
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE DEPUTY CHIEF OFFICER OF THE STATES OF JERSEY POLICE REGARDING DISMISSAL OF THE COMPLAINANT FROM THE STATES OF JERSEY POLICE

**Presented to the States on 19th December 2013
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT**Foreword**

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint by Mr. C. Berry against a decision of the Deputy Chief Officer of the States of Jersey Police regarding his dismissal from the States of Jersey Police.

Deputy J.M. Maçon of St. Saviour
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

29th October 2013

**Findings of the Complaints Board constituted under
the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint
by Mr. C. Berry
against a decision of the Deputy Chief Officer of the States of Jersey Police
regarding his dismissal from the States of Jersey Police**

1. Present –**Board Members**

Advocate R. Renouf, Chairman
Mr. F. Dearie
Mr. S. Catchpole, Q.C.

Complainant

Mr. C. Berry
Mr. C. Hopkins (representing Mr. Berry)
Ms. R. Freeman

States of Jersey Police

Mr. M. Bowron, Chief Officer
Mr. B. Taylor, Deputy Chief Officer
Mr. M. Pinel, former HR Operations Director
Mr. A. Sugden, former HR Manager
Mrs. L. Webster, Senior HR Manager

States Greffe

Mrs. L. Hart, Assistant Greffier of the States

The hearing was held in public at 11.00 a.m. on 29th October 2013 in Le Capelain Room, States Building.

2. Summary of the dispute

- 2.1 The Board was convened to hear a complaint by Mr. Christian Berry (the Complainant) against a decision of the Deputy Chief Officer of the States of Jersey Police to terminate his contract with the States of Jersey Police, which decision was subsequently upheld by an appeal panel comprising the Chief Officer of the States of Jersey Police and the Director of HR Operations.
- 2.2 The Chairman formally welcomed both parties to the meeting. He advised that the Board had read all of the written submissions and therefore only a brief resume of the facts would be necessary from each side. He reminded both parties that the dispute was not about the legitimacy of Mr. Berry's absences from work, but would focus on the legal authority to dismiss and whether this was able to be exercised by the Chief Officer of the States of Jersey Police

and, if so, whether the process followed could be criticised in relation to Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, as having been –

- (a) contrary to law;
- (b) unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
- (c) based wholly or partly on a mistake of law or fact;
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or
- (e) contrary to the generally accepted principles of natural justice.

3. Summary of the Complainant's case

- 3.1 Mr. Hopkins advised that the complaint centred on 2 key elements, namely the legality of the Managing Attendance Policy and the use of this policy in relation to Mr. Berry.
- 3.2 The Board was advised that the Managing Attendance Policy had been introduced into the Terms and Conditions of employment for all public sector staff, but Mr. Hopkins had no recollection of it having been submitted to the Police Negotiating Board or the Police Association for negotiation prior to its implementation within the States of Jersey Police. Mr. Hopkins had, until his retirement in 2012, been the Police Association representative. He argued that the Attendance Policy had been 'imposed' upon the Police, and he was quite certain that the Police Association would not have been supportive of its introduction, yet it was now displayed on the Police's intranet pages, reflecting the policies, procedures and publications applicable to all Officers. Mr. Hopkins claimed that there was no evidence that the usual process of discussion and negotiation had been followed prior to the introduction of the Policy. In 2002, the Force Management Board had approved the adoption of the Policy (used States-wide for all public sector employees) which the Chief Officer of the day, in conjunction with Human Resources (HR), had amended to include the words 'Police Officer', despite the fact that Officers were not employees but were appointees and therefore excluded from the Employment (Jersey) Law 2005.
- 3.3 The Board was advised that the Police Force (Jersey) Law 1974 and the Police Force (General Provisions) (Jersey) Order 1974 detailed the terms and conditions of service for Police Officers and included reference to when and who could terminate that contract. It was noted that the legislation did not include reference to the ability of the Deputy Chief Officer (DCO) to terminate an Officer's contract for any reason, other than the Chief Officer not being in post or unavailable to fulfil his duties. Mr. Hopkins asserted that in fact the legislation only allowed for the dismissal of a Police Cadet (no longer in existence) by the Chief Officer. The Board noted that the legislation did

state in some detail aspects pertaining to the termination of an Officer's contract by the Chief Officer if that Officer was considered unfit to continue his duties due to ill-health and was entitled to a medically enhanced pension.

