my decision, that is, in my judgment, unavoidable on the basis of the law as it stands, and which I must loyally apply.

261. Furthermore, insofar as this is a consequence of what I consider to be the correct interpretation of the 1993 Law regarding the function and powers of the IDO, the disadvantages of this effect have previously been brought to the attention of the States of Deliberation, both in 1991 when the 1993 Law was debated, and again in 2010 when the report on its operation in relation to the industrial action of the Guernsey Airport Fire Fighters was received by the States. As no action has been taken to moderate this effect, it must be assumed that the States considers that it is in the best interests of Guernsey, as a matter of industrial relations generally, to have a very broad definition of "*industrial dispute*" administered by the IDO as a lay official, notwithstanding the possible practical disadvantages of this, which the present case has highlighted.

Hazel Marshall KC
Lieutenant-Bailiff

30th November 2022

