
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE STATES OF JERSEY EMPLOYMENT BOARD

**Presented to the States on 15th April 2010
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 as amended, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the States of Jersey Employment Board not to promote Regulations that would create a fairer situation for members of the Public Employees Contributory Retirement Scheme who retire after their normal retirement age.

Connétable J. Gallichan of St. Mary,
Chairman, Privileges and Procedures Committee.

STATES OF JERSEY COMPLAINTS BOARD

15th March 2010

**Findings of the Complaints Board constituted under
the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint
by Mr. B. against the States of Jersey Employment Board
not to promote Regulations that would create a fairer situation for members of
the Public Employees Contributory Retirement Scheme who retire after their
normal retirement age**

1. Present –

Board members

Mr. N. Le Gresley (Chairman)
Ms. C. Vibert
Mr. R. Bonney

Complainant

Mr. B.

States Employment Board, Chief Minister's Department

Mr. M. Pinel, Head of Employment Relations
Mrs. M. Byron, Senior Human Resources Manager

States Greffe

Mrs. A.H. Harris, Deputy Greffier of the States

The hearing was held in public at 2.00 p.m. on 15th March 2010 in
Le Capelain Room, States Building.

2. **Summary of Dispute**

2.1 The Board was convened to hear the complaint by Mr. B. against a decision of the States Employment Board not to review the policy relating to the calculation of pension for those persons who continue to work after the normal retirement age and who continue to contribute to the Public Employees Contributory Retirement Scheme.

3. **Summary of the Complainant's case**

3.1 The Board considered correspondence from Mr. B., currently employed as Assistant Law Draftsman, setting out his complaint. This was in 2 parts, but principally concerned the decision of the States Employment Board not to review the position of those members of the PECRS who chose to retire after normal retiring age. Mr. B. had pointed out that several years ago the States Employment Board had reviewed the position of those members of staff who

retired early – that is, before normal retiring age – and had recommended to the States that a member who retired before normal retiring age should receive a reduced pension. This was adopted by the States and resulted in a reduction by 2.4% in pension for each year the person retired early, and which Mr. B. considered a perfectly reasonable decision. However he had raised at the time, and also subsequently, the position of a member of staff who retired after normal retiring age, but who continued to pay pension contributions, but did not receive any enhancement in pension despite the evident reduction in number of years that any pension would be payable.

- 3.2 In his correspondence, Mr. B. had explained that he had worked for the States for over 11 years. According to statistics published by the States, a man born in 1939 can expect to die at about the age of 75. Therefore had he started to work for the States when he was 49 he could have retired at age 60 and would have expected to receive a pension for 15 years. Equally had he started work for the States when he was 54 and retired at normal retiring age, he could have expected to receive a pension for 10 years. As it was, he started work for the States when he was 59, so on retirement in 2010 he can expect to receive a pension for only 4 years assuming the normal life span of 75. Mr. B. took the view that if the States were to apply the same arguments relating to pension as they did when they reduced the pension by 2.4% per year for those retiring early, it would seem reasonable that an enhanced pension should be applied for those who retire late. To do otherwise would be to discriminate solely based on age.
- 3.3 In Mr. B.'s submission to the Board, he highlighted the steps that the States have taken to remove any compulsory retiring age for employees in Jersey when they approved the Employment (Amendment No. 5) (Jersey) Law 201-. This legislation, once enacted, will remove the barriers preventing public sector employees working past the age of 65. At present, all public sector employees who retire after the age of 65 receive a pension calculated on the assumption that they retired at the age of 65.
- 3.4 Mr. B. was the Assistant Law Draftsman who had prepared the draft Regulations providing that PECRS members who retired early should receive a reduced pension. At that time he pointed out to the instructing department that the same arguments could be used to promote a change to the Pension Scheme for those who retire after their normal retirement age. The instructing department wished to deal with one matter at a time, so did not promote this change at that time. After 2 years, Mr. B. wrote to the department querying the situation, and he wrote again a further 2 years later. He did not receive a reply in either case. Having then written to the Chairman of the Trustees of the Pension Fund, he was advised to take the matter up with his employer, namely the States Employment Board. He duly wrote to the States Employment Board and asked whether he could address the Board, as he was aware that he was putting an opposite view to the department which advised the Board on matters of policy. The reason for not specifically asking the Board if they wished Mr. B. to attend was on the basis that the Board do not usually meet with individual employees regarding policy decisions.