- 3.4 The Board was referred to the 30th draft of the (now enacted) States of Jersey Police Force Law 2012 and noted that Article 11, which related to the Terms and Conditions of appointment of Police Officers, appeared to state that in the future, responsibility for such matters would rest with the States Employment Board, rather than the Chief Officer. At no point was reference made in the draft Law that an Officer's contract could be terminated by the DCO, nor was there any mention made of the Managing Attendance Policy. Mr. Hopkins contended that if the Law Draftsman, Minister for Home Affairs, Chief Officer or States Members had wanted the DCO to be able to terminate a Police Officer's contract, then this should have been included within the draft. Although Mr. Hopkins accepted that this was still a draft, he questioned why there was no specific mention of the DCO's powers to terminate, if this was something he currently held. The Board later noted that the draft Law had recently been enacted, seemingly with no substantive changes which might have impacted upon Mr. Hopkins' submissions.
- 3.5 Article 9(3) of the Police Force (Jersey) Law 1974 provided that the Chief Officer was responsible to the Minister for the general administration, discipline, training and organisation of the Force. Mr. Hopkins opined that the matter was clearly not a training issue, and if it had been a disciplinary matter, then Mr. Berry would have been entitled to legal assistance through the Association as well as an appeal to Jurats of the Royal Court. He did not consider that general administration extended to the introduction of a Policy which allowed the DCO to terminate a contract on the basis of attendance, and therefore assumed that the Attendance Policy had been introduced as part of the organisation of the Force.
- 3.6 In commencing to address the second aspect of the argument, Mr. Hopkins accepted that the percentage figures quoted by him during the appeal hearing had not been accurate; however, the number of Officers being managed in accordance with the Policy had been correct. At the time of Mr. Berry's appeal, the attendance of 6 Officers was being managed in line with the Policy. All six were uniformed Officers; all but Mr. Berry were on Stage 1; and three, including Mr. Berry, were on the same shift and therefore under the same supervisors. Mr. Hopkins contended that at that time there were 15 Officers with a worse sickness absence record than Mr. Berry, including a number of supervisors, but owing to the nature of his illness, Mr. Berry had the highest frequency of incidents, all short-term. Mr. Hopkins highlighted that Mr. Berry's absences had been inaccurately described as having been the highest level and frequency, when the former was not correct. He also highlighted that Mr. Berry's probation had been completed in July 2007, rather than August 2008 as indicated in the documents submitted to the Board on behalf of the Chief Officer; and he contested the notion that Mr. Berry's attendance had been raised as an issue during his probationary period when the first recorded notes on this matter dated from November 2008, well over a year after the completion of his probation. This point was immediately accepted by the DCO.

- 3.7 The stated aim of the Attendance Policy was to improve attendance. Once Mr. Berry's illness had been diagnosed, his Bradford Factor had improved from 3993 in 2008 to a figure of 16 at the time of the termination of his contract. Mr. Hopkins considered that this should have been regarded as a great success worthy of support, particularly as it achieved the aim of the Policy.
- 3.8 Mr. Hopkins alleged that, at the first Stage 3 meeting on 21st September 2011, the DCO had asked Mr. A. Sugden, HR Manager, what the average number of sickness absence days was across the Force and had been advised that it was 6 days. The DCO had then set that figure as the target for Mr. Berry to attain, allowing an additional 10 days for medical procedures associated with his condition. The DCO had backdated 3 of the 6 days to the date of the last report from AXA, the occupational health advisers, and therefore Mr. Berry's target was no more than 3 days' absence over the forthcoming year. However, at a later meeting it had been confirmed that the average number of sickness absence days within the Force was actually 10.91 days and Mr. Hopkins contended that this revised figure should have been Mr. Berry's target, rather than the 6 days.
- 3.9 The Board noted that, following the establishment of the target, Mr. Berry had not taken any sick days for a 3 month period and had then had one day's absence. After 9 months he had taken a further 3 days, one of which he had spent in hospital with dehydration. This had produced a cumulative total of 7 days' absence and, as this exceeded the target which had been set, a third stage meeting was convened on 19th July 2012.
- 3.10 Mr. Hopkins advised the Board that Mr. Berry had been sent a letter from Mrs. L. Webster, Senior HR Manager, asking him to submit the names of any witnesses he wished to call to give evidence at his appeal hearing, and the letter had also stated that he could be accompanied by a Trade Union/staff association representative or a workplace colleague. A template had clearly been used for this letter which was not applicable for Police Officers, given that it was illegal for Officers to be members of a Trade Union. Furthermore, the letter also stated that no legal representative was permitted to attend, but had Mr. Berry been facing disciplinary action, he would have had the right to legal representation. Mr. Hopkins emphasized that no Police Officer had ever faced the termination of his contract on this basis before.
- 3.11 Mr. Hopkins advised that he had asked for Mr. Sugden to be called as a witness in relation to the setting of the 6 day target. Mr. Hopkins had wanted to appeal the target of 6 days, which he claimed had been set as a direct consequence of the response given by Mr. Sugden to the DCO's question. He maintained that the DCO had not asked for the 'target' but the average, and therefore the response given by Mr. Sugden had been misleading. However, Mr. Hopkins' request had been refused by the Chief Officer, as he maintained that Mr. Sugden had advised the DCO that the target was 6 days as this had been the 'aspirational target' set by the Chief Officer, having achieved this within his previous Force in the City of London. Mr. Hopkins had then requested that Mr. Sugden not be allowed to attend the hearing as he questioned the accuracy of his evidence; however, the Chief Officer had insisted that Mr. Sugden be in attendance to assist the DCO. Mr. Hopkins

argued that, as the Chief Officer had been directly involved in the original decision-making process by imposing the ‘aspirational’ target, his position as an independent chair of the appeal was conflicted, and he should have recused himself and allowed another senior person to chair the appeal.

- 3.12 The Board was advised that the Chief Officer’s previous Force had reduced average sickness absences from 12.1 days to 6, but noted that this had been achieved over a 5 year period and with the involvement of a business psychology company.
- 3.13 Mr. Hopkins had also requested that Ms Freeman be able to attend the appeal as a character witness in order to confirm the legitimacy of Mr. Berry’s illness, as well as his commitment to reducing his sickness level. The Chief Officer had also refused this witness on the basis that the validity of Mr. Berry’s medical condition was not in any doubt. Ms Freeman had been allowed to submit a written statement which had been acknowledged by the Chief Officer and Mr. Pinel.
- 3.14 Mr. Hopkins contended that the appeal should have been an opportunity for Mr. Berry to present all of the relevant facts, and the Chief Officer’s refusal to hear certain witnesses had represented a breach of natural justice.
- 3.15 The Board accepted that there was a marked difference between someone with a genuine medical condition and someone who simply could not be bothered to attend work. Mr. Hopkins maintained that Mr. Berry had improved his attendance and was managing his illness, yet he had been unfairly treated by a flawed process which terminated his contract based on previous absences. His doctor had failed to diagnose his illness for a considerable period of time but, once diagnosed, his attendance had improved enormously. However, it was at the point of improvement that his contract had been terminated. Mr. Hopkins advised that there were at least 2 serving Officers with criminal records who had been sacked but then reinstated, following an appeal to Jurats under the disciplinary procedure. Mr. Berry, who had committed no criminal offence, had been given no such recourse even though he had been genuinely ill – in essence he had been treated less fairly than a convicted criminal. Mr. Hopkins concluded by reiterating that Mr. Berry genuinely believed that he had been unfairly treated by the States of Jersey Police and the Minister for Home Affairs, who had failed to act and failed to review the process.

4. **Summary of the Chief Officer of the States of Jersey Police’s case**

- 4.1 The Chief Officer advised the Board that he was the Appeals Authority within the States of Jersey Police Force. He contended that there had been a misunderstanding about the 6 day ‘average’ and it had been an ‘aspirational’ target across the Force. The reason he had refused hearing Ms Freeman’s witness statement at the appeal meeting was that she had not been part of the original hearing and, as it was an appeal, no new evidence could be presented. He maintained that the proper policy and procedure had been followed. The Chief Officer of Police advised the Board that, whilst he and his colleagues could comment on matters of process, procedure and policy, none were qualified to interpret the law and they had acted on legal advice provided by

Human Resources. The Chairman reiterated that the decision would be judged against Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982.

- 4.2 The DCO advised that he had become involved with the process when Mr. Berry had been placed on Stage 3 of the Policy. He had based his powers on the provisions contained within the Police Force (Jersey) Law 1974 and the Police Force (General Provisions) (Jersey) Order 1974. Article 9(3) of the Law provided that the Chief Officer was 'responsible to the Minister for the general administration and the discipline, training and organisation of the Force' and it was considered that the Managing Attendance Policy fell within this jurisdiction. The Policy, which had been adopted by the Police in November 2002, was applicable to all public sector staff. The Board was advised that the Policy was a 3 stage process used by supervisors and managers. Stage 1 involved discussions with an Officer about the length and frequency of his or her absences and targets were set. Stage 2 was a more formal process applied if there had been no improvement since the implementation of Stage 1. Subject to there being no improvement or a failure to meet targets set, Stage 3 followed and involved the referral of the matter to the DCO. During Stage 3 the Officer's continued employment and the possible termination of his contract was discussed. The DCO was firmly of the view that he had the power to terminate a contract at this stage of the process if deemed applicable.
- 4.3 The Board was advised that Mr. Berry had joined the Police in July 2005 and had completed his probation in July 2007. During his probation he had been absent for 15½ days in 2006 and 10 days in 2007. The DCO considered that 25½ days was an extensive period of absence during a probationary period. Mr. Berry's attendance had first been reviewed in November 2008, and there were 44 incidents of absence across his police career (109½ days in total). In 2008, Mr. Berry had been placed on the first stage of the Policy and his sickness record had been monitored for a 3 month period. In May 2010, he had again been placed on the first stage of the process. In June 2011, Mr. Berry had met with the HR Manager and Management to discuss his attendance, and it was at this meeting that arrangements were made for Mr. Berry to be referred to AXA (Occupational Health) and he was placed on the second stage of the process with a requirement that his attendance show an improvement over the following year. Targets were established and medical certificates were required for each day's absence. Shortly following the meeting in June 2011, Mr. Berry received a diagnosis of his condition. In September 2011, Mr. Berry had been referred to the DCO for a Stage 3 review, at which meeting the 6 day target was set.
- 4.4 The Board was advised that, on 19th July 2012 the DCO had met with Mr. Berry for a second Stage 3 review. Mr. Berry had failed to meet the targets set, and the DCO decided to terminate his appointment as a Police Officer in accordance with paragraph 13 of the Policy. The DCO considered that Mr. Berry had been given every opportunity to improve his attendance, and was confident that the decision made had been lawful and appropriate in respect of the legal framework and the provisions within the Policy.