- 3.5 The submission goes on to say that it should not be possible for the department to argue that a pension should be reduced when the member retires early, but not increased when a member retires late. In Mr. B.'s case, both he and the States as the employer had continued to contribute to PECRS, and that even to get back the money paid into the Fund by the States and himself (with no interest being received on it), would mean that he would have to live to at least 100.
- 3.6 Mr. B. had ascertained that currently there were 2 PECRS members still in full-time employment over the age of 65, at the time of the search both being aged 69. Mr. B. had undertaken some research as to whether an annuity would have paid a better dividend than the pension he could expect to receive. Based on the figure of £300,000 paid by the States and Mr. B. into the Pension Fund during this period, the average annuity he could expect to receive at the moment, being not an especially good moment with the low interest rates presently prevailing, on the purchase of an annuity at aged 71, was £25,000 a year. This sum is considerably more than the States pension that Mr. B. would receive of £14,000 a year. Mr. B. pointed out that where an employee retires before their normal retiring age but retains their right to a pension, what actually happens is the Actuary to the Fund would calculate the pension the person should receive. Mr. B. suggested the same approach for States employees who retire after their normal retiring age. Changing factors, not least the fact that people are living longer, can then be taken into account by the Actuary. Mr. B.'s submission concludes by making it clear that he too would like to receive an increased pension, and that he hoped that if the Board were to recommend that the Regulations be changed, then they might also recommend that they take effect from 1st January 2010.
- 3.7 During Mr. B.'s oral presentation to the Board, he added the point that the Actuaries can be requested to review the pension to be paid and to award a pension that is cost-neutral, that is, look at all the factors so that there is no great loss or gain to the Pension Fund. If pension awards are worked on a neutral basis, they would not affect the Fund so there would be no damage to the Fund, and in offering enhanced pensions, it would be possible for the States to attract employees to work beyond retirement age.

4. **Summary of the Chief Minister's Department's case**

- 4.1 The Chief Minister's Department submitted the relevant correspondence in connection with the case, together with the chronology of that correspondence from 24th October 2007 until 26th January 2010. The letter dated 2nd November 2008 from the Chairman of the PECRS Committee of Management to Mr. B. sets out the main points that the Actuary made when discussing Mr. B.'s letter, given that the Actuary was present at the PECRS Committee of Management meeting. The main points were –
- (a) in his experience, final salary pension schemes in the UK normally deal with members working beyond normal retirement age (NRA) in one of 2 ways: either –

- (i) a member continues to accrue pensionable service whilst he is working and his pension is calculated by reference to his full pension “additional accrual method”); or
 - (ii) a member’s pensionable service ceases to accrue at NRA and his pension is calculated by reference to pensionable service and his final salary at NRA; this pension is uplifted by a factor calculated by the Actuary to take account of the members having worked beyond NRA (the “late retirement enhancement method”).
- (b) PECRS adopts the additional accrual method. The PECRS Actuary has not encountered any final salary scheme that combines both methods.
 - (c) There are winners and losers from both methods, depending on the value of the actuarial uplift compared to the additional pension earned from accruing additional service and having the pension calculated on potentially a higher salary if the member has enjoyed pay increases since NRA.
 - (d) The Actuary confirmed that PECRS was in line with the best UK practice in its approach to late retirement.

4.2 Therefore the Committee of Management had been advised that it would be very unusual to incorporate an actuarial uplift to pensions of members who have worked beyond NRA, into the current model which allows those members to accrue additional pensionable service, thereby enhancing their pension as their salary increases right up to the date of retirement. The Actuary had since identified the following extract from the report on the 2005 National Association of Pension Funds (NAPF) survey, which suggested only 1% of defined benefits schemes adopted this practice.

“Respondents were asked how pension accrual is handled where individuals have the opportunity to work beyond the Scheme’s normal pension age.