- 4.5 Mr. M. Pinel, former HR Operations Director, responding to a question posed by the Board, advised that whilst the 1974 Law remained silent on termination, it was now perhaps more of a possibility that the dismissal of an Officer could prove necessary. Under Articles 10(2) and 10(3) of the States of Jersey Police Force Law 2012 (not yet in force but intended to replace the 1974 Law), express provision was made for the Minister to provide by Order for the dismissal of a Police Officer, and for the Minister to confer the power to dismiss on one or more of 3 independent bodies. However, it did not appear to the Board that the Chief Officer or DCO would be given explicit powers in this regard.
- 4.6 Mr. Pinel advised the Board that no single union or association had 'agreed' the Managing Attendance Policy, as it had been introduced, not as a negotiable policy, but as a consultative one, akin to similar policies on bullying and whistle-blowing. He expressed surprise at the notion that the Association had not been consulted in 2002, but reiterated that it would not have been a matter which would have been subject to negotiation. Mr. Hopkins countered that all policies should at least be signed off, and he opined that there should be a signed policy agreement on file to confirm that some form of discussion had taken place and it was not simply imposed by the Chief Officer.
- 4.7 Mr. Pinel affirmed that the aim of the Policy was to improve attendance. It was normal practice for the Chief Officer to maintain a distance from the dismissal stage of the termination process in order that he could hear any appeal which might follow. Ms Freeman's evidence had not been required, as there had never been any doubt about the legitimacy of Mr. Berry's illness. He maintained that it was not sufficient to state that an employee fitted one of 2 options, namely being either 'fit to work' or 'unfit to work' (in which case an Officer would be pensioned on medical grounds). He advised that an Officer could be classed as fit for work, but might not satisfy other performance criteria, such as having poor timekeeping.
- 4.8 Mr. Hopkins argued that whilst the 'normal' procedure across States Departments was that the Chief Officer would not be party to any discussions leading up to an appeal, this had never been the case within the Police, as the Chief Officer had always been involved in the hearings for all disciplinary matters. Moreover, there was no 'normal' procedure in this instance as the situation was unique, and no-one had reached Stage 3 before within the Force. He questioned why the incidences of absenteeism during the probationary period had not been addressed if they were considered significant, particularly as Mr. Berry could have been released from his contract at any point during his probation on those grounds. Mr. Hopkins alleged that the matter had not been raised until November 2008, some 16 months after the probation period had ended. Mr. Hopkins had a clear understanding of how Orders would be made as subordinate enactments, and noted that under the new legislation the power to terminate could even be extended to a senior Civil Servant within the Force. Mr. Berry added that the significance of this would be that the Civil Servant, as an employee, would be protected by the Employment (Jersey) Law 2002 whilst the Officer, as an appointee, would not.

- 4.9 Mr. Pinel countered that there were a number of policies which were applicable to all staff, irrespective of appointee status, to ensure a commonality within the service, such as attendance, behaviour, and so on. He acknowledged that Police Officers were afforded no protection from the Employment Law. It had been historically considered inappropriate for Officers to be employees in order to ensure that their independence and duty to uphold the law was not compromised.
- 4.10 Mr. Sugden advised that the Chief Officer had made it known that the 6 day target for sickness absences was an aspiration across the Force. He insisted that he had never meant to imply that 6 days was the 'average' across the service, and could not remember being asked the question at the meeting in July 2011. However, he was certain that had he been asked for the 'average' he would not have responded with that figure, as 7.9 days was the lowest average that had been achieved. It was noted that the average figure of 10.91 would have been publicised at monthly management meetings. Mr. Sugden advised that he was reasonably confident that he had never referred to 6 days as the Force average.
- 4.11 The Board noted that after the meeting on 21st September 2011, the DCO had written to Mr. Berry confirming the decision made to impose a 6 day target. Within the letter, dated 23rd September 2011, the DCO had referred to the most recent advice received from AXA that Mr. Berry should not experience 'more than average sickness rates'. The Board questioned whether this 'average' was deemed to be the Force average and if so, asked why the actual average at that time of 10.91 days was not then set, rather than the 'aspirational' target of 6. The Board was unsure why this had not been made explicit within the letter. The Board was advised that a 'significant proportion' of Officers had met the 6 day target during 2011–2012, with many Officers taking no sickness absences in a calendar year. It was noted that the overall figures included Officers who were on long-term sick leave. Only Mr. Berry had reached Stage 3 of the policy. However, it was acknowledged that until he had reached Stage 3 he had not been diagnosed with a medical condition, and once the appropriate medication had been prescribed, he had vastly improved his attendance.
- 4.12 Following an adjournment the meeting resumed. Mr. Pinel advised the Board that in 2002 he had received a letter from the former H.M. Attorney General (now Bailiff) which had advised that under the 1974 Police Law, the Chief Officer had the power to recruit and dismiss members of the Force. The advice was privileged but Mr. Pinel undertook to approach the Law Officers' Department requesting the authority to release it. The Chairman advised that the Board did not wish specifically to access the advice but was interested in the Department's understanding of the same. During the course of the hearing, there was some discussion regarding the power to dismiss and the legal advice which had been sought in relation to the legality of the termination. As the matter had not been dealt with under the disciplinary code, Mr. Berry had not been entitled to legal support from the Police Association. The legal advice received by the States HR Department had not been disclosed, and Mrs. Webster advised that she had made a formal request to the Law Officers to share this with the Board. The DCO stated that that the Police had not taken any legal advice, but had acted upon the advice given by HR. Some days after

the hearing, Mrs. Webster advised the Board by e-mail that, as a matter of principle, advice from the Law Officers' Department was not disclosed to a third party. Furthermore, H.M. Attorney General had advised that, as the advice exclusively dealt with the application of the States of Jersey Police's Managing Attendance Policy, disclosure of the advice would not have been helpful to the Board in any event, as it did not relate specifically to the power to dismiss Police Officers under the Police Force (Jersey) Law 1974. Some days after the hearing, Mr. Pinel advised the Board by e-mail that H.M. Attorney General had declined to release a copy of the letter, but Mr. Pinel was able to advise that, except in respect of cases of misconduct, the letter did not give support to the statement that the Chief Officer had the power to dismiss members of the Force.