7% of those whose main open scheme was a DB or hybrid scheme said there was no facility for employees to continue working beyond the Scheme’s normal pension age. A further 16% said that working beyond normal pension age was permitted but no further pension rights could be accrued in such circumstances. Equal numbers offered additional accrual (35%) and a late retirement enhancement (35%), with 1% offering both.”

4.3 The Actuary advised that to offer both accrual and late retirement enhancement would be a benefit improvement to PECRS benefits. The Committee of Management itself cannot change the PECRS benefits, but it can advise the principal employer of anomalies in the Regulations so that the employer can amend them. However, in the case of late retirement, the Committee of Management is clear from the Actuary’s advice that PECRS is in line with the industry norms and it considers that there is no such anomaly.

In a later letter dated 28th January 2009 from the Senior Human Resources Manager to Mr. B., she advised him that if an amendment were made to the Scheme which allowed salary enhancement for later retirees, this would be a benefit improvement, and as such incur a capital cost which would need to be funded by the principal employer. As a result, the Board had rejected the request for enhanced pensions to be paid to employees working beyond normal retirement age. A further letter dated 1st April 2009 set out that there were some 19 persons who were working beyond normal retirement age in the States of Jersey, all except 2 were working part-time hours.

- 4.4 In his oral presentation, the Head of Employment Relations advised the Board that final salary pension schemes are being wound up in the private sector as they are considered to be relatively generous. Consideration had been given to closing the final salary to new employees, but to date the States Employment Board has resisted this. However, there was no intention of improving benefits or of increasing costs to the States. For this reason, the States contributions had been capped. If there were an enhancement to the Scheme, the Committee of Management had advised that the employer, and therefore the taxpayer, would have to pay for the improvements in benefits and not the employee.
- 4.5 The Head of Employment Relations referred to the reduction in pension to be received by an employee who retired early. In the case of an employee who continued to work beyond NRA –
- (a) he would continue to accrue entitlement on the number of years' service; and
 - (b) the final salary upon which the pension would be based would continue to go up.
- 4.6 The advice of the Actuary was reiterated and the following issues were raised –
- (1) The Regulations do not provide what the applicant is asking for.
 - (2) Is it reasonable to ask the employer to provide an amalgamation of the 2 methods of pension calculation?
 - (3) Is it right to do this when –
 - (a) the final salary schemes are being phased out; and
 - (b) there is a need to save costs?
 - (4) An employee who continues to work past the age of retirement does so of their own free will and in full knowledge of the terms and conditions which are attached to that extension of employment.
- 4.7 Given the figures quoted on pension contributions, it was noted that Mr. B. was buying additional years' service – the contribution is normally around 5% for an employee – and the contributions made by Mr. B. were increased so that he was paying £15,000 a year into the Pension Fund.

5. General discussion

- 5.1 The Board put a number of questions to both Mr. B. and the representatives of the States Employment Board; and noted first of all that Mr. B. had accepted a new contract at age 65 which had been offered on the same terms and conditions as previously, namely with a pension. It was noted that Mr. B. could have opted out of pension after normal retirement age and his contract could have been amended accordingly. However, he decided to continue making contributions, and indeed was purchasing additional years. The Board noted what the benefits were in purchasing additional years. While 5% was the normal contribution rate, an employee could choose to contribute up to 15% of salary, and for example an additional 1% might buy 20 days a year. The younger an employee is, the more he could accrue. Mr. B. had thought it would be beneficial to make additional contributions, so he would then receive his pension plus added years at the date of his retirement.
- 5.2 The Board noted that unfortunately one e-mail dated 9th June 2006 from Mr. B. had not been drawn to the attention of the Committee of Management. However, the letter written subsequently was put before the Committee, and the Committee of Management had said that if it decided to change the rules, it would be an employer decision to enhance the Scheme and therefore the employer would have to fund the capital cost associated with it. Even though employees might receive a pension for fewer years, the extra payment is seen as an extra cost to the Scheme, as there are imponderables as to how many employees would take it up and how long they would live and therefore draw pension. The Senior Human Resources Manager made it clear that there were winners and losers in any scheme and in any amendments to a scheme. She made the comparison between a civil servant and a fire-fighter who draws a pension at an earlier age. There were cross-subsidies between categories of employees.
- 5.3 The Board heard that Mr. B.'s application had been addressed on its merits. It was possible that for the future there could be changes to the Pension Scheme; for example the pension age might be raised to 67. For the time being, the States Employment Board was not prepared to make any recommendations for change. The proposals for changes to the unfair dismissal legislation for over-65s were not yet on the statute book: the amending Law was awaiting Privy Council sanction at the present time. Clearly it was inappropriate for a separate provision to be made for one employee alone: any policy change introduced would need to be applied to all employees.
- 5.4 The meeting discussed whether there had been discrimination on the basis of age; and the views of the parties differed. The States Employment Board was not prepared to request the Actuary to carry out the costings of a change for the sum of £4,000, given that the Board opposed the change in principle. The Head of Employment Relations made it clear that there were 2 possible methods of determining pension, either the additional accrual method or the late retirement enhancement method; but it was not possible to have a combination of both. He agreed that it might be worth looking at a change from one method to the other, but using a combination was very rare in the UK and was not an option here. In Mr. B.'s case, both salary at retirement and accrued service now counted, and this was an enhancement over the 1987