- 4.13 The DCO stated that Mr. Berry's target had been acknowledged to be 6 days, with an additional 10 days awarded for medical treatment associated with his condition, should they be required. It was noted that the occupational health advisers (AXA) had pronounced Mr. Berry as fit for full operational Police work and the prognosis was for 'average absence in the future'. However, AXA had not determined what this average amount of sick leave would be and the DCO, in his letter dated 23rd September 2011, had stated that Mr. Berry 'should not experience more than average sickness rates'. The Board asked why, when the Force average was acknowledged to be 10.91 days, Mr. Berry had been required to achieve better than average levels. This in itself would have been a challenge to any Officer, but this aggressive target was doubly challenging given that Mr. Berry had a pre-existing medical condition.
- 4.14 Mr. Hopkins maintained that the Policy had been unlawfully imposed. However, if it was accepted as applicable, its aim was surely to address malingers or 'Monday clubbers'. He contended that if Mr. Berry was a malingeringer, then he would have taken all 10 days which had been 'discounted', when in actuality he had taken only one of the days from this additional allowance. In essence, he had tried hard to meet the target imposed, and had effectively achieved lower sickness rates than the true Force average.
- 4.15 It was noted that in July 2012, Mr. Hopkins had requested an additional occupational health referral before action relating to Mr. Berry's sickness absence be taken. However, the DCO had made the decision to terminate Mr. Berry's employment without the benefit of contemporary medical evidence.
- 4.16 The Board was advised that the Chief Officer of the States of Jersey Police was appointed by the States Assembly, and he in turn appointed Officers. Paragraph 10 of the Police Terms and Conditions of Appointment provided that sick leave '*may be granted for a period of six months in any calendar year at the discretion of the Chief Officer, but any period after six months may be granted only by the Committee (now Minister)*'. It was questioned whether this indicated that ultimately the Minister was in control of the process and, if so, whether the appeals process, which had been considered by the Committee in the past, should have been to the Minister rather than the Chief Officer. Mrs. Webster advised that Mr. Pinel had been asked to sit on the Appeal in order to ensure a degree of independence. The Chief Officer advised that he

had not been involved in the previous stages of the process in order that he could act as the appeal authority. The Board questioned whether the Chief Officer, who had set the target which Mr. Berry had failed to meet, could be regarded as sufficiently impartial. The Chief Officer accepted that he had set the 'aspirational' target but he advised that he had deliberately divorced himself from the process beforehand in order to be able to hear the appeal. He reminded the Board that third stage appeals were rare, but he had been mindful of the impartiality issue, and had therefore called upon Mr. Pinel to attend, given his wealth of experience in such matters. He was comfortable with the way that the Appeal had been heard, and considered that the decision made had been correct. Mr. Pinel added that it was usual practice for appeals to be heard by the Chief Officer of a Department, as the Chief Officer was responsible for disciplinary matters and ensuring that attendance levels were maintained. Mr. Pinel also advised that managers at Director level in other Departments had the power to dismiss.

- 4.17 The Chief Officer advised that the 6 day target was a long-term goal. He acknowledged that the difficulty in achieving this across the Force was that long- and short-term sickness levels were collated and therefore staff suffering from an illness such as cancer would impact upon the outcome. However, the intention of the Policy was to reduce 'manageable' periods of sickness. Although the 5 people who had been on the Managing Attendance Policy at the same time as Mr. Berry had all been uniformed Officers, the Policy had now been applied equally to supervisors and plain-clothed Officers, as well as civilian staff, although only 2 staff were being managed under Stage 1 of the Policy as of that day. It was noted that in his letter of 20th July 2012, the DCO had advised Mr. Berry that it was important that the Force 'deals with sickness absence on an individual and case-by-case basis' and Article 9 of the Attendance Policy provided that 'judgement and discretion must be used'. The DCO maintained that a consistent approach had been taken, and it was noted that there had been several terminations under the Attendance Policy in respect of civilian staff. However, it was acknowledged that civilian staff, as employees rather than appointees, had recourse to an Employment Tribunal under the Employment Law.
- 4.18 The Board was advised that ill-health discharge from the Force was dealt with under the auspices of organisation of the Force. Officers held a special status, and were subject to independent scrutiny especially for their appointment and removal from office. If dismissed for misconduct, Officers were able to seek an independent appeal to the Chief Officer and could then have a Jurat's appeal. The Board questioned whether non-attendance could be regarded as misconduct in terms of neglect of duty. Indeed, had Mr. Berry's illness not been verified by doctors' certificates, his absences would have been regarded as misconduct and he could have followed the disciplinary route. The Board considered it ironic that someone who was genuinely ill appeared to be afforded less recourse than someone who was a malingerer.
- 4.19 Mr. Hopkins, in closing, reiterated his contention that the Attendance Policy was unlawful and should not have been implemented by the DCO.
- 4.20 The DCO maintained that he had been acting in accordance with the powers conferred by Article 3(3) of the Police Force (Jersey) Law 1974, and that the

matter had been dealt with in the context of the organisation and management of the Force. The DCO and Chief Officer considered that they had correctly applied the Laws and Policies available.

- 4.21 The Chairman thanked both parties for attending the meeting and they then withdrew from the meeting to enable the Board to consider its findings.

5. The Board's findings

- 5.1. The Board considered whether the complaint could be criticised on any of the grounds outlined in Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, as having been –

- (a) contrary to law;
- (b) unjust, oppressive or improperly discriminatory, or in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
- (c) based wholly or partly on a mistake of law or fact;
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or
- (e) contrary to the generally accepted principles of natural justice.