position where the level of salary would have frozen at age 65 even though employees working beyond that age continued to pay into the Fund.

5.5 As closing points, Mr. B. advised that the Fund had benefited from his continued contributions from the age of 65 to 71 and coupled with this, a late retirement was also a benefit to the Pension Fund as pension would not be paid out until later and for a shorter period. The States Employment Board representatives added that Mr. B. was a contract employee and was never actually required to remain in PECRS beyond the age of 65, and could have instead contributed to a private scheme he considered more beneficial from normal retirement age.

5.6 The parties then withdrew.

6. **The Board's findings**

6.1 The Board reviewed Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982, and in particular considered whether the Scheme was discriminatory. It had noted, however, that in the United Kingdom an equal number of the pension schemes followed the additional accrual method and the late retirement enhancement method. However, there did appear to be a difference in Jersey between the treatment of people who were below the age of 65 and those who were over the age of 65.

6.2 Having reviewed the possible bases for upholding a complaint, the Board decided that it was not able to uphold Mr. B.'s personal complaint that the pension he would finally achieve would not be enhanced because he was retiring late. Mr. B. had entered into a contract with the States Employment Board and would have understood the implications and limits of the Pension Scheme at that time. Therefore Article 9 of the Administrative Decisions (Jersey) Law 1982 did not apply.

7. **The Board's observations**

7.1 The Board decided to make observations on the position of employees continuing to work beyond normal retirement age, which was being encouraged in Jersey. This was evidenced by the fact that the States Employment Board was already looking at late retirement at the age of 67. Mr. B. was clearly an expert in the preparation of pensions legislation, and might even have been used as a resource in assisting the States Employment Board to think through options for the future.

7.2 The Board was disappointed by the argument used that in any Scheme, there would be 'winners and losers'. Certainly, the prospect of a long retirement is less likely in the case of an employee who retires at 70 than in the case of an employee who retires at 55–60. Expressing the pension prospects of a person who retires at 70 or over in terms of being a 'winner' or a 'loser' is somewhat inappropriate. One would anticipate a Pension Scheme being fair and just for all of its members.

7.3 The Board was mindful that the States had saved money by reducing the pension of those who retire early, quite rightly, but had not undertaken any research into the position of those retiring late. The Board was disappointed that the States Employment Board had not sought information from the Actuary for the relatively modest sum of £4,000 because the proposal was against their policy, and consequently no work had been undertaken on this at all. In the absence of such an exercise, the States Employment Board could not estimate what the costs of any change might be, or whether any changes could have been made at neutral cost. Particularly, given the States' intention to move to later retirement and to encouraging those employees beyond the normal retirement age to continue to work, the Board hoped that some serious consideration could be given in early course as to how this would not only impact upon the Pension Fund, but also to how it would impact upon retired public employees. The Board felt it seemed unfair that the States should promote legislation which reduces a pension, to the Pension Fund's benefit, when a person retires early, but completely ignores the reverse scenario.

Signed and dated by:
Mr. N. Le Gresley, Chairman

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Ms C. Vibert

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Mr. R. Bonney