- 5.2 The Board expresses its gratitude for the clear and helpful submissions that were addressed by both parties during the course of the hearing, particularly as neither party was legally represented and the Complaint raised difficult questions of law. The Board wishes to make it clear that nothing in its findings is a criticism of the Chief Officer, the Deputy Chief Officer or any other member of the Jersey Police Force. It was evident to the Board that both Officers were diligently and proactively endeavouring to address a relatively high average absenteeism rate within the Jersey Police Force, and operating within what was an unsatisfactory legal framework.

- 5.3 As noted above, as a result of neither party being legally represented, the Board reached its conclusion without the benefit of full legal argument on the meaning and effect of the legal provisions which were relevant to this Complaint, although it is correct to note that 2 members of the Board are legally qualified. Naturally the Board reached its conclusions on the basis of the information that was provided by the parties as part of their submissions.

- 5.4 The Board considered that the key issue was whether the Chief Officer and DCO had the power to appoint and dismiss a Police Officer, and whether this was able to be determined by the proper construction of the relevant primary and subordinate legislation.

- 5.5 The Board acknowledged that under Article 3(3) of the Police Force (Jersey) Law 1974, a Police Officer was granted all of the powers and privileges relating to policing which a Connétable or Centenier had by virtue of the

common law or of any enactment for the time being in force, save for certain powers which were expressly reserved to the latter 2 Officers by virtue of Article 3(2) of that Law. It is significant that a Police Officer is not an employee. A Police Officer is an office-holder. An individual is appointed to that office by the Crown. An Officer swears allegiance to the Crown to carry out his or her duties “with courage, fairness and integrity, protecting human rights and according equal respect to all people” and, to the best of the person’s ability “to uphold the laws and usages of Jersey, cause the peace to be kept, prevent offences against people and property and seek to bring offenders to justice according to law”. That encapsulates the important features of the Officer’s duty. It is for that reason that it has, historically, been felt that it would not be appropriate for Officers to be employees. One of the concerns has been that, by making a person an employee, Police Officers might find themselves in a position where their independence and duty to uphold the law is compromised.

- 5.6 For Mr. Berry, that means that he had no rights to claim unfair dismissal and could not seek the protection of the employment legislation that is extended to employees of the States. The Board expects that when passing legislation concerning Police Officers, the States must be presumed to have intended that the independence of the Officers was protected and that they were also treated fairly.
- 5.7 Article 8 of the Police Force (Jersey) Law 1974 provides, *inter alia*, as follows –

8 Duties and powers of Minister

- (1) *It shall be the duty of the Minister [i.e. the Minister for Home Affairs] to secure the maintenance of an adequate and efficient Force in Jersey and for this purpose the Minister may –*
- (a) *provide and maintain such buildings, structures and premises and make such alterations to any buildings, structures or premises already provided, as may be required;*
- (b) *provide and maintain such vehicles, apparatus, clothing, equipment and other articles as may be required.*
- (2) *The Minister shall determine the ranks in the Force and the number of persons of each rank which is to constitute the establishment of the Force.*
- (2A) *The States Employment Board shall under this paragraph determine the pay, conditions and gratuities of the members of the Force, other than the Chief Officer and the Deputy Chief Officer.*
- (3) *The Minister may by Order make provision for any matter which it considers necessary for the proper administration of the Force and generally for the purpose of carrying this Law into effect and, in particular, but without prejudice to the generality of the foregoing, may make provision for –*

- (a) *the retirement of members of the Force and for the payment of pensions and gratuities;*
- (b) *the qualifications for appointment and promotion of members of the Force.*

5.8 Article 9(3) of the Police Force (Jersey) Law 1974 provides –

- (3) *The Chief Officer shall be responsible to the Minister for the general administration and the discipline, training and organisation of the Force and of the Port Control Unit.*

5.9 It is Article 9(3) which the Deputy Chief Officer understood conferred the power on him on to dismiss Mr. Berry. What is noticeable about the above provisions is that there is no explicit provision setting out who may dismiss a Police Officer. This is, in the Board's view, an unfortunate omission. It notes that it has been rectified since Mr. Berry's dismissal by the enactment of the States of Jersey Police Force Law 2012, assuming the relevant provisions of that Law are brought into force. Under Article 10(2) and (3) of the new Law (yet to be brought into force), express provision is made for the Minister to provide by Order for the dismissal of a Police Officer from office, and for the Minister to confer the power to dismiss on one or more of 3 independent bodies, namely the States Employment Board, the Appointments Commission and the Police Authority. What is also noticeable about the Law is that it is not the Chief Officer or the Deputy Chief Officer who would be entitled to dismiss a Police Officer.

5.10 The only relevant Order made under Article 8 of the Police Force (Jersey) Law 1974 to which the Board's attention was drawn was the Police Force (General Provisions) (Jersey) Order 1974. This provides, *inter alia*, as follows –

- (a) Paragraph 2 sets out the requirements for appointment as a Police Officer. It is important to note that, under the proviso to that paragraph, the Minister (but no other person) has the power to appoint a candidate who does not fulfil all of the requirements;
- (b) Paragraph 4(1) provides that the Minister may, on the recommendation of the Chief Officer extend, reduce or dispense with the period of probation of 2 years provided by paragraph 4(1);
- (c) Similarly, paragraph 4(2) provides that the Minister may dispense with a probationer's services if, in effect, it is thought that the person is not suitable to be a Police Officer;
- (d) Paragraph 5(1) provides that promotion is to be made by the Minister on the recommendation of the Chief Officer;
- (e) Paragraph 8 provides that any member of the Force who wishes to resign shall, unless provision to the contrary be made with the approval of the Minister, give to the Chief Officer one month's notice in writing;

- (f) Paragraph 10 makes various provisions setting out, *inter alia*, the power of the Minister to vary the age of retirement in an individual case and providing for a pension when a member of the Force is “required by the Minister to retire on medical grounds before completing 25 years of service”.
- 5.11 In addition, Police Officers are subject to the Police (Complaints and Discipline) (Jersey) Order 2000. This was made pursuant to the Police (Complaints and Discipline) (Jersey) Law 1999. The Board understands that this does provide, *inter alia*, for the Chief Officer to dismiss an Officer if certain prescribed procedures are followed. Critically, however, an Officer who is subject to those procedures has the right to legal representation and, ultimately, an appeal to 3 Jurats (i.e. an independent appeal body). As noted above, Mr. Berry’s employment was not terminated under the Disciplinary Code and, as such, he did not have the benefit of those procedural protections.
- 5.12 The Board’s review of the relevant legislation led to the firm conclusion that all relevant powers relating to the appointment of a Police Officer and the termination of that appointment rest with the Minister. At every stage, it is the Minister who makes the relevant decision, either alone or on the advice of the Chief Officer. Subject to the normal public law constraints, it is open to the Minister to provide by Order for that power to be exercised by another person in certain circumstances. That is confirmed by the terms of the Police Force (General Provisions) (Jersey) Order 1974 and the Police (Complaints and Discipline) (Jersey) Order 2000 referred above.
- 5.13 Article 9(3) of the Police Force (Jersey) Law 1974 does not, it appears to the Board, act to confer on either the Chief Officer or the Deputy Chief Officer any separate power to dismiss a Police Officer. Pursuant to that Article, the Chief Officer is responsible “to the Minister” for the discipline, training and organisation of the Force. Neither the Chief Officer nor the DCO has powers in relation to the appointment or termination of an Officer’s appointment under the Police Force (General Provisions) (Jersey) Order 1974. In simple terms, the Chief Officer’s role is to run the force and to advise or recommend certain courses of action to the Minister which affect an individual office-holder, but it is the Minister who is responsible for making the final decision. In turn, the Minister is accountable to the States and the Royal Court for his actions. That is also consistent with the general interest in ensuring that holders of the office of constable are protected from unwarranted interference in the exercise of their duties.
- 5.14 That conclusion is reinforced by the “Statement of Terms and Conditions Appointment to the Post of Police Constable” that was signed by the then Chief Officer and Mr. Berry appointing the latter to the Force. In particular –
- (a) paragraph 1 of the Statement asserts expressly that “This agreement is between the Chief Officer, States of Jersey Police on behalf of the Home Affairs Committee and Mr. Berry”. In other words, the Chief Officer was acting as agent for the Home Affairs Committee (now the Minister) but it was the Home Affairs Committee (now the Minister) which was the relevant body that appointed Mr. Berry to his office;

- (b) paragraph 2(i) states expressly that the appointment is subject to the terms and conditions of the Police Force (Jersey) Law 1974 and the Police Force (General Provisions) (Jersey) Order, 1974. This is to be expected. The appointment is governed by the relevant statutory provisions relating to the States of Jersey Police Force;
 - (c) paragraph 10 provided that sick leave for a period of 6 months in any calendar year could be granted at the discretion of the Chief Officer, but that any period thereafter could only be granted by the Home Affairs Committee (now the Minister), thereby confirming the ultimate responsibility of the Minister for regulating the terms of Mr. Berry's appointment;
 - (d) paragraph 12 specified that rules of conduct of Police Officers are prescribed by the Police (Complaints and Discipline) (Jersey) Law 1999, and that details regarding the disciplinary action which will be taken in the event of misconduct are set out in the Police (Complaints and Discipline Procedure) (Jersey) Order 2000. As noted above, as we understand it, the latter provided for legal representation during the disciplinary process and an appeal to an independent body;
 - (e) paragraph 18 provided that "Termination of service is by one month's written notice on either side". The phrase "on either side" can only refer to the relevant parties to the Appointment. Those parties are the Minister and Mr. Berry. In other words, there was no power in the Chief Officer or the Deputy Chief Officer to terminate under that provision unless they were acting as the duly authorised agent of the Minister.
- 5.15 The Board gave consideration to the terms of the Managing Attendance Policy. It noted that, as the title implies, this is a Policy. It is not an Order by the Minister. By definition it cannot confer wider powers on any person other than permitted by the law. It was made under Article 9(3) of the Police Force (Jersey) Law 1974. Since, however, that Article does not contain any delegation of the power to terminate the appointment of a Police Officer, it follows that a policy developed pursuant to such Article cannot confer on any person any powers of termination.
- 5.16 Critically, the Board considers that paragraph 13 of the Managing Attendance Policy does not purport to confer a power of dismissal on any person. What it actually says is as follows –

13. THIRD STAGE

13.1 If there is no improvement in attendance by the given review date, the Chief Officer or the Deputy Chief Officer, and a representative from Human Resources, Chief Minister's Department in the case of Civil Servants and Manual Workers, will attend an interview with the employee and their representative to discuss continued employment with the States of Jersey and possible termination of contract.

13.3 *Existing practices and procedures regarding termination of employment will apply.*

- 5.17 It follows from the above that Article 9(3) of the Police Force (Jersey) Law 1974 does not, in the Board's view, confer any power on either the Chief Officer or the Deputy Chief Officer to dismiss a Police Officer. As such, although acting in good faith and on the basis of the advice that he had received, the Board does not consider that the Deputy Chief Officer had any legal power to dismiss Mr. Berry.
- 5.18 Even if that were not correct, paragraph 13 of the Managing Attendance Policy does not purport to confer a power of dismissal on the Deputy Chief Officer or the Chief Officer. All that is envisaged by that paragraph is a discussion about continued service with the Force. Such a discussion might lead to a number of outcomes, including resignation, a recommendation to the Minister to allow the Officer to retire on medical grounds, or termination. If the latter course was adopted, however, "*existing practices and procedures*" had to be followed. The only relevant practices and procedures – and, indeed, the only relevant powers – would be under the Police (Complaints and Discipline) (Jersey) Order 2000 or, potentially, by the Minister under paragraph 18 of the Statement of Terms and Conditions which provides that termination of service is by one month's written notice on either side.
- 5.19 It follows that the Board concludes that neither the Deputy Chief Officer nor the Chief Officer had the power to dismiss Mr. Berry in the way that they did. If they wished to terminate his appointment, they should have followed the procedures prescribed under the Police (Complaints and Discipline) (Jersey) Order 2000. If there is or was no relevant provision under that Order, or any Code made pursuant to it, which could be utilised, then there is a lacuna in the Law. It would simply be a matter for the Minister and the States to determine whether the Law ought to be amended for the future, and indeed the Board notes that the 2012 Law has empowered the Minister to make relevant provision by Order.
- 5.20 The matter does not, however, end there. The Board considers that Mr. Berry's dismissal was also invalid on at least 2 other grounds.
- 5.21 On 21st September 2011, Mr. Berry was set a target of no more than 6 days' absence over the ensuing 12 month period. The Board finds that Mr. Berry was led to believe that 6 days represented the average absence for the Force at that time, noting that the occupational health advice considered at the hearing on that date was that Mr. Berry was fit for full operational Police work and his prognosis was for average absence in the future. Nothing in the documentation relating to that meeting explains any other reason for setting the target at 6 days and there is nothing recording the fact that the actual 'average' for the Force at the relevant time was 10.91 days. The Chief Officer informed the Board that an average of 6 days' absence in any year was an 'aspirational' target. Whilst the Board appreciates the difficulties faced by the Chief Officer and the Deputy Chief Officer in managing the Force, including reducing the time taken on sick leave where possible, in the Board's view Mr. Berry was reasonably led to expect that as long as he was within the average for the Force, his appointment was secure. This allowed him time to demonstrate the

continued improvement in his health since diagnosis of Acid Reflux Disease. It follows that the 6 day target was incorrectly applied to Mr. Berry.

- 5.22 Second, the Board does not consider that the policy was rationally applied to Mr. Berry, particularly as –
- (a) Mr. Berry’s illness was genuine and debilitating and this was not disputed;
 - (b) The illness was not diagnosed until after the Second Stage Review Meeting and under the Managing Attendance Policy before the Third Stage Review Meeting with DCO Taylor on 21st September 2011. It was only once the illness was diagnosed that Mr. Berry had begun to receive appropriate treatment for it. In those circumstances, the Board finds it to be unreasonable to have taken into account his absences before he was diagnosed and receiving appropriate treatment in determining whether his ongoing attendance was acceptable. The only rational course would be to assess his attendance after the diagnosis and the commencement of the appropriate treatment.
- 5.23 Since the date of diagnosis, Mr. Berry had taken 3 days’ sick leave. It was not disputed that this was related to his illness and resulted from a misunderstanding as to when he ought to take the medication. That is the sort of problem that one would expect to occur when starting a new course of treatment. It does not seem to the Board to be rational to include these 3 days in the 6 day/average target for Mr. Berry, particularly when the Deputy Chief Officer was prepared to allow some 10 days’ sick leave not to be counted in relation to 2 procedures which were related to planned medical procedures. In the Board’s view, the ‘aspirational’ target of 6 days, or the average figure, could only have been applied from a point in time when Mr. Berry was undergoing appropriate treatment and understood what was required by that treatment.
- 5.24 The Board was troubled by the fact that an ‘aspirational’ target had been applied to an Officer who was, it was accepted, ill, had just started treatment and was trying hard to get to work. The target effectively imposed on Mr. Berry a requirement to achieve an aspirational target which would cover all “normal” illnesses that would be expected that Officers generally might suffer from, as well as any absences due to his illness. When that was coupled with the fact that Mr. Berry had already used up 3 days of his 6 day allowance in the circumstances described above, he was in effect being given a target of a maximum of 3 days’ sick leave for whatever reason, or he would lose his job. That seemed to the Board to be unwittingly setting the Officer up to fail, and was setting an Officer who was recovering from a *bona fide* illness a target that was far more onerous than the targets for other Officers. That seemed to the Board to be the exact opposite of what the Managing Attendance Policy was designed to achieve.

5.25 Accordingly the Board concluded, pursuant to Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982, that the decision made by the Deputy Chief Officer was –

- (a) contrary to law;
- (b) unjust;
- (c) based wholly or partly on a mistake of law;
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts.

5.26 The Board asked the Minister for Home Affairs to consider the above findings and to advise it within 28 days of the steps which have been taken to reconsider the matter and the result of that reconsideration.

Signed and dated by:
Advocate R. Renouf, Chairman

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Mr. F. Dearie

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Mr. S. Catchpole, Q.C.